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THE

NORTHWESTERN REPORTER,

VOLUME 35,

CONTAINING

ALL THE DECISIONS OF THE SUPREME COURTS

OF

MINNESOTA, WISCONSIN, IOWA, MICHIGAN, NEBRASKA, AND DAKOTA.

DECEMBER 3, 1887—FEBRUARY 11, 1888.

WITH TABLES OF NORTHWESTERN CASES PUBLISHED IN VOL. 71, IOWA REPORTS; 59 AND 60, MICHIGAN; 68, WISCONSIN.

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SUPREME COURT RULE.

WISCONSIN.

In all criminal cases the plaintiff in error shall prepare and serve upon the attorney general, at least 10 days before the case is called for argument, a printed or written statement of the points of error relied upon.

Adopted December 13, 1887, to take effect January 2, 1888.

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THE

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VOLUME XXXV.

DE MARS *v.* MUSSER-SAUNTRY LAND, L. & MANUF'G CO.

(*Supreme Court of Minnesota.* November 8, 1887.)

COMPROMISE—CONSIDERATION—DISPUTED CLAIM.

To constitute a good consideration for the compromise of a disputed claim, it is not necessary that the matter in dispute should be really doubtful in fact, provided the parties *bona fide* considered it so. But there must have been in fact a dispute or doubt as to the rights of the parties honestly entertained. A party cannot create a dispute sufficient as a consideration for a compromise, by merely refusing to pay an undisputed claim.

(*Syllabus by the Court.*)

Appeal from municipal court of Stillwater; NETHAWAY, Judge.

Searles, Ewing & Gail, for De Mars, respondent. *Clapp & Macartney*, for Musser-Sauntry Land, L. & Manuf'g Co., appellant.

MITCHELL, J. Action to recover for work performed for defendant in a logging camp. There being no evidence that any special time of payment was fixed in the contract, plaintiff's wages would be payable upon demand any time after the services were performed. But, by way of defense, the defendant alleges that after the work was completed the parties had a disagreement as to the terms of payment under the contract, and that thereupon they had a settlement of their dispute, by the terms of which $67.26 of plaintiff's account should become due at once, and the balance of $200 in 60 days after the logs on which the work was performed should arrive in the St. Croix boom; and that defendant paid plaintiff the $67.26, in cash, and gave him a due-bill for the balance, payable according to the terms of their settlement, which plaintiff accepted in full settlement of his claim, and that the logs had not arrived in the St. Croix boom. The court below found that there was no consideration for this alleged settlement, and the only question presented on this appeal is whether this is sustained by the evidence.

The defendant is entirely right in his law that the compromise of a disputed or doubtful claim is in itself a good consideration, and that no investigation into the character or value of the claims submitted will be gone into for the purpose of setting aside a compromise honestly made. It is sufficient if the parties entering into it thought at the time that there was a question between them. It is not even necessary that the question in dispute should be really doubtful, if the parties *bona fide* considered it so. The real consideration which each party receives under a compromise is not the sacrifice of the right,

but the settlement of the dispute. But, on the other hand, it is equally true that to constitute a good consideration for a settlement by way of compromise there must have been an actual *bona fide* difference or dispute between the parties as to their rights. There is an entire absence of evidence in this case tending to show any such dispute. There was certainly none as to the amount of plaintiff's claim. Neither was there any as to when it was due according to the terms of the contract. Swenson, who made the alleged settlement with plaintiff, did not claim that the contract was different from what plaintiff asserted it to have been, or that by law the wages were not payable until the logs arrived in the boom. He simply asserted, according to plaintiff's statement, that he would not pay all the money because it was not "the law of the company," or, according to his own statement, because they "didn't settle that way," without giving any reason. A person cannot create a dispute sufficient as a consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion, and not compromise. There must in fact be a dispute or doubt as to the rights of the parties honestly entertained. The evidence of this is utterly wanting in this case.

The transaction lacked another element usually found in these compromises, viz., mutual concessions. Swenson conceded nothing. He merely paid the one-fourth of the account in cash, which he had always offered to pay. Defendant catches at one expression of plaintiff as meaning that Swenson at first refused to pay "any money" until the logs arrived, but, taking his entire evidence together, this was evidently not what he meant. We might further suggest that, aside from this question of a want of consideration, there is, to say the least of it, very slight evidence that plaintiff ever assented to the alleged settlement. There is certainly none that he did so expressly, and the fact that, after getting the $67.26, he took back his "time certificate," which was his evidence of the time he had worked, with this so-called due-bill written upon it by Swenson, is certainly not conclusive evidence of his assent to or acceptance of its terms.

The finding of the court was abundantly sustained by the evidence, and the order denying a new trial must be affirmed.

Rich v. City of Minneapolis.

(*Supreme Court of Minnesota.* November 8, 1887.)

1. Municipal Corporations—Right to Remove Soil and Mineral from Street.
   The public acquires in a street only a right of way, with the powers and privileges incident thereto. Subject to this right, the soil and mineral belong to the owner of the fee. Hence, the public easement justifies only the taking and removing of material which the process of the construction or repair of the street requires.
2. Same—Agreement with Contractor—Agency—Liability.
   When a city, acting within its general powers to improve streets, makes a contract for the grading of a street, by the terms of which the contractors, in consideration of doing such grading, are to receive and appropriate to their own use all the stone in the street; and, under and in accordance therewith, the contractors proceed and remove the stone, they are the agents of the city in the premises, and the city is responsible for their acts.
3. Same—Abutting Owners—Presumption as to Fee.
   The presumption of law is that the owner of the land abutting on a street is the owner of the fee in the street.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; Young, Judge.

Merrick & Merrick, for Rich, appellant. *Seagrave Smith*, for City of Minneapolis, respondent.

Mitchell, J. It clearly appeared from the evidence introduced by plaintiffs that the city of Minneapolis had no right to take these stones. It was

not necessary to remove them for the purpose of grading or improving the street, as they were below the grade line. The public acquires in a street only a right of way, with the powers and privileges incident thereto. Subject to this right, the soil and mineral in a street belong to the owner of the fee, the same as if no street had been laid out. When the surface of the land is above grade line, so that in order to grade and improve the street it is necessary to remove superincumbent materials, this may be done, and probably such material may be used, if necessary, in improving other parts of the street; but the public easement justifies only the taking of material which the process of the construction or repair of the street requires. *Althen* v. *Kelly*, 32 Minn. 280, 20 N. W. Rep. 188; *Robert* v. *Sadler*, 104 N. Y. 229, 10 N. E. Rep. 428.

The evidence also shows, or tends to show, that the city, acting within its general powers, made a contract with certain parties to grade the street, in which, among other things, it was provided that, in consideration of their grading the street, the contractors were to receive and be permitted to quarry, take away, sell, or use as their own, all the rock in this part of the street, and that, in pursuance of and under this contract, they took out and disposed of the stone in question. Under these facts the contractors were the agents of the city in the premises, and the city responsible for their acts. *Sewall* v. *City of St. Paul*, 20 Minn. 511, (Gil. 459.)

If the plaintiff owned the land abutting on the street, he presumably owned the fee in the street, such being the established presumption of the common law. 3 Kent, Comm. 432; Thomp. Highw. 26, 27. Therefore, inasmuch as the evidence showed that the plaintiff owned the lots on both sides of the street, subject to certain reservations by his grantors, he presumably owned the stone in the street, unless covered by these reservations. This action being purely one for the value of the stone removed, and the evidence introduced being directed solely to that question, of course plaintiff could not recover unless he owned the stone. He acquired title to the lots on one side of the street from one Rogers. It appears that these lots were subject to a prior lease from Rogers to one Aronson, who had a right to remove the stone during the term of his lease, and was to pay Rogers a certain price therefor, but the date or duration of the lease was not proven. On the same day that Rogers conveyed to plaintiff, the parties executed a supplemental contract, (Ex. D,) in which it was agreed that whatever stone Aronson did not remove from the lots during the term of his lease, plaintiff was to pay Rogers therefor at the rate of 35 cents a perch. This agreement further provided as follows: "It is mutually agreed that all of the rock in and upon said lots is now and shall be the property of said May P. Rogers; and all moneys arising from the quarrying and sale of the same, under the mentioned lease to B. Aronson, shall be paid to her the same as if this sale (the conveyance of the lots) had never been made. In other words, the said Samuel M. Rich, in buying the lots mentioned, agreed that said May P. Pogers should retain the lease to B. Aronson, and all moneys arising therefrom, and all rock remaining in and upon said lots at the termination of said lease." This amounts clearly to a reservation of all the rock in the lots, which would include that to the center line of the street, subject to the public easement. The only possible interest which plaintiff could have in the rock was the obligation to take at a fixed price, at the end of the Aronson lease, whatever, if any, was left, and it did not appear that any such contingency had or ever would occur. The plaintiff therefore made out no right of recovery for the rock taken from that half of the street.

Plaintiff acquired the lots on the other side of the street under a conveyance from one Henry Downs, which contained the following reservation: "Excepting and reserving to the said Henry Downs, his heirs or assigns, the ownership to the stone imbedded *in said land, and* the right to quarry and remove the same, from Nicollet street, adjoining *said land*, to a distance of twelve (12) feet, at most, *into said street*, before August 1, 1887." This is somewhat

obscure and ambiguous. If the first clause stood alone, it would undoubtedly amount to a reservation of the stone in all the land conveyed,—the street, as well as the land outside the street line. But, in the absence of any evidence of extrinsic facts tending to throw light on its meaning, we think that the fair construction of this reservation, and the only one that will reasonably give effect to the whole of it, is that the term "*said land*" refers to the lots exclusive of the street, and that the first clause reserves merely the stone in the lots proper, and that the intention of the second clause was to reserve in addition the right to remove the stone out in the street to the distance of 12 feet from the street line, any time before August 1, 1887. As Nicollet street is 60 feet wide, this would leave a strip 18 feet wide, the stone in which, not being reserved, would pass by the deed to plaintiff, subject only to the rights of the public. For this much, at least, the plaintiff would be entitled to recover. It is true, he did not prove what proportion of the stone was taken from that strip, but he was, under the evidence, entitled at least to nominal damages. For this reason the court erred in dismissing the action.

Order denying a new trial reversed.

PIGOTT and others *v.* O'HALLORAN and others.

(*Supreme Court of Minnesota.* November 8, 1887.)

1. TAXATION—SALE—DATE OF ASSIGNMENT BY STATE—PAROL EVIDENCE.
   Parol evidence is admissible to prove the actual date when certificates of the assignment of the rights of the state in land bid in for it at tax sale were in fact delivered to the purchaser, and the date when he paid the purchase price into the county treasury.
2. SAME—RIGHTS OF HOLDER OF ASSIGNMENT CERTIFICATES—EXPIRATION NOTICE.
   On the fifteenth day of February, 1877, L. went to the county auditor's office, and selected a number of tracts which had been bid in for the state at tax sale, and requested the auditor to make out assignment certificates therefor, and, as an evidence of his good faith in the matter, deposited with the county treasurer a check for a part of the amount necessary to be paid for these certificates. The county treasurer did not at that time turn this into the county treasury, but held it until the transaction should be closed. In March, and *subsequent to the sixth, the date when Laws* 1877, *c.* 6, *went into effect*, L. paid to the county treasurer the balance of the purchase price, and thereupon the certificates were then delivered to him by the county auditor. *Held*, that L.'s rights as purchaser from the state vested only from the date at which the certificates were delivered to him, and consequently that he purchased subject to the provision of section 37 of the act cited, and his rights under the certificates would not ripen into title until after notice of the time of the expiration of the right of redemption had been given, as required by the section referred to.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county; SIMONS, Judge.

W. C. Goforth and *H. C. Eller*, for Pigott and others, appellants. *John F. Fitzpatrick*, for O'Halloran and others, respondents.

MITCHELL, J. Action to determine an adverse claim to real property. The plaintiffs hold the patent title. The defendants claim solely under state assignment certificates issued to their grantor, W. F. Linderman, bearing date February 15, 1877, assigning to him the interest of the state acquired at a sale thereof under the tax judgment of 1875, for the taxes of 1874, at which the lands were bid off for the state, October 16, 1875.

There is no substantial conflict in the evidence as to the facts. A careful examination of it satisfies us that it shows that on or about the fifteenth of February, 1877, one Oppenheim, as agent for Linderman, who desired to invest in tax certificates, went to the county auditor's office and selected for his principal a large number of tracts, including the land in dispute, which had been bid in for the state upon the tax judgment of 1875, and requested the auditor to make out assignment certificates therefor, and as evidence of his

good faith in the matter, and as an assurance that he would take the certificates when made out, (which would require some time,) he deposited with the county treasurer a check for $2,000, which was in fact much less than the amount necessary to be paid for the certificates of the land thus selected. The treasurer did not turn the amount into the county treasury at that time, but held it, as he generally did in such cases, until the transaction should be closed, because until then there was really no account to which he could put it. About the middle of March, and *subsequent to the sixth* of that month, Oppenheim went and paid to the county treasurer the balance of the money, and received the certificates.

If the parol evidence admitted was competent, it stands conclusively proven that, while the certificates bear date February 15th, the money for the same was not all paid by Linderman, or paid into the county treasury, or the certificates delivered to the purchaser, until after *March 6, 1877*. If these facts were material, there can be no doubt that parol evidence was competent to prove them. The effect to be given to these certificates as evidence is fixed by Laws 1874, *c.* 1, § 129, by which they are placed in that respect upon the same footing as any other deeds of real estate. The date of a deed is merely presumptively the date of its delivery, but it is always competent to prove by parol that this was not the true date of its delivery, or that it was never delivered at all. It can hardly be necessary to cite authorities in support of this proposition. 1 Greenl. Ev. § 284; 3 Washb. Real Prop. 298.

The question then is, when in point of time did Linderman's rights as purchaser from the state attach? This can admit of only one answer, viz.: At the date that he paid the purchase money in full into the county treasury, and the certificates were delivered to him by the county auditor. The auditor, who was clothed only with the special authority vested in him by statute, was authorized to assign only to a person who had paid into the county treasury the amount for which the lands were bid in for the state, with interest and subsequent taxes. No authority is given to him to make contracts for future purchases, or to sell on credit for the whole or any part of the purchase price. Consequently Linderman's rights did not attach until on or about March 15th, when the certificates were delivered to him, upon payment in full of the purchase money. All that occurred prior to that time was but preliminary to a proposed sale, and vested no legal rights whatever in him. It follows, as a logical consequence, that the state was the owner of these certificates on March 6th, the date when chapter 6, Laws 1877, went into effect, and that Linderman's rights under this assignment, having been acquired after that date, could not ripen into title until notice of the expiration of the time of redemption had been given, as provided in section 37 of that chapter, (*State* v. *Smith*, 32 N. W. Rep. 174,) and the burden was on defendant to show that this notice had been given, (*Nelson* v. *Central Land Co.*, 35 Minn. 408, 29 N. W. Rep. 121.) Therefore the finding of the court that the allegations of the answer were true, was not supported by the evidence. The statute of limitations invoked by defendant (Gen. Laws 1875, *c.* 5, § 30) cannot, at least under this disposition of the case, have any possible application. The question is not the validity of the sale, or the certificate, but whether the rights acquired under them have ripened into title.

Order denying new trial reversed.

TODD and others *v.* MINNEAPOLIS & ST. L. RY. CO.

(*Supreme Court of Minnesota.* October 12, 1887.)

1. PLEADING—MOTION TO MAKE DEFINITE AND CERTAIN—PATENT DEFECTS.

The indefiniteness or uncertainty to be relieved against on motion, is only such as appears on the face of the pleading itself, and not an uncertainty arising from extrinsic facts as to what particular evidence may be produced to support it; following *Lee* v. *Railway*, 34 Minn. 225, 25 N. W. Rep. 399.

2. SAME—ACTION AGAINST CORPORATION—COMPLAINT NEED NOT GIVE NAMES OF AGENTS COMMITTING WRONG.

A complaint need not state the names of officers or agents of the defendant who did the act constituting plaintiff's cause of action, but such acts may be pleaded generally as done by defendant.

(*Syllabus by the Court.*)

Appeal by defendant from an order of the district court, Freeborn county, FARMER, Judge, presiding, denying its motion to require the complaint to be made more definite and certain.

The complaint alleges, in substance, that prior to October 1, 1878, the defendant laid out certain warehouse lots on its station grounds, in the city of Albert Lea, Minnesota, and offered to lease them; that, as an inducement to buyers and shippers of grain to take these lots, defendant, prior to said date, had laid out, and dedicated and graded, a street, from said lots over and across its tracks and station grounds, connecting with the only direct traveled highway from the business part of the city to the said station grounds; that on said October 1, 1878, defendant leased one of the lots to plaintiff Elmore, to whose rights plaintiffs have succeeded, representing to him at the time that said street had been dedicated, and was to be a permanent street, and means of access to the said city; relying upon which representations of defendant, Elmore accepted the lease; that defendant knew at the time that the intent of Elmore was to erect buildings on the lot, for the purpose of engaging in the business of buying and selling grain and other merchandise, among which was a certain brand of flour, manufactured by plaintiffs, for which they had a profitable market at said Albert Lea; that for about two years thereafter plaintiffs enjoyed the use of said street, which was during that time kept open by defendant; that in 1882 defendant permanently closed the said street to public travel, whereby plaintiffs' business has been destroyed. For the destruction of their business, plaintiffs brought this action for damages.

Defendant moved to have this complaint made more definite and certain, presenting in support of the motion an affidavit stating that the officers who controlled defendant corporation at the time of the alleged lease in 1878, have since then disposed of their interest in defendant and are now engaged in other business, and absent from the state of Minnesota; that none of the present officers have any knowledge or information of any of the facts or allegations of the complaint foregoing; that defendant is not apprised by the allegations of said complaint by whom of said former officers of defendant the negotiations, representations, etc., were made, and that without such knowledge defendant cannot safely answer the complaint; that the former officers cannot be secured as witnesses without great inconvenience to them, and expense to defendant; and that to bring them would be a hardship, when any or all of them may be immaterial witnesses if they took no part in the acts alleged. Defendants therefore moved that the names of the officers of defendant who are alleged to have made such negotiations, etc., be stated in the complaint. The motion was denied, and defendant appeals.

B. S. Lewis, for Minneapolis & St. L. Ry. Co., appellant. *Lovely, Morgan & Morgan*, for Todd and others, respondents.

MITCHELL, J. This case is controlled by that of *Lee* v. *Railway*, 34 Minn. 225, 25 N. W. Rep. 399. The uncertainty or indefiniteness complained of is not as to what the complaint alleges, but as to what particular evidence the plaintiff may produce to support it. The allegations as to the acts of the defendant railway constituting plaintiff's cause of action are not claimed to be either uncertain or indefinite, but what defendant asks is that the plaintiffs be required to plead the names of the particular officers or agents, claimed to have done or committed these acts, so that it may be advised in advance what

particular witnesses it will probably need to rebut the evidence of the plaintiff. To require this would be unprecedented, and subversive of the most familiar and well-established rules of pleading.

Order affirmed.

STATE *ex rel.* COLE and another *v.* RACHAC, Register of Deeds, etc.

(*Supreme Court of Minnesota.* October 28, 1887.)

1. RECORDS—REGISTER OF DEEDS—RIGHT TO INSPECT.
The right to inspect the public records and papers in the office of the register of deeds, "either for examination, or for the purpose of making or completing an abstract, or transcript therefrom," given by Gen. St. Minn. 1878, *c.* 8, § 179, as amended by Laws 1885, *c.* 116, is not limited to those having some interest in such records.[1]
2. SAME—ABSTRACTS—TRACT INDEXES.
Those who are in the business of making and furnishing abstracts of title to others for compensation, are entitled to this right for the purpose of making or completing their "tract indexes," subject however to such reasonable rules as the register of deeds may prescribe to secure the safety of the public records intrusted to his official custody.

(*Syllabus by the Court.*)

Appeal from district court, Le Sueur county; EDSON, Judge.

E. Southworth, for Myron H. Cole and S. May Hopkins, petitioners. *Cadwell & Parker*, for Rachac, defendant.

MITCHELL, J. This appeal is from an order overruling a demurrer to the petition of respondents for a writ of *mandamus* against appellant to compel him to allow them to inspect, and make abstracts and transcripts from, the public records and papers in his official custody, as register of deeds. The ground of the demurrer was that the petition did not state facts sufficient to entitle relators to the relief demanded. As the contention of the appellant rests entirely on a single proposition of law, it is only necessary to say that it appears from the petition that the respondents were engaged in the "abstract" business, preparing and furnishing to any and all persons desiring them correct abstracts of title to any tract of land in Le Sueur county. That in this business it is necessary to make what are called "tract indexes" which will show, under the designation of each tract or lot of land, all conveyances or liens affecting the same; and what they claimed was the privilege of inspecting and examining the public records in the register's office, and making abstracts or transcripts therefrom, for the purpose of preparing their "tract indexes."

The counsel for appellant plants himself squarely upon the broad proposition that respondents are not entitled to any such privileges because they have no interest in the records which they desire to examine. His contention may be briefly stated thus: (1) At common law no person had a right to examine or copy the records in a public office in which he had no interest, present or prospective. (2) That the statute does not extend this right to others, but merely regulates its exercise by those who already possessed it at common law.

Conceding that the rule at common law was as stated, the question is, how far has this been changed by Gen. St. 1878, *c.* 8, § 179, as amended by chapter 116, Gen. Laws 1885? In view of its very strong and general language, we are strongly inclined to think that the original statute gave to every person a right to inspect and examine at all reasonable times, and in a proper way, all public records in the office of the register of deeds, whether he had any interest in them or not, subject, of course, to such reasonable rules as might be necessary to secure the safety of the records, and provided it was done in

[1]See note at end of case.

such a way as not to interfere with the proper performance of the official duties of the register of deeds. But however this might have been, we think the matter is entirely put at rest by the amendment of 1885. It is a matter of common knowledge that at the time this amendment was passed, in a large majority of counties in this state, persons had engaged in the "abstract" business, and at much expenditure of time and money had prepared, or were preparing, these abstract books or "tract indexes." These abstract offices, if properly conducted, are of great public convenience, because for well-known reasons they are usually the only place where abstracts of title can be conveniently obtained. It is essential to the convenient and proper transaction of the business, that those engaging in it provide themselves with these "tract indexes." This can only be done by examination of the records in the register's office, and making copies or abstracts of the same. The right to do this had been usually exercised and conceded without question. But in some instances the right had been denied, and disputes and even litigation over the matter had arisen between the registers and the "abstract" men.

Under this state of affairs, the legislature enacted the amendment referred to, which throughout bears clear evidences of being intended to define and fix the right of all who might desire to make copies of or abstracts from any of these records. While its operation is not confined to those engaged in the so-called "abstract business," yet in its language and general scope it shows that these were prominently in the mind of the legislature. The original statute gave to every one demanding it the right to "inspect" these records. But as there might be doubt what the right of inspection included, the amendment adds, "either for examination, or for the purpose of *making or completing an abstract or transcript therefrom.*" As indicating what and whom the legislature had in mind, the act further provides that the county commissioners may permit any person having a set of "abstracts of titles" to occupy a part of the county building for an office. Taking the whole act together, and construing it in the light of the circumstances existing at the time of its passage, and which probably suggested its enactment, we have no doubt that its meaning and intent is to give to every one the right of inspection of these public records, "either for examination," or for the purpose of making or completing an abstract or transcript therefrom," whether they have any interest in such records or not. Of course this right is subject to the limitations expressed or implied by the act. What these are does not concern us here, but we may say generally that it is, of course, subject to such reasonable rules as the register of deeds may prescribe to insure the safety of the public records intrusted to his official custody, and the act expressly provides that it does not give to any person the right to use the records when it would interfere with or hinder the register in the performance of his official duties.

The suggestion in appellant's brief that the petition does not allege or show that the right claimed by the respondents can be exercised without interfering with the register in the performance of his official duties was evidently made under a mistake of fact.

Order affirmed.

NOTE.

REGISTER OF DEEDS—RIGHT TO COPY ENTIRE RECORDS. At common law, parties had no vested rights in the examination of a record of title, or other public records, save by some interest in the land or subject of record. Cormack v. Wolcott, (Kan.) 15 Pac. Rep. 245. In *Kansas*, it is held that the register of deeds will not be compelled by *mandamus* to permit any person to make copies of the entire records in his office for the purpose of making a set of abstract books for private use or speculation, under that section of the statute which provides that all books and papers required to be kept in the county offices shall be open for the examination of any person. Id. The same doctrine is laid down in *Colorado*, under a similar statute. Bean v. People, 2 Pac. Rep. 909. Also in *Michigan*, where the statute provides that the register of deeds shall furnish proper and reasonable facilities for the inspection and examination of the records and files in his office, and for making memorandums or transcripts therefrom during the usual

business hours, to all persons having occasion to make examination of them for any lawful purpose. Webber v. Townley, 5 N. W. Rep. 971. In *New York*, it is held that every person has the right to inspect, examine, and copy, at all reasonable times and in a proper way, the records in the office of the register of deeds; but that the register must necessarily have control of his office, and of the records, and must be permitted the exercise of some discretion as to the manner in which persons desiring to inspect, examine, and copy the records may exercise their rights. People v. Richards, 1 N. E. Rep. 258.

STATE *ex rel.* BURNER *v.* RICHTER, Sheriff.

(*Supreme Court of Minnesota.* November 11, 1887.)

1. EXTRADITION—FUGITIVE FROM JUSTICE.
   To be a fugitive from justice in the sense of the act of congress regulating the subject of extradition, (Rev. St. U. S. § 5278,) it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against its laws, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another state. *Roberts* v. *Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291.
2. SAME—FACT THAT PERSON CHARGED HAS LEFT STATE, SUFFICIENT.
   The important fact is not his purpose in leaving, but that he has left, and hence is beyond the reach of the process of the state in which the crime was committed.
3. SAME—INTENT IN LEAVING, IMMATERIAL.
   The fact that he is not within the state to answer the charge when required, renders him, in legal intendment, a fugitive from justice, regardless of his purpose in leaving.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county. Writ of *habeas corpus*. *Fayette Marsh*, for State *ex rel.* Burner, relator.

MITCHELL, J. The question here is whether the relator is a fugitive from justice within the meaning of Rev St. U. S. § 5278. The record shows that she was duly charged with crime, committed in Shawnee county, and state of Kansas; and that, upon being arraigned on an information filed against her in the district court of that county, she entered a plea of guilty. It is not denied that she was in that state at the date when the crime is alleged to have been committed. It appears, and is not disputed, that, after her plea, but before any sentence had been passed upon her, she left the state of Kansas and came to the state of Minnesota, where she has since remained. According to her testimony, the sheriff and county attorney of Shawnee county informed her, after the entry of her plea, that her presence there was no longer required, and advised and directed her to leave that state, which she thereupon did, and came to the state of Minnesota to answer an indictment against her pending in the district court of Hennepin county, in accordance with the conditions of a recognizance which she had previously entered into in that court. Her contention is that, to constitute a fugitive from justice, a person must have left the state where the crime was committed for the purpose of escaping from the legal consequences of his crime; and that, inasmuch as she did not leave the state of Kansas for any such purpose, or with any such intent, she is not a fugitive from justice, within the meaning of the statute. We think that this question has been determined adversely to the relator's contention by the supreme court of the United States, whose decisions upon the construction of federal statutes are controlling, and binding upon all state courts. In *Roberts* v. *Reilly*, 116 U. S. 80–97, 6 Sup. Ct. Rep. 291, that court held that "to be a fugitive from justice, in the sense of the act of congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state com-

mitted that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another."

The meaning of this language is unmistakable, viz.: That the motives or purposes of the party in leaving the state where the crime was committed are entirely immaterial; that all that is necessary to constitute him a fugitive from justice is (1) that, being within a state, he there committed a crime against its laws, and (2) when required to answer its criminal process, he has left its jurisdiction, and is found in the territory of another state.

This construction fully accords with our own views. The sole purpose of this statute, and of the constitutional provision which it was designed to carry into effect, was to secure the return of persons who had committed crime within one state, and had left it before answering the demands of justice. The important thing is not their purpose in leaving, but the fact that they had left, and hence were beyond the reach of the process of the state where the crime was committed. Whether the motive for leaving was to escape prosecution or something else, their return to answer the charges against them is equally within the spirit and purpose of the statute; and the simple fact that they are not within the state to answer its criminal process when required renders them, in legal intendment, fugitives from justice, regardless of their purpose in leaving.

Some objections were made to the sufficiency of the extradition papers, but we do not deem them of sufficient importance to require us to say more than that we do not think them well taken.

The writ is discharged, and the relator remanded to the custody of the sheriff of Ramsey county.

BENEDICT *v.* THOE and another.

(Supreme Court of Minnesota. November 11, 1887.*)*

1. NEGOTIABLE INSTRUMENTS—SURETY SIGNING AS MAKER—DUTY OF PAYEE WITHOUT NOTICE.
   Where one of several signers of a joint note is surety for the others, but such fact does not appear upon the face of the paper, the payee is not, in the absence of any notice, bound to inquire into the relations of the makers as between themselves, nor, until informed thereof, is he bound to regard the equitable rights of such surety.
2. SAME—NEGLECT TO ENFORCE COLLECTION—RELEASE OF SURETY.
   Mere neglect to bring suit, or take active efforts to collect the note of the principal maker at the request of the surety, is insufficient to discharge the latter.[1]

(Syllabus by the Court.)

Appeal from district court, Dodge county; BUCKHAM, Judge.

Geo. B. Edgerton, for Olson, appellant. *Arthur L. Gove*, for Benedict, respondent.

VANDERBURGH, J. 1. The defendant Olson claims to have signed the notes in suit, as surety, though that relation as between him and the other signers is not disclosed on the face of the paper. Upon the trial he offered to show that, while Fladequal, the alleged principal on one of the notes, was solvent, he requested the plaintiff to commence suit, and collect the same of him, which plaintiff neglected to do. It did not, however, appear from the evidence, nor

[1] The fact that when a debt falls due a surety requests the creditor to sue the principal debtor, who is then solvent, does not operate to discharge the surety upon the failure of the creditor to comply with the request, and the subsequent insolvency of the debtor. Smith v. Freyler, (Mont.) 1 Pac. Rep. 214. Under the Dakota statute it is held that, in order to so operate, there must be an explicit notice that, in case the creditor shall fail to sue, the surety will hold himself discharged. Kennedy v. Falde, 29 N. W. Rep. 667. See Silver Plate Co. v. Flory, (Ohio,) 7 N. E. Rep. 753, and note; Ingals v. Sutliff, (Kan.) 13 Pac. Rep. 828; Medley v. Tandy, (Ky.) 4 S. W. Rep. 308.

did the defendant offer to show, that Fladequal had since become insolvent, or had, in fact, left the jurisdiction, or that he had himself offered to indemnify plaintiff for his costs, or that the latter had waived such indemnity. The offer would have been properly rejected, even if plaintiff had known that defendant was surety for the other makers. *Huey* v. *Pinney*, 5 Minn. 310, (Gil. 246;) Gen. St. 1878, *c.* 66, § 130. Mere passive delay on the part of the plaintiff in prosecuting his remedies did not operate to release the surety. He could have paid the debt, and become subrogated to plaintiff's rights, and have proceeded against his principal, or have brought suit under chapter 66, § 130, Gen. St.

2. As to the second note, upon its face all the signers appear to be joint makers. There is nothing in the record tending to show that the plaintiff had any knowledge or notice that the defendant Olson was merely a surety. The fact that, after the note became due, the latter requested him to collect it of Thoe, who, as he alleges, was the principal debtor, and helped get security of him, is insufficient to raise a presumption of the knowledge by plaintiff of the obligations of the debtors between themselves, as this may have been done for other and different reasons. As to him, they all contracted as joint makers, and, until he was informed of the relations of the makers to each other, he was not bound to take notice of the defendant Olson's equitable rights as surety. *Agnew* v. *Merritt*, 10 Minn. 312, (Gil. 242,) and cases. It is not material, therefore, to consider whether the trial court erred in rejecting the evidence of an agreement by plaintiff to extend the time of the payment of the note, in consideration of the security given by Thoe.

Order affirmed.

MAXIM *v.* WEDGE.

(*Supreme Court of Wisconsin.* November 1, 1887.)

1. TRESPASS—TITLE TO LAND PUT IN ISSUE BY DENIAL ON INFORMATION AND BELIEF.
   In an action for trespass to real property, a denial of plaintiff's title to the property in question, "upon information and belief," puts the title in issue.
2. SAME—COSTS—JUDGMENT LESS THAN FIFTY DOLLARS.
   Rev. St. Wis. §§ 2918, 2920, provide that in actions for tort the plaintiff shall be allowed full costs when his judgment is $50 or more, and if the plaintiff's judgment is less than $50, the defendant shall have full costs. *Held* that, in an action for trespass to land, where the title is in issue, the plaintiff is entitled to full costs upon a judgment of less than $50.

Appeal from circuit court, Winnebago county.

F. F. Duffy, for respondent. *Elihu Coleman*, for appellant.

ORTON, J. The complaint substantially alleges that the plaintiff was the owner and in possession of the premises upon which the trespass was committed, and that the defendant, without leave of the plaintiff, entered said premises and cut and girdled 11 ornamental shade-trees of the value of $300, and that the land upon which said shade trees were growing was thereby greatly damaged, and lessened in value to the amount of $700, to his damage of $1,000. There is an allegation, also, that said land was owned and occupied by the plaintiff as her homestead. The defendant alleged in his answer, substantially, that he has no knowledge or information sufficient to form a belief as to the ownership of the said land, and that he so entered under license, etc. This averment of the defendant's want of knowledge or information sufficient to form a belief put the plaintiff to proof of her ownership of the land. Van Santv. Pl. 436; *Hastings* v. *Gwynn*, 12 Wis. 671; *Boorman* v. *Express Co.*, 21 Wis. 152; section 2655, Rev. St. The plaintiff recovered only five dollars damages, and judgment was rendered in her favor for said five dollars damages, together with $196 taxable costs. The defendant appealed from that part of the judgment allowing the plaintiff said costs, and claims

that the plaintiff was not entitled to costs on said recovery, and that he was entitled thereto because the plaintiff recovered in the circuit court less than $50 damages. This is the only question. The learned counsel of the appellant, in support of said claim, contends (1) that this case is governed by part 5 of section 2918 and section 2920, Rev. St., the first giving full costs to the plaintiff in actions of tort, when $50 or more is recovered, and the latter giving costs to the defendant when the plaintiff is not entitled thereto. (2) That this action is for the unlawful cutting of timber where the value thereof recovered does not exceed $50, as provided in chapter 147, Laws 1880, amending section 2922, Rev. St. (3) That the claim of title to real property did not necessarily arise on these proceedings.

1. This is an action in tort, it is true, but it is also an action of trespass to real property, where the title of the plaintiff to the *locus in quo* is put in issue by the pleadings, and therefore it could not have been brought in a justice's court. The recent case of *Ames* v. *Meehan*, 63 Wis. 408, 23 N. W. Rep. 586, is in point. That was an action of trespass for cutting timber, and the plaintiff alleged title and possession in himself of the land, and the answer contained a general denial. The recovery was less than $50 damages, and $150.90 costs. It was held that a justice of the peace had no jurisdiction of the action, because the title to the land was put in issue by the pleadings, and that the plaintiff was entitled to full costs.

2. Chapter 147, Laws 1880, amending section 2922, Rev. St., relates to a particular class of actions "founded upon the unlawful cutting of timber," the same as in section 4269, Rev. St., "to recover the possession or value of logs, timber, or lumber, wrongfully cut upon the land of the plaintiff;" and certain peculiar statutory provisions relate to that class of cases. This is strictly an action of trespass where the damages arise from permanent injury to the freehold.

Therefore, third, the title of the plaintiff may properly be alleged and put in issue by the answer. The case of *Lipsky* v. *Borgman*, 52 Wis. 256, 9 N. W. Rep. 158, was for entering upon the land of the plaintiff and carrying away a certain building. The answer was a general denial. It was held that "this denial puts in issue the title of the plaintiff to the land upon which the trespass is alleged, in the first count of the complaint, to have been committed, and of itself makes a proper case for the recovery by the plaintiff of full costs in the circuit court, if he succeeds in the action." It not only makes a case under subdivision 1 of section 2918, Rev. St., "when a claim of title to real property arises on the proceedings," but divests a justice of the peace of jurisdiction in the case under section 3619, Rev. St., because the answer "states facts showing that the title of land will come in question." The above recent cases in this court rule this case in all particulars as to the question of costs, without further argument or citation of authority. The stipulation of the defendant that the plaintiff was the owner of the land, only dispensed with the proof of that fact. It did not divest the case of that issue. It is clear that full costs were properly allowed to the plaintiff.

That part of the judgment of the circuit court appealed from is affirmed.

MATTOON MANUF'G CO. *v.* OSHKOSH MUT. FIRE INS. CO.

(*Supreme Court of Wisconsin.* November 1, 1887.)

INSURANCE—WHAT CONSTITUTES CONTRACT FOR.

Plaintiff gave its note, undated, to defendant insurance company, payable in installments at such times as defendant might order, with a blank application signed by plaintiff, which was accepted by the agent of the defendant, with the agreement that it would effect a contract of insurance, and that, when plaintiff would give defendant the apportionment of the risk, the policy should issue, and the note and application be filled up to correspond. *Held*, that such an arrangement did not make a contract of insurance.

Appeal from circuit court, Sheboygan county.

Seaman & Williams and *Joshua Stark*, for respondent. *F. W. Houghton* and *C. W. Felker*, for appellant.

ORTON, J. This suit was instituted by the respondent company to recover $5,000 insurance, by virtue of a contract of insurance between the parties, made on the twenty-fifth day of August, 1886, on account of loss by fire occurring on the tenth day of September, 1886. The pleadings are such that only one single issue was presented, and that was whether there was any contract of insurance between the parties, or whether the facts proved constituted a contract of insurance. It was stipulated by appellant's counsel that the circuit court in which the action was tried might direct a verdict for either party, as it might be advised from the evidence, and that the only error that the appellant can assign will be a matter of law arising upon the finding that there was a contract upon the facts proved. This seems to be the effect of the proposition made by the learned counsel of the appellant, found in the record. The court thereupon overruled the motion of the defendant to direct a verdict in its favor, and directed the jury to find a verdict in favor of the plaintiff for the sum of $4,800, with interest on that amount from the fourteenth day of September, 1886, and the defendant's counsel excepted to both rulings. The defendant's counsel thereupon made a motion for a new trial on the minutes, on the ground that said verdict is contrary to the law and the evidence, and excepted to the overruling thereof.

It is substantially stated in the complaint that about the twenty-fifth day of August, 1886, the respondent *gave its note* to the appellant for $1,000, payable in installments at such times as the appellant might order or assess, with a blank application annexed thereto, duly signed by the respondent; and that the same was accepted by the agent of the appellant with the understanding and agreement *that the same would effect a contract of insurance*, and that such agent should fill out, or cause to be filled out, the blanks in said application and note, in accordance with the facts relating to the ownership of the property to be insured, *with a description of the risk*, of which a printed form, issued by the respondent for such purposes, *was then and there exhibited* to the appellant's said agent; and that thereupon a written policy of insurance for such time and for such terms, in accordance with such agreement, should be made by said appellant, and *forthwith* delivered to the said respondent. It is further stated in the complaint that said note and application were by said agent forwarded to, and are in the possession of, said appellant, and said agreement was duly reported to said appellant, and said appellant duly accepted of said risk, and notified the respondent thereof, but has neglected to send the written policy so promised to the respondent, and continued to so neglect, even after the fire, to send or deliver the same to the respondent, and refuses all liability in the premises. These statements are followed with the proper statements of the loss of certain property by fire, and of demand and refusal of payment, etc.

It is very clear that these facts make a complete, subsisting, and valid contract of insurance, without the written policy that the appellant company so neglected to send or deliver to the respondent. (1) It is alleged that the appellant gave its note of $1,000 for such insurance; (2) that there was an understanding and agreement, upon the acceptance of said note and application by the appellant, that the same would effect a contract of insurance, and that the agent should fill out the blanks therein as to date; (3) that said agent should fill out said application with a description of the risk, of which the printed form was then and there exhibited to said agent; and (4) that thereupon a written policy of insurance, for such time and terms, should be made out and delivered forthwith to the respondent; (5) that the appellant neglected, and still neglects, to do these things; and (6) that the appellant duly accepted of said risk,

and notified the respondent thereof. These allegations are necessary and vital to make the contract of insurance perfect and complete.

These important allegations were virtually denied in the answer, and it is substantially alleged that the note was in blank as to date; and the application was in blank as to date, and the description of the property to be insured, contained in a form to be *thereafter* made and furnished to the appellant by the respondent; and that such form was never furnished to the appellant until after the loss by fire had occurred.

In this connection it is proper to say that it is claimed on behalf of the appellant that, admitting the facts stated in the complaint to be true, there was no contract of insurance, because there had been no payment of the first installment of the said note, as the first year's premium on said risk, according to a by-law of said appellant company, that makes it liable only after such payment as a condition precedent. It seemed to be customary for said company to demand and receive such one year's premium on the delivery of the policy; and there is in evidence a policy made out and delivered, bearing date the twenty-fifth day of August, 1886, the date of the application in that case as well as in this, to the Halstead & Whiffin Manufacturing Company, by this same insurance company, for $5,000 on the main building, and three classes of property as the contents thereof, and said premium of $200 was demanded and paid at the time of such delivery. George B. Mattoon was the president of both companies, and made the application in both cases. In that case the description of the particular property to be insured was furnished by the respondent to said company at the time of the application, and inserted therein, and everything was done to make a valid contract of insurance, before the actual issue of the policy, which was to be antedated to agree with the time of the application. This policy of insurance to another company, and the facts concerning the same, were introduced in evidence, against the objection of the appellant. But it certainly serves to illustrate the manner in which such business was done by both companies at the time, and when a contract of insurance was deemed fully completed. The terms of the note given in such a case, and in this case, would seem to determine the question of the payment of any and all of the installments thereof. The $1,000 is payable *by installments at such time as the directors of said company may order and assess.* If such a note is given, and everything else done to make a valid contract of insurance, we cannot say, as a matter of law, that the first year's installment of such a note must be paid to make the company liable, unless the company had so *ordered and assessed* before the contract was otherwise completed. So we say, if everything stated in the complaint had been done, the contract of insurance was complete although such first year's installment had not been paid, because not so ordered and assessed.

There is very little substantial difference between the testimony of Mattoon, the president of the respondent company, who made the blank application and note, and of Mather, the agent of the appellant company, who received and transmitted the same to said company. Wherein there is any disagreement will be observed in passing. The facts appear to be as follows:

The applications for insurance, in both cases, were made at the same time. In the case of the Halstead & Whiffin Manufacturing Company, the application and note were filled out and signed at the time. The witness Mattoon testified that "he told the agent that he wanted the $5,000 to cover that risk, [the factory and contents,] but that he did not know which he would place it all on,—machinery, building, or stock,—but they were just taking an inventory." The treasurer of the company, Paltzer, handed the agent a printed "form" that had been used in other cases, containing buildings and factory, the size and location thereof, the amount of machinery, building, and stock to be insured. The object of awaiting such inventory appears to have been to make out a specific "form" similar to that exhibited, containing a descrip-

tion of the building, and the particular contents thereof, classified in certain amounts to make up the $5,000. This was to be the description of the property to be filled in the written application, after such inventory had been made, and such form furnished. It seems, also, that this particular building, and the contents thereof, had already been insured in other companies to the amount of over $60,000, and so classified. In explanation of this, said witness testified: "I told him, when we got the inventory figured up, if *we were short on machinery* or *stock*, that I would put it on *that*,—divide it up; and he [agent] said that would be all right." When asked if he referred to filling out the "form" with the amount of insurance on each kind of property, which was not done at that time, he replied: "It was understood that it should be done." "That form was made out three days after the fire." "No form was made out and sent until it was made out and sent (with a letter to the company) three days after the fire," (which occurred on the tenth day of September, 1886.) "It was left with them to make it, until [after] we got our inventory fixed, *until we could see where we were short.*" The blank note in evidence, which was signed by the respondent, had no date, and was as follows: "OSHKOSH, WISCONSIN, ——188—. For value received in policy No. ———, dated the ——— day of ———, 188—, we promise to pay," etc. The application prefixed to the note is as follows: "Application of [respondent company] for insurance in [appellant company] in the sum of five thousand dollars, against loss or damage by fire and lightning *on the property below specified*, for the term of five years from the ——— day of ———, 188—, to-wit, ———." This blank left for a description of the property is followed by questions and answers in respect to the property to be inserted in the same; the first being as follows: "Are you sole owner of the property to be insured, (exclusive of the land?) *Answer.* Yes." This note and application so left in blank were forwarded to the company by the agent, Mather, with a letter dated August 25, 1886, and at said date saying: "Inclosed find application [of] the Mattoon M. Co., to be held until they send you the form they are getting up,—some new ones. [Signed] J. H MATHER." These were all the papers or advices the appellant company ever received until after the fire.

The witness Mattoon further testified: "I think it was three days after the fire, the 13th, when I made up the apportionment on the various specific items of property, as set forth in Exhibit H." "Then, when we made up the apportionment or the forms, we placed it where we pleased; that is a privilege I had when I gave the insurance, and I could place it where I saw fit." This apportionment or form, which was to contain a specific description of the property insured, and which was so furnished after the fire, was, in effect, $500 on the buildings, describing them; $1,500 on machinery, shafting, etc.; $3,000 on stock, raw, wrought, and in process, etc. The appellant company was furnished, for the first time, the day after the fire, with a list of the companies in which the factory and contents had been insured, with the particular description of the property insured in each company, and the amounts of insurance upon each class of the property. At the bottom of this schedule or list is appended the following note, viz.: "The Oshkosh Mutual has accepted a risk of $5,000 on this property, *but it has not yet been apportioned between 'building,' 'machinery,' and 'stock,' and no policy yet issued.*"

The agent, Mather, who was called as a witness for the respondent, testified that he called at Mattoon's office, and applied for some insurance, as he said he would give him some; that Mattoon replied that they were not prepared to fix it then, as they were taking stock; and they showed him a form similar to that exhibited to witness, and he understood that they were getting up some new ones, and as soon as they got them out they would send them to the company. The witness then proposed that they would make out a blank application then, leaving the date blank, fill the note out, and leave the date

blank, and when they got their forms ready they would send them to the company, and that they could then make out a policy, and date it, and fill in the date of the note and application to correspond. The witness further stated that Mattoon consented to this arrangement, and signed the note. The witness Mattoon did not deny this version of the matter, when re-examined, except that there was nothing said about dating the note or application.

On the ninth day of September, the day before the fire, the secretary of the appellant company wrote to the respondent to send on the "forms" to be inserted in the policy, and that the policy would be sent by return mail, and yet none were furnished until three days after the fire.

This is all the material evidence in the case.

The circuit court directed a verdict for the plaintiff for $5,000; less, as is supposed, the $200, the first installment of the note and first year's premium.

It seems to us that these facts, viewed in the most favorable light for the respondent, fall far short of making a contract of insurance. (1) No policy of insurance was ever issued, nor could it be issued, by reason of a want of description of the property to be insured; and neither the note nor application was ever completed, and could not be, for the same reason. (2) Neither party could have understood that the contract was completed and valid on the twenty-fifth day of August, 1886, or the note would have been dated on that day, as well as the application, and everything done, except the specific description of the property, which was not deemed material, and left to be inserted by the respondent in the application and policy, at any time before or after the fire, as a matter of mere form; or why was not the policy issued on the "factory and contents," and sent to the respondent to insert a special description of the property insured, at its leisure? (3) The respondent was never bound by its note or application, or by any of the conditions of the policy, before the fire or since, and, of course, neither was the appellant bound by any pretended agreement on its part. (4) Both parties saw fit to make the contract and policy depend upon the respondent's furnishing the description of the property that it wished to have insured, as a condition precedent to the issuing of the policy. (5) The respondent reserved the right to have the insurance placed upon property that was "short of insurance" in other companies, and to make an inventory in order to ascertain that fact, and to have such property inserted in the application and policy, and thereby prevented a consummation of the contract. (6) The description of the property to be inserted in the application and policy was not immaterial, because both parties saw fit to make it material by their contract. (7) As the matter stood before the fire, there was no consideration whatever for the risk. All that the appellant company had ever received from the respondent was this blank note and blank application, with the request to "hold them" until the "forms" are sent on. (8) The appellant company could make no assessment of the cash premium to be paid on this blank note, according to section 1907, Rev. St., and according to the condition of such notes themselves. (9) The apportionment of the insurance was the right of the respondent, and it had not exercised that right. (10) The appellant company had never acted upon the application, or been called upon to act, but awaited its completion according to directions.

By the simple elements or elementary principles which constitute a contract, here was no contract. (1) Important and material things were left to be done. (2) The minds of the parties had never met upon the subject-matter of the contract, or property to be insured. (3) There was no mutuality or consideration in the unfinished state of the negotiation, and no promise or undertaking on the part of the appellant company to insure any certain property. (4) There must be subject-matter to which the policy could attach. (5) The amount of indemnity must be *definitely* fixed. (6) The *duration* of the risk must be definitely fixed, also. When did this risk commence, and when was the end of the five years? (7) The premium of cash or note, as the consider-

ation of the risk, must be agreed upon, and fixed as a *valid charge against the insured*. These requisites of a contract of insurance without a written policy are all wanting in this case, and if either of them is wanting there is no valid contract. 1 Wood, Fire Ins. § 5, and note. "If anything is left open or undetermined, so that the minds of the parties have not met, no contract exists," (Id. § 6, and note; *Strohn* v. *Insurance Co.*, 37 Wis. 625;) "or where the *apportionment* of the risk has not been agreed upon," (Id.; *Sandford* v. *Insurance Co.*, 11 Paige, 547;) "or if anything remains to be done by the insured, as a condition precedent," (Id.; *Thayer* v. *Insurance Co.*, 10 Pick. 326;) "or if, upon the whole evidence, it is left in doubt whether a binding contract was really made, a recovery will not be permitted;" "the details of the contract must be fixed," (Id.; *Hughes* v. *Insurance Co.*, 55 N. Y. 265;) "or where the assured had the right to determine how the risk should be apportioned, no recovery for the loss could be had," (*Sandford* v. *Insurance Co.*, *supra*;) "or if the contract is not so far perfected that the insurer could maintain an action for the premium, no perfect agreement exists, and the insurer is not liable," (Id.; *Wood* v. *Insurance Co.*, 32 N. Y. 619.) A case very much in point is cited by the learned counsel of the appellant, (*Kimball* v. *Insurance Co.*, 17 Fed. Rep. 625,) resting upon the want of an apportionment of the risk.

But this transaction is so wanting in all of the elements of a perfect contract, it would seem to be supererogation to cite further authorities. Among other numerous authorities cited by the learned counsel of the respondent to support this contract, there are none applicable to such a case. Here, everything was left *blank* and unperfected, to await the apportionment to be made by the respondent, as to fix the date, and consequently the duration, of the risk, and the liability of the respondent upon the note, or for the premium to be paid, and to complete a valid application for insurance. I do not believe that any case can be found so wanting in nearly all of the elements of a contract of insurance, and, much less, in which such facts are held to have constituted a perfect and valid contract. There may have been cases in which the contract was held to be valid and complete where the apportionment was not made by the parties, but they were such that certain known property was insured, and the law could make the apportionment from *data* furnished by the contract, or the circumstances of the case. Such was the case of *Fitton* v. *Insurance Ass'n*, 20 Fed. Rep. 766, cited by the learned counsel of the respondent.

There was something said about the policy covering the "factory and contents," but the appellant company never knew or heard of any such thing; and the application made out by the respondent, to be forwarded by the agent to the company, was a blank as to any and all property to be insured, and remained so until after the fire, and the company never knew what property the respondent wished to have insured.

It is too clear for further consideration that there was no contract, and we think the circuit court erred in the law in finding from these facts that there was.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

CLEMENT *v.* CLEMENT and another, impleaded.

(*Supreme Court of Wisconsin.* November 1, 1887.)

1. PARTNERSHIP — EXECUTION OF NOTE AFTER DISSOLUTION — FAILURE TO GIVE NOTICE TO PAYEE.

In an action upon a partnership note, it was shown that the partnership was dissolved prior to the execution of the note, but that no notice of such dissolution was given to the payee. *Held* that, in the absence of such notice, all the members of the firm were chargeable, notwithstanding the dissolution.

2. SAME—LIMITATION OF ACTION—ACKNOWLEDGMENT BY ONE PARTNER AFTER DISSOLUTION.

Rev. St. Wis. § 4244, provides that "If there are two or more joint contractors * * * no such contractor * * * shall lose the benefit of [the statute of limitations] so as to be chargeable, by reason * * * of any acknowledgment or promise made by any other" joint contractor. *Held*, that a partnership note is a contract within the meaning of the statute; but that a promise or acknowledgment, within the period of limitation, by one member of a firm previously dissolved, is not binding upon another member unless such dissolution was not known to the payee of the note, at the time such promise or acknowledgment was made.[1]

Appeal from county court, Fond du Lac county.

C. K. Pier, for appellant. *H. F. Rose* and *A. M. Blair*, for respondent.

ORTON, J. This action was brought upon two promissory notes given to the plaintiff by the firm of Clement Bros., composed of said defendants, the first dated December 1, 1874, for $125, payable 90 days after date, and the other dated April 13, 1875, for $633.80, payable one year after date. The defendant Charles Clement in his answer admits the signing of both notes and the receipt of the money, and alleges that he made all the payments thereon up to 1884, and counter-claims for board of plaintiff. The defendant Stephen, while admitting the partnership up to January 1, 1875, denies its continuance after that date, and alleges a dissolution thereof on that day, with the knowledge of the plaintiff, before the last note was given, and pleads the statute of limitations upon both of said notes.

The payments proved were sufficient to cancel the first note, to reduce largely the other note, and these payments, running along from July, 1875, until and including September 1, 1884, were all made by the defendant Charles. In short, the pleadings are such that the following material issues were made: *First*. Whether there was a dissolution of the firm January 1, 1875, or before the last note was given. *Second*. Whether if there was, the plaintiff had notice thereof, before receiving said note and the payments thereon. The referee found that the defendants had failed to show by a preponderance of proof that the partnership was dissolved "January 1, 1875," and that they failed to show by a preponderance of proof that the partnership was dissolved "at any particular or specified date." This last finding is extremely awkward, but it may be substantially sufficient, if we can construe it to mean that there was no preponderating evidence that the partnership was dissolved before the last note was given. If the evidence did not show the date of the dissolution, it did not show that its date was before the last note given, as an affirmative fact to be proved by the defendants. Having thus found, the referee very properly did not find whether the plaintiff had any notice of such dissolution. The referee held both defendants, as the partnership of "Clement Bros.," liable for the balance of the notes.

On the counter-motions to confirm, or set aside, or modify the report of the referee, the county court confirmed the report as to the defendant Charles, and rendered judgment against him accordingly, but set aside the report of the referee as to Stephen Clement and dismissed the complaint as to him with costs. Whether the county court found that there was preponderating evidence of the dissolution before the note was given, and discharged the defendant Stephen Clement on that ground alone, or found, besides this, that the plaintiff had notice of such dissolution before the note was given, as we understand the law, the finding of the first fact made the other necessary in order to exonerate the defendant Stephen. On reading the evidence, we are inclined to hold that the referee was right in his finding, and the county court was wrong. Although there was some evidence of a dissolution, at some

[1] After dissolution of a partnership, one partner has no power to create or continue a debt as against his copartners, either by express agreement or partial payment. Cronkhite v. Herrin, 15 Fed. Rep. 888. See note to Willey v. State, (Ind.) 5 N. E. Rep. 884.

time, the date of that occurrence was left by the evidence very uncertain. The finding of the second fact by the county court, if such fact was found at all, that the plaintiff had notice of the dissolution before the note was given, or the payments made upon it within the periods of limitation, we cannot but think was entirely without proof. If the county court was wrong as to the fact that a dissolution took place before January 1, 1875, or before the last note was given, that ends the case. But we will not rest the decision of the cause upon that finding, but upon the finding (or what should have been the finding) that the plaintiff had no notice of such dissolution before the note was given or the payments made. And this raises the only real question of law in the case.

It does not seem to be controverted by the learned counsel of the respondent that the defendant Stephen Clement or the partnership was bound by the second note, unless the plaintiff had notice of the dissolution before it was given. The plaintiff had dealings with the firm, and took the first note so recently that there can be no question but that he had a right to assume the continuance of the partnership to the time of giving the second note, unless he had notice of the dissolution. This is elementary. Pars. Partn. § 411 *et seq.*. But the question whether, if the partnership had been previously dissolved in fact, notice of it to the plaintiff is necessary to make the payments of promise made by one partner have the effect to remove the bar of the statute of limitations, is seriously and plausibly controverted by the learned counsel of the respondent. The statute, section 4244, Rev. St., is invoked to show that the payment or acknowledgment made by one joint contractor shall not have such effect. There may be some question whether this statute is applicable to partnerships, or to partners as joint contractors. But it has been held by some courts in states where this statute exists, that it has application *sub modo*, but not to dispense with the necessity of notice to the creditor of the dissolution, as in *Peirce* v. *Tobey*, 5 Metc. 168, and *Faulkner* v. *Bailey*, 123 Mass. 588. In the case, specially cited and relied upon in the brief of the respondent, of *Gates* v. *Fisk*, 45 Mich. 522, 8 N. W. Rep. 558, it was held "that a partnership note is a joint contract, within the meaning [of the statute,] so that a payment thereon, by one partner within the period of the statute of limitations, will not bind the other, if the firm had previously dissolved, *to the payee's knowledge.*" There are incidents, rights, and liabilities, of a partnership which make the members of the firm in such case something more than mere joint contractors, and it is only after notice of dissolution to the creditor that places the partners upon the same footing of other joint contractors, in respect to a promise by one not removing the bar of the statute as to another partner, that the statute has any application. "Until the payee knows of the dissolution, any contract made by one partner within the scope of the partnership business binds the other partner also." *Pratt* v. *Page*, 32 Vt. 15. And "payment by the liquidating partner, would take the case out of the statute of limitations." *Reppert* v. *Colvin*, 48 Pa. St. 248. A partnership debt remains the same after dissolution, and the partners are all responsible *in solido*, any arrangements between the partners to the contrary notwithstanding, and they are still agents for each other in making payments, or doing anything else material to the contract. Pars. Partn. (3d Ed.) 388, 395, 398, 421, 457; Colly. Partn. § 106; *Whiting* v. *Farrand*, 1 Conn. 60; *Gay* v. *Bowen*, 8 Metc. 100; Story, Partn. § 334. Dissolution does not revoke the authority of one partner as agent for the others, to arrange, liquidate, settle, and pay the debts before created. Pars. Partn. § 390. Part payment by one partner before the statute of limitations has attached, as in this case, forms a new point from which the statute begins to run as to all the partners. *Pennoyer* v. *David*, 8 Mich. 407; *Palmer* v. *Dodge*, 4 Ohio St. 21; *Turner* v. *Ross*, 1 R. I. 88; *Joslyn* v. *Smith*, 13 Vt. 353; *Mix* v. *Shattuck*, 50 Vt. 421; *Coleman* v. *Fobes*, 22 Pa. St. 156. Many authorities hold that until notice of the dissolution, the

firm is bound even by a new contract that any of the partners make with a creditor. *Pecker* v. *Hall*, 14 Allen, 532; *Dickinson* v. *Dickinson*, 25 Grat. 321; *Page* v. *Brant*, 18 Ill. 37; Pars. Partn. § 397: *Lovejoy* v. *Spafford*, 93 U. S. 430.

It is perfectly clear, then, that these payments, scattered along almost every year since the giving of the note until 1884, by Charles Clement, removed the bar of the statute as to Stephen also, the plaintiff having had no notice of the dissolution. This disposes of this case, whether there was a dissolution or not, as there was no evidence of the plaintiff's knowledge of it. Both Charles and Stephen Clement were alike bound, and as to neither had the statute of limitations run upon either note. The county court should have so found, and rendered judgment against both of the defendants as an existing partnership.

The judgment of the county court appealed from is reversed, and the cause is remanded with directions to render judgment in said action also against Stephen Clement for the amount unpaid of said note, and interest, the same as against said Charles Clement.

MOON *v.* ESTATE OF EVANS, Deceased.

(*Supreme Court of Wisconsin.* November 1, 1887.)

DESCENT AND DISTRIBUTION — CHILDREN OMITTED FROM WILL — ACCIDENT OR MISTAKE. Rev. St. Wis. § 2287, provides that "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate. * * *" *Held*, that the evidence must be very clear that the omission was the result of mistake or accident, and that the right of a child omitted to share in the estate can rest upon no other basis.

Appeal from circuit court, Iowa county.

J. P. Smelker and *J. M. Smith*, for appellant. *A. McArthur* and *Reese & Carter*, for respondent.

ORTON, J. The petition of the appellant in the county court was made under section 2287, Rev. St., which reads as follows, to-wit: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section"—which is, that "it shall be assigned to him as provided by law in case of intestate estates." The will of Mary Ann Evans, deceased was executed October 8, 1883. She died February 17, 1885, and it was admitted to probate May 4, 1885. She was the mother of the petitioner, and she entirely omitted him in her will, and provided for the other of her children, except Harriett Rogers, and for her husband, by various devises and legacies. The county court found against the petitioner, and upon appeal to the circuit court, the jury in that court found "that Mary Ann Evans did not unintentionally omit her son William [the appellant] from her will; in other words, did intend when she made the will, that William should have none of her property after her death." From the judgment of the circuit court so determining, this appeal is taken.

The only question is one of fact, and from an examination of the evidence we cannot say say that the jury did not decide correctly. It seems from the evidence that the daughter of the testatrix, Harriett Rogers, had been amply provided for by her mother in her life-time, before making her said will.

William H. Moon, the petitioner and appellant, was sentenced, in the state of Illinois, to the Joliet penitentiary for life, for murder, the eighteenth day of November, 1873, and was pardoned after the death of his mother, May 18,

1885. It appears from the evidence, also, that his mother had made every effort possible to defend him, and to secure his pardon, and at a very great expense, which she complained of as having ruined, or nearly ruined, her, and which was much more than his equal share in her estate. It appears, also, that she intended to change her will "if William got his freedom," and that she said at one time that she intended to will William something, and if William never got his freedom, she was going to have her property willed so that it would come back to the rest of the heirs. This is very strong evidence that the testatrix intended to give the petitioner nothing by her will, and that she omitted him intentionally from her will. The testimony of Mr. Smelker only shows that she wished her estate that was willed to her husband, to come back *to her heirs or children*, except her daughter Harriett, after his death. This was her direction to him in drawing the will, and he did not know that she had a child named William, and he drew it accordingly. The testimony of Mr. Smelker is not liable to any criticism, and appears to have been very fair and honorable. But this testimony would not weigh against the fact that he read the will over to her after it was drawn, and she made no objections to it, and she was a competent business woman. She must be presumed to have known what was in, and what was omitted from, her will. There is not a particle of evidence that the omission of the petitioner from her will was made "by mistake or accident," or that it was not intentional. The testatrix evidently omitted the petitioner intentionally. She probably supposed that he was doomed to suffer imprisonment for life, and would need none of her estate, and that at any rate, he had already received the benefit of the largest portion of it in expenses to obtain his pardon. The evidence is all one way, and that against the petitioner. However great the hardship, and however much we may sympathize with the petitioner, after he has been pardoned on the ground of his innocence, to be in this manner excluded from the generous provision of his mother's will, neither the courts below, nor this court, can open her will to admit him to his full share as one of her heirs, unless the evidence shows that his omission from her will was not intentional, but was made by mistake or accident, and this the evidence falls far short of showing.

The judgment of the circuit court is affirmed.

ALLEN v. GRIFFIN and others.

(*Supreme Court of Wisconsin.* November 1, 1887.)

1. WILL—ADMISSION TO PROBATE—EVIDENCE OF TESTAMENTARY CAPACITY—CONTEST—BURDEN OF PROOF.
   In an action contesting the probate of a will, where there is an entire absence of evidence tending to show a want of testamentary capacity, slight evidence of such capacity is all that is required to authorize the probate of the will, and the burden of proof is on the contestant to show want of such capacity.
2. SAME—WITNESSES—KNOWLEDGE OF NATURE OF INSTRUMENT NOT NECESSARY.
   It is not necessary to the validity of a will that the witnesses should know the nature of the instrument they are signing.
3. SAME—PRESUMPTION THAT TESTATOR SIGNED FIRST.
   In the absence of clear proof that the witnesses to a will signed it before the signing of the testator, it will be presumed that the latter signed first.

Appeal from circuit court, Winnebago county.

Chas. E. Pike, for appellant. *Gary & Forward*, for respondent.

TAYLOR, J. This is an appeal from the decision of the circuit court refusing to admit to probate a paper writing alleged to be the will of Charity S. Allen. A paper writing purporting to be the last will and testament of Charity S. Allen, deceased, was offered for probate in the county court of Winnebago county, by Edward Allen, the husband of the said Charity S. Allen, deceased. The probate was opposed by the said respondents. The objections

made to the probate of the said alleged will were: (1) That the paper was not duly executed by the said Charity S. Allen, and attested as her last will and testament; (2) that at the time of the date of said instrument the said Charity S. Allen was not of sound mind; (3) that, if said Charity S. Allen signed and executed said paper, her signature thereto, and the execution thereof, were procured by fraudulent practices, and undue influence, exercised by Edward Allen, named as the principal legatee and executor in said paper. On the hearing in the county court, that court refused to probate the will, and from the order of that court refusing such probate the proponent duly appealed to the circuit court of Winnebago county, and upon the hearing of the case in that court probate was again refused, and the proponent appealed from the judgment of such court.

In the circuit court no evidence was offered by the contestant. After the proponent had produced his witnesses and testimony the contestants moved to reject the paper writing proposed as the last will and testament of Charity S. Allen upon the evidence of the proponent, for the reason that it is not established by the evidence that it is the will of a competent testatrix, and executed and attested as required by law to establish it as a will. The motion of the contestants was granted by the court and probate of the will was refused.

The circuit court made the following findings in the case: "(1) That said paper writing was not attested and subscribed in the presence of the said Charity S. Allen by two competent witnesses, as required by law. (2) That said paper writing is not the last will and testament of said Charity S. Allen, deceased." And as conclusions of law: "(1) That said paper writing should be rejected and disallowed. (2) That the order of the county court of Winnebago county appealed from herein be affirmed." These findings of fact and conclusions of law were duly excepted to by the appellant.

In this court the learned counsel for the appellant contends that the circuit court erred in finding that the said paper writing purporting to be the will of Charity S. Allen was not attested and subscribed by two competent witnesses, as required by law. And he further insists that this is the only question of fact decided by the circuit court. That which is stated as a second finding of fact is a mere conclusion of law, and not a fact. We are inclined to hold that the contention of the counsel for the appellant is sustained by the record in the case, and that the only material question raised by the testimony in the case, and upon the findings, is upon the execution and witnessing of the paper presented for probate. No evidence was given which in the least tended to show any fraudulent practices or undue influence on the part of the proponent, or any other person, and no evidence was given which tended to show that the said Charity S. Allen was not competent to make a last will and testament at the time she executed the paper writing in question.

The main question in the case, as disclosed by the record, is, was the paper writing executed by the deceased as her will, and was such execution witnessed and attested by two competent witnesses in her presence? After a careful consideration of the testimony, it is very clear to us that it was executed and attested as prescribed by the statute. The learned counsel for the contestant contends that the evidence does not conclusively show that the two persons whose names were placed upon the paper as witnesses at the time the deceased signed it, signed as such witnesses after the same was signed by the testatrix. We think the fair construction of the evidence shows that they did sign after the deceased had signed, and that they signed in her presence. To reject the probate of a will upon such evidence as was offered in this case, on the ground that it does not conclusively appear that the witnesses signed as such after the signature of the alleged testatrix, would jeopardize the probate of very many honest wills. We think, in the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first. This would be the

usual order of signature. This view of the case seems to be sustained by the authorities below cited. Upon the proofs in this case, it would seem to us that it affirmatively appears that the two witnesses who first signed as witnesses signed after it was signed by the deceased.

If we understand the very able argument of the learned counsel for the respondents, he does not rely with any great degree of confidence on this point. The main argument upon which he justifies the rejection of the probate of the instrument in question is that the witness Hattie Wyman, whose name appears as the first witness to the will, had no knowledge that the paper she signed as a witness was the last will and testament of the said Charity S. Allen. And he has made a very able and elaborate argument to show that, unless the persons who sign, as witnesses, an instrument which is intended to be a will, know the fact that such is the nature of the instrument upon which they place their names as witnesses, they do not attest and subscribe as required by section 2282, Rev. St. 1878. This is a very old question, both in England and this country, and with all due respect for the learning and ability of the counsel for the contestants, we think it very clear that the great weight of authority is against the claim made by the counsel. The reason for holding that, under a statute like ours, the witnesses need not know the nature of the instrument to which they attach their names as witnesses to the signature of the person who has subscribed the same, is entirely satisfactory to us.

If the contention of the learned counsel is to prevail, then the fact that a will was duly witnessed as required by law would in all cases depend upon the memory of the persons signing as such witnesses; and the most honest will, executed in the most formal manner, would be defeated of probate if the witness should be unable to call to mind or recollect that when he signed as such witness the person signing it had declared that it was his or her will. Such a rule, instead of preventing the probate of suspicious or doubtful testamentary papers, would only tend to defeat the probate of honest and fair ones. Without further indicating the reasons of the courts for holding that the witnesses to a will, under our statute, and statutes of a similar character, need not know the nature of the instrument witnessed by them, we content ourselves with citing a few of the many cases repudiating the contention of the learned counsel for the contestants. *Osborn* v. *Cook*, 11 Cush. 535; *Hogan* v. *Grosvenor*, 10 Metc. 54–58; *Tilden* v. *Tilden*, 13 Gray, 110; *Ela* v. *Edwards*, 16 Gray, 91; *Eliot* v. *Eliot*, 10 Allen, 357; *Chase* v. *Kittredge*, 11 Allen, 49–52; *Dewey* v. *Dewey*, 1 Metc. 349; *Brinckerhoof* v. *Remsen*, 8 Paige, 488; *Jauncey* v. *Thorne*, 2 Barb. Ch. 40; *Remsen* v. *Brinckerhoof*, 26 Wend. 324. In the cases in New York, the English cases holding the same rule, under a statute in all respects like ours, are cited and commented upon. *Leverett* v. *Carlisle*, 19 Ala. 80; *Dickie* v. *Carter*, 42 Ill. 376; *Flood* v. *Pragroll*, 79 Ky. 607; *Brown* v. *McAlister*, 34 Ind. 375; *Dean* v. *Dean*, 27 Vt. 746; *In re Hulse*, 52 Iowa, 662, 3 N. W. Rep. 734; *Greenough* v. *Greenough*, 11 Pa. St. 489, 51 Amer. Dec. 567; *Osborn* v. *Cook*, 59 Amer. Dec. 155, and note; *Lawrence* v. *Norton*, 45 Barb. 448–452; *Linton's Appeal*, 104 Pa. St. 228.

The foregoing citations are abundant to show that the contention of the respondent on the point above stated is not sustained by authority. Although this court may not have passed upon the exact question now raised by the learned counsel of the respondents, it has certainly strongly intimated that it would follow the rule established in cases above cited. See *In re Meurer*, 44 Wis. 392; *In re Jenkins*, 43 Wis. 610. We think no good results could follow the establishment of the rule contended for by the learned counsel, but, on the contrary, that very great evil might be the result of establishing such rule.

We think there is great force and good sense in the remarks of the learned judge who delivered the opinion in the case of *Flood* v. *Pragroll*, *supra*. He says: "The legislature has prescribed such formalities as it deemed proper,

and we ought not to add to them formalities by construction, especially when the efficacy of the constructive requirement depends solely upon the memory of the subscribing witness. After any considerable lapse of time, the witness who could remember the circumstances connected with his subscription to the paper, so as to be able to state that the person whose signature he was called to attest declared that the paper signed was a will, might be justly subject to suspicion of fabrication, one of the principal things against which the formalities specifically prescribed were designed to guard. * * * These rulings show the understanding of the court to be that the attestation is of the genuineness of the signature of the testator, and not of the contents of the paper."

There is no question in this case, upon the testimony, but that the writing to which the witnesses affixed their signatures was intended by the deceased to be her will. This is fully established by the evidence of Hall, who drew the instrument, and witnessed the same; and this fact would not be more clearly established had the other witness, Hattie Wyman, been able to testify that the deceased asked her to sign as a witness to her will. Her memory of that fact would not be as satisfactory as the evidence of the man who was called upon to draw the instrument, and had full knowledge of its contents, and of the purpose for which it was made. We are satisfied that the learned circuit judge erred in holding that the will was not attested and subscribed in the presence of the testator by two competent witnesses.

But it is further insisted by the learned counsel for the respondents that the ruling of the circuit court ought to be affirmed, because there was no evidence given as to the competency of the deceased to make a will at the time this was made. The answer to this contention is—*First*, that the court below has not passed upon that question; and, *second*, that, in the absence of any testimony tending to show a want of testamentary capacity, slight evidence of such capacity is all that is needed to authorize its probate. The evidence in this case certainly tends to show nothing impeaching the testamentary capacity of the deceased at the time the will was executed, and there is some direct testimony showing such capacity. The witness Hattie Wyman was asked the following question: "How did Mrs. Allen seem to be at the time, so far as her mind was concerned?" And she answered: "I did not observe anything unusual." This witness was intimately acquainted with the deceased. This testimony, together with the other matters as to what she did at the time, is sufficient to entitle the will to probate, so far as her soundness of mind is concerned, there being nothing in the case which in the least tends to show affirmatively a want of testamentary capacity. This court has held, and we think properly, that, in a case where a will is contested on the ground that the deceased was insane or otherwise incompetent to make a will at the time the same was made, the burden of proof is on the contestant, and that the proponent need not, in making out his side of the case, make full proof of the capacity of the testator, but may content himself by making out a *prima facie* case of capacity, and introduce his further proofs on that question after the contestant has made his proof. See *Silverthorn* v. *Silverthorn*, 32 N. W. Rep. 287; *In re Cole*, 49 Wis. 179, 5 N. W. Rep. 346. In a case which does not disclose any facts which tend to show incompetency, slight evidence of the competency of the testator is sufficient to put the contestant to his proofs upon that question.

We do not pass upon the question raised as to the validity of the provisions of the will presented for probate in this case. If the same was duly signed and witnessed, and if there was no fraud or undue influence, and the deceased was competent to make a will, then we think it should be admitted to probate. As there has not been a trial upon the real issues in the case, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WITTE v. MEYER.

(*Supreme Court of Wisconsin.* November 1, 1887.)

PRACTICE—FILING COMPLAINT—ORDER OF PUBLICATION.

In an action against a non-resident, to recover damages for an assault and battery, the complaint, affidavit, and order of publication were indorsed: "County Court, Fond du Lac County, Wis. Filed May 14, 1886. J. W. WATSON, Clerk," but they were never left in the office of the clerk of the court, but were kept by plaintiff's attorney in his office. Rev. St. Wis. § 2640, provides that an order of publication shall be based on a complaint *duly* verified and *filed*. *Held*, that it was not such a filing as is required by the statute.

Appeal from Fond du Lac county court.

Gerpheide & McKenna, for respondent. *W. D. Conklin*, for appellant.

TAYLOR, J. This is an action to recover damages for a personal assault by the appellant upon the plaintiff and respondent. The action was commenced against the defendant, who is not a resident of this state, but is a resident of the state of Illinois. After issuing the summons the respondent made an affidavit showing that he had a cause of action for damages, for an assault and battery committed upon him by the defendant; that the cause of action arose in this state; and that the defendant was a resident of the city of Chicago. Upon this affidavit an order to serve the summons by publication was made, and publication was made. The order for publication was made the fourteenth day of May, 1886.

Upon the third day of September, 1886, W. D. Conklin, as attorney for the defendant, appeared specially for the purpose of making a motion to dismiss the action, and vacate all proceedings therein on the ground that "there had been no service of the summons, and no jurisdiction thereof by the court." This motion was made upon all the proceedings in the case, and upon the affidavit of W. D. Conklin, showing that the complaint in the action had not been, and was not, filed with the clerk of the court on the day the order of publication was made, nor at any time up to the time of making such motion. At the time the motion was to be heard, the counsel for the plaintiff stated in open court that the complaint, affidavit, and order of publication were filed, but still remained in the hands of the plaintiff's attorneys in their office.

Thereupon, by leave of the court, the clerk made the following certificate: "I, J. W. Watson, clerk of the court in and for said county, hereby certify that no summons, complaint, affidavit, or order of publication, nor other paper or entry whatever, has remained on file or of record in my office, since the fourteenth day of May, 1886, and that no state tax has been paid in the above-entitled action of Carl Witte against Herman P. Meyer, nor at any time. If my signature or filing upon any paper or pleading in said cause has at any time been procured, such paper or pleading was not, and has not been, left with me, nor been or remained on file in my office, at any time up to and including the opening and adjournment of the session of the said county court on this forenoon.

"Witness my hand and seal of said court, this thirteenth day of September, 1886. J. W. WATSON, Clerk as above stated."

The motion was then held open until 2 o'clock P. M. of the same day, when the counsel for the plaintiff produced what purported to be the complaint, affidavit, and order of publication, which severally appeared to have the following indorsed thereon: "County Court, Fond du Lac County, Wis. Filed May 14, 1886. J. W. WATSON, Clerk." And thereupon the court denied the motion of the appellant, without costs, and with leave to the defendant to answer herein, within 20 days from and after service of the order. From this order the defendant appealed to this court.

We think the publication of the summons and the other proceedings in the

court should have been set aside, on the ground that it conclusively appeared that the complaint had not been filed as required by the provisions of section 2640, Rev. St. The affidavit of Mr. Conklin and the certificate of the clerk clearly show that the complaint had not been "filed" within the meaning of the statute. It has been said that the object of the statute in requiring the complaint to be filed is that the defendant may, if he sees fit, examine it at the office, to determine whether he will appear and answer in the case. But, whether this or some other purpose was the reason which induced the legislature to require it to be filed, it is very clear from all the decisions upon the subject that, the manner of service being a purely statutory one, all the requirements of the statute must be followed, or the service is void, and the court acquires no jurisdiction to try the case. *Anderson* v. *Coburn*, 27 Wis. 558; *Cummings* v. *Tabor*, 61 Wis. 185, 191, 21 N. W. Rep. 72; *Manning* v. *Heady*, 64 Wis. 630, 25 N. W. Rep. 1.

If an attorney may procure an indorsement of the filing of his complaint by the clerk, and then put the same in his pocket until he enters judgment, the statute might as well be repealed so far as it is intended to furnish any information to the defendant in the action. We do not hold that a temporary removal of the complaint from the files of the court would vitiate the service, but we hold that it must be in fact filed in the office of the clerk, and remain there, subject, perhaps, to a temporary removal for a lawful purpose. The evidence in this case clearly shows that it never was in the hands of the clerk as a paper filed in his office, nor does it appear that any entry of the action was made in the docket of the clerk. We cannot approve of the practice pursued in this case.

There is another objection to this proceeding, to which we call the attention of the attorneys of the plaintiff for their consideration: The affidavit sets up a cause of action in tort, arising in this state, and alleges the non-residence of the defendant, and perhaps comes within the letter of the statute. Subdivision 1, § 2689, Rev. St. We have very grave doubts whether a judgment rendered against the defendant in such an action would bind his person or property. If it would not, it would be improper to permit the party to take judgment therein. If there had been an allegation in the affidavit that the defendant had property in this state, describing the same, it may be that the action might proceed to judgment without first attaching such property, and that such property might be liable to seizure and sale upon an execution issued on such judgment. That this might be lawfully done was strongly intimated in the case of *Jarvis* v. *Barrett*, 14 Wis. 591–595; See, also, *Winner* v. *Fitzgerald*, 19 Wis. 393; *Jones* v. *Spencer*, 15 Wis. 583; *Rape* v. *Heaton*, 9 Wis. 328. We think the same cases as strongly intimate that when the affidavit does not disclose that the defendant has property within the state, the court cannot obtain jurisdiction of the defendant, so as to make the judgment of any effect against him. Upon this question, see, also, the case of *Smith* v. *Grady*, 31 N. W Rep 477.

The order of the county court is reversed, and the cause is remanded, with directions to that court to enter an order setting aside all the proceedings in the action, except the issuing of the summons.

CONRAD *v.* HILDEBRAND and another.

(*Supreme Court of Wisconsin.* October 11, 1887.)

NEGLIGENCE—MISUSE OF HORSE—INSTRUCTIONS.

Plaintiff brought an action to recover damages for injuries to his horse. The evidence tended to show that the horse was about four years old, and had never been worked in a collar, and was in good condition at the time plaintiff hired defendants to pasture it; and that having got the distemper and while sick, the defendants had worked him on a very hot day in a collar harness drawing heavy loads, and that when returned to plaintiff his neck was scalded and swollen, his knees en-

larged, and he was in a very poor condition and still affected by the distemper. *Held*, the inquiry being whether the injury was caused by the aggravations of the disease through the neglect and misuse of defendants, instructions predicated upon the theory that the misuse of the horse caused him to have the distemper, were properly refused.

Appeal from Milwaukee county court.

Thompson & Dorr, for respondent. *C. M. Bice*, for appellants.

ORTON, J. This action was brought in a justice's court for damages to a horse of the plaintiff caused by the defendants while he was in their care and keeping as bailees. The main facts are few. About the sixteenth day of June, the plaintiff hired the defendants to pasture his horse of about four years old. In the mean time, the horse escaped from the pasture of defendants with one of their own horses, and they hunted him up and reclaimed him. In the mean time, also, the horse had a distemper, and while he was sick the defendants worked him with another horse, in a collar harness, drawing loads of earth or sand. The horse had never been worked much, and never in a collar, and the heat was very intense. When the horse was finally returned, about the eighth day of July, to the plaintiff, his neck had been scalded and was very much swollen, and his knees were bunched and enlarged, and he was very much reduced in flesh, and was still affected by the distemper, and was generally in a very poor condition. When taken to pasture he was sound, and in good health and condition, and was of the value of about $250.

The claim of the plaintiff was that his horse had been much injured by the defendants by their working him as they did, and by other bad treatment. The jury found that the value of the horse had been lessened by said bad treatment and use $125, and allowed the defendants on their counter-claim $25 for hunting and reclaiming the horse after he had so escaped. The printed case leaves out the most material and strongest evidence of the plaintiff, and argues that there was no proof that the defendants had so injured and damaged the horse. We think by reading the bill of exceptions that there was sufficient evidence of such injury to warrant the jury in finding as they did. The appellants claim, also, that the court ought to have given the instructions asked by them. These consist of eight sections of very long instructions, some of them passing upon the effect of the evidence, and none of them very applicable to the case proved. These special requests appear in the printed case, while the very full instructions given by the court to the jury do not appear there. This might be a sufficient reason for this court to disregard this assignment of error. But we have taken the trouble to read the instructions found in the bill of exceptions, as well as the evidence, and we are satisfied that the instructions covered the whole case, and that they were very fair to the defendants. The jury found that the horse was taken sick while in the care of the defendants, and when he was so taken it was observable by them with proper care, and that it was not proper care for them to use the horse as they did while sick, and that such use and exercise aggravated the disease with which the horse was afflicted, and that he was damaged thereby, including expenses, $125. The learned counsel seems to have mistaken the evidence and finding by predicating instructions upon the theory that the misuse of the horse caused him to have the distemper. There was no such evidence or special verdict. The main injury was the *aggravation* of the disease by neglect and misuse. According to the evidence on behalf of the plaintiff, the horse was very badly used and injured, and the jury was justified in so finding, and the amount of such damage stated in the evidence. We can find no possible error in the record, and the learned counsel of the appellants have failed to discover any.

The judgment of the county court is affirmed.

HAWKINSON v. HARMON.

(*Supreme Court of Wisconsin.* November 1, 1887.)

1. CONTRACTS—WHAT CONSTITUTES—LETTERS.
Defendant, having been solicited to purchase some trees of plaintiff, a nurseryman near Minneapolis, wrote the plaintiff's agent, April 29, 1885, inquiring if the trees could be delivered at his farm in Lisbon, Dakota, "as soon as possible." Defendant passed through Minneapolis May 8th, and while there wrote plaintiff's agent on that date to the effect that if he had not shipped the trees to Lisbon, to do so at once. These two letters were handed plaintiff Saturday, May 9th, and the trees were shipped the following Monday. Two days later plaintiff found a telegram in his post-office box, dated May 11th, and purporting to be from the defendant at Lisbon, and ordering him not to send the trees. *Held*, that the two letters taken together constituted a contract for the purchase of the trees, and that defendant was liable thereon, plaintiff having used due diligence in filling the order.

2. FRAUDS, STATUTE OF—CONTRACT FOR SALE OF GOODS—MEMORANDUM SIGNED BY AGENT.
A contract for the sale of trees of the value of $94.50 is within the Wisconsin statute of frauds, and is void where no earnest-money is paid, and no partial delivery made, unless "a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith;" but an order by letter is a sufficient "memorandum," and under Rev. St. § 2327, such "subscription" may be made by an agent of the buyer.[1]

Appeal from county court, Winnebago county.

This action was brought by Hawkinson, appellant, in justice's court, to recover the purchase price of a quantity of trees alleged to have been sold by the plaintiff to the defendant. The plaintiff recovered before the justice, and the defendant appealed to the county court. A trial in the latter court resulted in a judgment of nonsuit, from which the plaintiff appeals to this court. The material facts as disclosed by the testimony given on the trial in the county court, are as follows: The plaintiff is a nursery-man in the vicinity of Minneapolis, Minnesota; the defendant resides at Oshkosh, in this state, and has a farm in Dakota, but in the transactions out of which this action arose, one Little was the agent of the plaintiff, and one Chase the agent of the defendant. Under the date of Oshkosh, April 29, 1885, Chase, by direction of defendant, wrote to Little as follows: "I received yours of the 22d, and immediately wrote a postal to Horace Harmon, [the defendant] but he did not come to see me until yesterday; but I told him you wrote me that you would commence to deliver last Monday, and I did not know where a letter would reach you, but I would write to Minneapolis. * * * He says he will be there when the trees arrive, and if they look O. K. he has the money to pay for them on the spot. He wants 13,500 box-elders, one year old, at $4 per thousand, and 13,500 soft maple, one year old, at $3 per thousand. This makes in all 27,000 trees—quite a little order. He wants them delivered at Lisbon, Dakota, as soon as possible, and wants you to write to me just as soon as you get this, and tell me if you can do it, and when the trees will be in Lisbon; for he is going there, and does not want to go until about the time the trees will be there." This letter was signed by Chase. It contained other matter, but the above extracts therefrom are all it contained concerning the trees. Under date of Minneapolis, May 8, 1885, the defendant wrote to Little as follows: "I stopped over here on my way out to Lisbon, to see if you had shipped my trees. I presume you have not. Please

[1] As to what is a sufficient memorandum of a contract to satisfy the statute of frauds, see Love's Ex'rs v. Welch, (N. C.) 2 S. E. Rep. 242; Doherty v. Hill, (Mass.) 11 N. E. Rep. 581; Elliot v. Barrett, (Mass.) 10 N. E. Rep. 820, and note; Higham v. Harris, (Ind.) 8 N. E. Rep. 255; Hastings v. Weber, (Mass.) 7 N. E. Rep. 848; Falmouth & L. T. Co., v. Shawhan, (Ind.) 5 N. E. Rep. 408, Welch v. Darling, (Vt.) 7 Atl. Rep. 547; Dunn v. Rothermel, (Pa.) 3 Atl. Rep. 800; Banks v. Manufacturing Co., 20 Fed. Rep. 667; Wardell v. Williams, (Mich.) 28 N. W. Rep. 796; Camp v. Moreman, (Ky.) 2 S. W. Rep. 179; Insurance Co. v. Oliver, (Ala.) 2 South. Rep. 445; Webster v. Brown, (Mich.) 34 N. W. Rep. 676; Sheley v. Whitman, (Mich.) 34 N. W. Rep. 879.

send them at once, as I do not want to stay out there any longer than I can possibly help, and I can't do anything until they come. Yours, respectfully, H. M. HARMON." The trees here mentioned are those specified in Chase's letter of April 29th. Both the above letters were handed to the plaintiff by Little on Saturday, May 9, 1885, and the plaintiff shipped the trees to Lisbon, Dakota, consigned to the defendant, by the Northern Pacific Railroad, on Monday, May 11, 1885, a little after noon. He also took the usual bill of lading from the agent of the railway company, and about the same time sent a bill of the trees to Chase at Oshkosh. The testimony tends to show that the trees arrived at Lisbon, and the defendant refused to accept them because, he claimed, they came too late; but the plaintiff was not notified of such refusal until two or three weeks afterwards. The plaintiff guarantied the freight on the trees, and afterwards paid it. On May 13th, two days after the shipment, the plaintiff found in his post-office box a telegram, dated May 11th, signed "H. M. Harmon," which reads: "Do not send the trees." To whom this telegram was addressed, or how it came in the plaintiff's box, does not appear. It was not there, however, on May 11th. On the above testimony the county court nonsuited the plaintiff.

Jackson & Thompson, for appellant. *Finch & Barber*, for respondent.

LYON, J. Counsel for the defendant maintain that the testimony fails to show any contract for the sale and purchase of the trees; and if that proposition is not sustained, and it be held that a contract in form was so made, that such contract is void, under the statute of frauds.

1. Did the parties enter into such contract? There is some apparent ground for the argument that the letter of April 29, 1885, was a letter of inquiry, to ascertain whether the trees could be procured of the plaintiff, rather than an absolute order for them. But the two letters, of April 29th and May 8th, must be read together, and, being so read, there can be no doubt but that they constitute an absolute order for the trees, which became a contract of purchase and sale between the parties, when the plaintiff accepted the same and shipped the trees as directed. In the letter of May 8th, the plaintiff, or what is the same thing, his agent, Little, was requested to send the trees at once. It must be held, therefore, that a contract for the sale and purchase of the trees was closed, at least in form.

2. The claim that such contract is void within the statute of frauds cannot be successfully maintained. The point made against the validity of the contract is that no note or memorandum thereof was made in writing, and subscribed by the party to be charged therewith. Rev. St. 655, § 2308. The letter of April 29th was subscribed by Chase, the agent of the defendant, and that of May 8th by the defendant himself. Section 2327, Rev. St., provides that "every instrument required under any of the provisions of this title (title 22) to be subscribed by any party, may be subscribed by the agent of such party lawfully authorized thereto." This section is applicable to the present case. We conclude that the contract between the parties is not void under the statute of frauds. It follows that if the plaintiff has executed the contract on his part he is entitled to recover. No question is made but that the trees shipped by him fulfilled the requirements of the contract, as to description, quality, and quantity. If, therefore, he shipped them within a reasonable time after he received the order therefor, he has fulfilled the contract on his part. The testimony tends to show that the shipment was made within a reasonable time. The plaintiff having established a *prima facie* case by the testimony which he introduced on the trial, it was error to nonsuit him.

The judgment of the county court must be reversed, and the cause will be remanded for a new trial.

HANSON *v.* EICHSTAEDT.

(*Supreme Court of Wisconsin.* November 1, 1887.)

PUBLIC RECORDS—REGISTRY OF DEEDS—RIGHT TO MAKE PRIVATE ABSTRACT BOOKS.

Under Rev. St. Wis. § 700, any person, during the usual hours of business of each day, in a proper manner, and by paying fees, when allowed, and under the reasonable supervision and control of such officer, may enter the office of the register of deeds, and examine the records, and take minutes, notes, and copies of books, records, and instruments therefrom, to make a set of abstract books for his own use.[1]

ORTON, J., dissenting.

Appeal from circuit court, Green Lake county.

The complaint verified February 4, 1887, alleged, in effect, that the plaintiff was elected and qualified as register of deeds of Waushara county; that as such he occupied the office of register of deeds at Wautoma provided by the county; that, December 1, 1886, the defendant, without his consent, took and continued to hold possession of said office, and occupied a table, and books and records therein, and belonging thereto, and threatened to continue to do so, and would unless restrained; that by so doing the defendant seriously interfered with the plaintiff's performance of his official duties; that the defendant uses such books to sit down upon, thereby excluding the plaintiff and the public therefrom; that in doing the things stated, the defendant pretends that he is preparing an abstract of titles to lands in said county from the records thereof, for his own use; that such use of said records is not in the usual way of taking notes, but to the exclusion of the plaintiff and the public; that said office is a rather small room, only large enough for the plaintiff and the public, and that the defendant's occupancy constitutes a nuisance; that the defendant utterly refuses to desist, though often requested; that the plaintiff has offered the defendant the reasonable use of such books, records, and office in the usual way, but he refuses such use, and persists in using as set forth; wherefore, he prays an injunction, etc. Upon that complaint, February 11, 1887, the defendant was temporarily restrained from doing the acts mentioned, during the pendency of the action, or until the further order of the court.

The verified answer of the defendant denied each and every allegation, and each and every matter and thing contained in the complaint, except as therein expressly admitted and qualified, and as hereinafter, in effect, stated. Upon that answer, and two affidavits verified March 12 and 14, 1887, the defendant moved the court, March 18, 1887, for a dissolution of said injunction. From said answer and affidavits, and two affidavits verified March 16 and 19, 1887, used in opposition to said motion, it appears, in effect, that the defendant was a lawyer residing at Berlin; that, being desirous of preparing an abstract of the title to lands in the eastern portion of Waushara county for the purpose of opening and keeping an abstract office at Berlin, he went to the register's office in the custody of the plaintiff, about December 1, 1886, and took notes, minutes, and copies from the books and records therein, with the consent or acquiescence of the plaintiff, from day to day, until December 11, 1886, when the plaintiff informed him that he had no right to use such books and records for the purpose of making such abstract, and then forbade him the further use of the same; that, December 20, 1886, the defendant made a formal demand for the use of such books and records for the purposes aforesaid; that the plaintiff then gave him access to said books and records until December 25, 1886; that, about February 3, 1887, the plaintiff renewed his work of taking such notes, minutes, and copies, and the plaintiff furnished the same, but in-

[1] As to the right to examine the public records and take copies thereof for the purpose of making a set of abstract books, see State v. Rachac, (Minn.) *ante*, 7, and note.

sisted that the defendant had no right thereto, and that he should stop him whenever he got ready to do so; that he did not want the defendant there for that purpose, as he was in the way; that the defendant claimed the right to be there for the purpose named; that the plaintiff acquiesced in his being there, and his continuing such work, until February 11, 1887, when the summons, complaint, and injunctional order were served upon him; that the defendant never at any time interfered with, or in any way obstructed, the plaintiff in the performance of his duties as such register, nor with the current business of the office, nor the business of the public with said office; that defendant at all times surrendered and gave up any books whenever requested by the plaintiff, and obeyed every request and direction of the plaintiff. Upon the hearing of the motion, and upon March 23, 1887, the court ordered that said injunctional order be, and the same was thereby dissolved, vacated, and set aside. From that order the plaintiff brings this appeal.

Cate, Jones & Sanborn, for appellant. *Geo. D. Waring* and *R. L. D. Porter*, for respondent.

CASSODAY, J. It is urged by counsel for the plaintiff that it was an abuse of discretion to dissolve the preliminary injunction. He contends that the right to inspect and copy public records is confined to those having some interest in the particular record sought to be inspected or copied, and does not extend to one seeking to do so from mere curiosity, or for his own private gain. Such seems to be substantially the rule at common law. 1 Greenl. Ev. §§ 473–475. It is claimed that the same rule should be applied under our statutes. In support of such contention counsel rely upon *Buck* v. *Collins*, 51 Ga. 391; *Bean* v. *People*, 7 Colo. 200, 2 Pac. Rep. 909; *Brewer* v. *Watson*, 71 Ala. 299; *Randolph* v. *State*, 2 South. Rep. 714; *Webber* v. *Townley*, 43 Mich. 534, 5 N. W. Rep. 971. To fully appreciate the significance of these decisions, as authority here, it becomes necessary to carefully note the statutes, and circumstances under which they were respectively made, as compared with those here involved.

In the Georgia case, the complainant insisted upon the right to make abstracts from books of records "without the payment of any fees" under statutes, which, as construed by the court, entitled the officer in charge of such records to exact fees. The court merely held that the complainant could not exercise such right without the payment of fees.

The Colorado case was under a statute requiring the recorder to keep his office "open during the usual business hours, * * * and that all books and papers required to be kept in his office shall be open for the *examination* of any person." But the statute of that state also made it the duty of the several clerks and recorders "to make and furnish, upon application therefor, abstracts of deeds," etc., "to any person who shall make application therefor, and shall *pay or tender the fees* provided by law." Sub. 584, Gen. St. Colo. 268. That case was based upon statutes making such fees appurtenant to the office of the custodian of such records. Under such circumstances it was held that the recorder was "not compellable, by *mandamus*, to allow abstract makers to use his office and the county records for the purpose of *abstracting the entire records* of the land titles of the county for sale." To hold otherwise would have been, in effect, to hold that such recorder was compellable, by *mandamus*, to aid in building up a rival establishment which would necessarily reduce the emoluments of his office, and without any statute in terms requiring him to do so. By section 762, Rev. St. *c.* 353, Laws 1864, and chapter 39, Laws 1867, a register in this state was required to keep a tract index in such counties as had already kept one, and in such other counties as the board of supervisors thereof should thereafter order one to be kept. That section was subsequently amended so as to authorize the discontinuance of such index, and to keep and maintain, in place thereof, "a complete abstract

of title to the real estate of such county." Chapter 149, Laws 1881. But there is nothing in this record indicating that Waushara county had adopted either system; nor that it is the duty of the register thereof to make abstracts; much less that the fees for making abstracts are appurtenant to his office.

The earlier Alabama case cited was an action against the state auditor to recover damages alleged to have been suffered by reason of the refusal of such auditor to allow him access to, and inspection of, certain public records belonging to his office. The decision was placed upon the rule at common law; and there does not appear to have been any statute in the state purporting to give the right demanded.

The Michigan case cited was an application for a *mandamus* to compel the register of deeds to permit the relators to inspect, or copy, or abstract the public records in his office, subject to reasonable rules and regulations as to time, facilities, etc. The opinion of the court is devoted principally to the rule at common law, in such cases; and it was held that "there is no common-law right to make copies or abstracts of public records for speculative purposes, as for the compilation of a set of abstract books for selling abstracts of title." In reference to the statute in that state, the court said: "The language of the act referred to does not in clear and unmistakable terms include a case like the present, and such a one should not be conferred by construction. The object of the act was to enable persons having occasion to make *examination* of the records '*for any lawful purpose*,' and what would be, we have already indicated, to have suitable facilities therefor," etc. The words "for any lawful purpose" were taken from the statute, and were there manifestly construed to mean any lawful purpose as understood at common law. In *Diamond Match Co.* v. *Powers*, 51 Mich. 145, 16 N. W. Rep. 314, an application for a *mandamus* was made for substantially the same purpose as in the other case, and was denied on the ground that "the remedy by *mandamus* contemplates the necessity of indicating the precise thing to be done; it is not adapted to cases calling for continued action, varying according to circumstances." In the opinion by GRAVES, C. J., no reference is made to the case in 43 Mich. 534, 5 N. W. Rep. 971, *supra*, although it was decided only three years before.

The recent Alabama case cited was an application for a *mandamus*, requiring the judge of probate to permit the examination and abstract of the records in his office, when not in use by him; and was made under a statute declaring that "the records of the judge of probate's office must be free for the *examination* of all persons, when not in use by him." Section 698, Code Ala. 1876. The court, following the earlier case, and the Michigan case cited, held, in effect, that, notwithstanding the statute, "attorneys at law, who are engaged in loaning money, are not entitled to have access to the records for the purpose of making abstracts of all the titles to real estate in the county, to enable them in future transactions to furnish abstracts promptly as required."

In *People* v. *Richards*, 99 N. Y 623, 1 N. E. Rep. 258, an application was made for a *mandamus* to compel the register of deeds to allow more than "three men," employed by the relator, to make abstracts in the office at the same time, under a statute which made the register "custodian of all the books and records in his office," and provided that such records shall "at all proper times be open for the inspection of any person paying the fees allowed by law;" and although the court were unable to hold that the *mandamus* was "improperly refused," yet the rule was declared thus: "These records are, therefore, public records which every person has the right to inspect, examine, and copy, at all reasonable times, in a proper way, and the register cannot deny access to his office or to the books, for such purposes, to any person coming there at a proper time, and in an orderly manner. But he must necessarily have control of his office and of the records, and must have some discretion to exercise as to the manner in which persons desiring to inspect, exam-

ine, and copy the records may exercise their rights. He must transact the current business of the office, and allow all persons reasonable facilities to exercise their rights in the office." That case was followed in a similar case, and under a similar statute in *People* v. *Reilly*, 38 Hun, 433. See *Hawes* v. *White*, 66 Me. 305; *O'Hara* v. *King*, 52 Ill. 303.

The statute of this state declares that "every * * * register of deeds * * * shall keep his office * * * open during the usual business hours of each day, * * * and with proper care, shall open to the examination of *any person* all books and papers required to be kept in his office, and permit *any person* so examining to take notes and copies of such books, records, or papers, or minutes therefrom; and if any such officer shall neglect or refuse to comply with any of the provisions of this section, he shall forfeit five dollars for each day such non-compliance shall continue." Section 700, Rev. St. This language, literally construed, certainly includes the defendant. The words "any person," when so construed, are distributive, and include every person. By what authority, then, are we to construe these words as only applicable to a particular class of persons, as, for instance, those only who are interested in the particular piece of land, the record of which is sought to be inspected or copied? If so, how is the fact of such interest to be determined —by the applicant, or by the register? Is the register to accept, without question, the statement of the applicant, or may he require other evidence? Of course, every statute is to be construed with reference to its object and subject-matter; and in that way, it frequently occurs that general words are limited in their operation. Wilb. St. 173–177. Here the subject-matter is the examination of the public books and records in the register's office, and the taking of notes, minutes, and copies therefrom; and the statute requires the register under a penalty, to "permit any person" to so examine and take notes, minutes, and copies. Under such a statute can we say that when a respectable person, in a respectful manner, applies to the register to make such examination, etc., he is to be excluded, merely because he does not belong to some class of persons unnamed and undefined in the statute; or if permission is given, is his examination to be confined to lands in which he or his clients have a present pecuniary interest? As bearing upon the construction of language thus sweeping and imperative, we venture a few citations. In *Sturges* v. *Crowninshield*, 4 Wheat. 204, MARSHALL, C. J., said: "It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. * * * If, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provisions to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application." In *Gibbons* v. *Ogden*, 9 Wheat. 217, the same chief justice, speaking for the court, said: "If the power reside in congress, as a portion of the general grant to regulate commerce, then acts applying that power *to vessels generally* must be construed as comprehending *all vessels*. If *none* appear to be excluded by the language of the act, *none can be excluded by construction*." In the language of DIXON, C. J., in *Harrington* v. *Smith*, 28 Wis. 60: "General words in a statute must receive a general construction, unless there be something in it to restrain them, or, as it is otherwise frequently expressed, if there be *no* express exception." To the same effect, *Laughter* v. *Seela*, 59 Tex. 186. In *Everett* v. *Wells*, 2 Scott, 531, TINDAL, C. J., said: "It is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing." Of course he referred to statutes in which the language was plain and unambiguous. In the same opinion, he said, in effect, we have no authority for "importing into the act a condition which we

do not find there." Substantially the same language has been used by this court in the case above cited, and others. *Comstock* v. *Bechtel*, 63 Wis. 661, 24 N. W. Rep. 465. Even the maxim that penal statutes are to be strictly construed "is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation, or in that sense in which the legislature had obviously used them, would comprehend." *U. S.* v. *Wiltberger*, 5 Wheat. 95. *In re Coy*, 31 Fed. Rep. 800, per HARLAN, J. In so far as the Alabama and Michigan courts may have indicated that a statute giving certain enumerated rights respecting records to "any person" is a mere confirmation of a rule at common law, giving similar rights to only a particular class of persons, we must decline to follow them. On the contrary, we must hold that our statute in question extends such right of examination, etc., to "any person," applying to such custodian of public records in a proper manner, subject, however, to the payment of fees when allowed, and such reasonable supervision and control by such officer as are essential to the convenient performance of his duties, and the current business of the public. It may be that some more definite regulations should be made in such matters, but that is a question for the legislature, and not for us.

The order of the circuit court is affirmed.

ORTON, J., dissents.

HANKINS *v.* ROCKFORD INS. CO. OF ROCKFORD, ILL.

(*Supreme Court of Wisconsin.* November 1, 1887.)

INSURANCE—STIPULATION AGAINST INCUMBRANCES—WAIVER BY LOCAL AGENT.

A policy of insurance was issued upon property upon which there was a mortgage, and contained a stipulation that the property insured should not be mortgaged or incumbered in any way, except by the written consent of the secretary of the insurance company. Subsequently the existing mortgage was paid off, and a new one given to a different mortgagee, without first obtaining the consent of the insurance company, as provided in the policy, the local agent of the company agreeing to waive the condition prohibiting such mortgage. In an action upon the policy, *held*, that the attempted waiver by the local agent is a nullity.[1]

Appeal from circuit court, Richland county.

This action is upon a policy of insurance issued by the defendant to the plaintiff, June 10, 1885, wherein and whereby the defendant, in effect, agreed to make good all such immediate loss or damage as might be sustained by the plaintiff by fire and lightning to the building and property therein specified, not exceeding the sum insured, from June 10, 1885, to June 10, 1890, and containing this clause: "Loss, if any, payable to Mrs. Emma Pease, as her interest may appear, as mortgagee;" and also a clause to the effect that if any of the property thereby insured should thereafter become mortgaged, or in any manner incumbered, "without the consent of the secretary in writing," then and in every such case said policy shall become void. The policy also contained this clause: "It is expressly provided that no officer, agent, or employe, or any person or persons, except the secretary, in writing, can in any manner waive either or any of the conditions of this policy, which is made and accepted upon the above express conditions." The Pease mortgage appears to have been paid and discharged July 14, 1885. October 8, 1886, the building so insured was, without the fault of the plaintiff, totally destroyed by fire. This action was commenced February 28, 1887. Among the defenses relied upon is that March 24, 1886, and contrary to a clause of the policy above mentioned, and without any such waiver thereof, the plaintiff and his wife executed and delivered to one James a mortgage upon the premises insured, to secure the payment of the sum of $62.50; which mortgage was there-

[1] See note at end of case.

upon duly recorded, and continued to be a valid and subsisting lien and incumbrance upon said premises insured from the date thereof, until long after the said building had been consumed by fire, and the loss of the plaintiff thereby incurred. A motion for a nonsuit having been overruled, the jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant brings this appeal.

L. H. Bancroft, for respondent. *H. W. Chynoweth*, for appellant.

CASSODAY, J. The mere fact that the mortgage to Pease, mentioned in the policy, had been paid and discharged, did not authorize the plaintiff to place another mortgage running to a different party upon the premises insured, in violation of the conditions of the policy above mentioned. Such conditions in policies "are to secure risks in which there shall be no motive for intentional or dishonest loss." *Redmon* v. *Insurance Co.*, 51 Wis. 301, 8 N. W. Rep. 226. True, the mortgage here is small, but to hold that the plaintiff had the right to put it upon the premises in contravention of the agreement, without jeopardizing the risk, would be to establish a rule which would authorize a large mortgage with the same impunity. The question was submitted to the jury whether the plaintiff procured the consent of the local agent to the placing of that mortgage upon the premises, with the instruction that, if he did, it "would be a waiver of the company of this special clause in the policy." The jury necessarily found that the plaintiff did procure such consent, and hence that there was such waiver. It is urged that a local agent for an insurance company is an agent for such company for all purposes, under section 1977, Rev. St. Expressions may be found, when not limited by the facts of the particular case being considered, authorizing such an inference. But the authority of a decision is necessarily limited to the points decided. True, that section declares that "whoever" does one of the several things therein mentioned, "shall be held an agent of such corporation to all intents and purposes;" but such agency, after all, is limited to the act of the particular person in doing one or more of the things thus specifically designated. In that sense "the word agent, whenever used" in chapter 89, Rev. St., is to "be construed to include all such persons." Id. In other words, whenever an insurance company authorizes any person to do any one of the things thus specified, it cannot disclaim the agency of such person in the doing of anything necessarily implied in the specific act thus authorized. Thus it has been frequently held, by this and other courts, in effect, that where a person was authorized by an insurance company to make a contract of insurance, he thereby had implied authority in doing so to waive stipulations as to the condition of the property, or other facts *then* existing; and it may be as to subsequent conditions, if such waiver is made at the time of effecting the insurance. But those cases have no bearing upon the question here presented. This contract of insurance was completed in all of its terms, and binding upon both parties, June 10, 1885. The plaintiff accepted it with all its conditions and limitations. In the absence of any fraud or mistake, he was, on general principles, conclusively presumed to know its contents. *Herbst* v. *Lowe*, 65 Wis. 321, 26 N. W. Rep. 751; *Brown* v. *Insurance Co.*, 59 N. H. 298. Thus it appears that the policy was "made and accepted" by the plaintiff with knowledge in law of its contents, "upon the above express conditions," to the effect that *no local agent*, at least, "can in any manner waive *either or any* of the conditions of this policy." With this policy in his possession, and more than nine months after the contract of insurance had been thus completed, the plaintiff, according to his testimony, requested the local agent to allow him permission, notwithstanding the conditions of the policy, to place the mortgage upon the premises, and claims that such agent answered: "It is all right; go ahead and make out the contract." In other words, it is claimed that, notwithstanding the conditions and limitations in the policy, it was, nevertheless, com-

petent for the local agent, without the knowledge or consent of the defendant, or any of its general officers, and without any consideration, and by mere words, to essentially change and modify the contract which had already been completed and binding upon the parties for more than nine months. Certainly, no such alteration of an existing contract, without the knowledge or consent of one of the parties to it, in any other business, would be permitted. We must hold that when the assured has accepted a policy containing a clause prohibiting the waiver of any of its provisions by the local agent, he is bound by such inhibition, and that any subsequently attempted waiver, merely by virtue of such agency, is a nullity. This proposition seems to be supported by the weight as well as the logic of the adjudicated cases. *Merserau* v *Insurance Co.*, 66 N. Y. 274; *Marvin* v. *Insurance Co.*, 85 N. Y. 278, 39 Amer. Rep. 657; *O'Reilly* v. *Corporation of L. Assur.*, 101 N. Y. 575, 5 N. E. Rep. 568; *Kyte* v. *Assurance Co.*, 144 Mass. 43, 10 N. E. Rep. 518; *McIntyre* v. *Insurance Co.*, 52 Mich. 188, 17 N. W Rep. 781; *Cleavers* v. *Insurance Co.*, 32 N. W. Rep. 660; *Bowlin* v. *Insurance Co.*, 31 N. W. Rep. 859; *Shuggart* v. *Insurance Co.*, 55 Cal. 408; *Enos* v. *Insurance Co.*, 67 Cal. 621, 8 Pac. Rep. 379; *Leonard* v *Insurance Co.*, 97 Ind. 299; *Insurance Co.* v. *Halzgrafe*, 53 Ill. 516; *Insurance Co.* v. *Weiss*, 106 Pa. St. 20; *Insurance Co.* v. *Insurance Co.*, 100 Pa. St. 137. Some of these cases go much further in favor of the insurance company than the proposition stated. By citing them, we are not to be regarded as committing ourselves to anything extraneous to the question here involved and decided.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

NOTE.

INSURANCE AGENTS—POWERS OF. A provision in an insurance policy that the agents of the company shall not have authority to modify any of the conditions of the contract, or to waive forfeitures, or any other limitation upon the powers of the agent expressed in the policy, is binding upon the insured. Cleaver v Insurance Co., (Mich.) 32 N. W. Rep. 660; Clevenger v. Insurance Co., (Dak.) 3 N. W. Rep. 313. But the company may waive a forfeiture or stipulation as to the powers of its agent by its methods in dealing with him. Insurance Co. v. Block, (Pa.) 1 Atl. Rep. 523. And the fact that the company has sanctioned a departure from the terms of the policy in this respect may be shown by parol. Clevenger v. Insurance Co., *supra*. Where a policy prescribes the manner in which the conditions contained in it may be waived, as by indorsement upon the policy, the local agent can waive the conditions in no other way. Enos v. Insurance Co., (Cal.) 8 Pac. Rep. 379. And in *Massachusetts*, an agent having the fullest authority cannot. Kyte v. Union Assur. Co., 10 N. E. Rep. 518. But in *Wisconsin*, where a policy was issued containing a condition that no additional insurance should be taken without the consent of the secretary of the company indorsed on the policy, the court held that the consent of a general agent to further insurance was a waiver of such stipulation. Insurance Co. v Gallatin, 3 N. W. Rep. 772. An agent who is only authorized to receive applications, and to collect and transmit premiums, cannot even grant an extension of time for the payment of the premium. Critchett v. Insurance Co., (Iowa,) 5 N. W. Rep. 543. Nor has an agent, who is merely authorized to deliver a policy and receive the premiums therefor, power to alter a contract of insurance so as to make it payable to one other than the assured. Bank v. Insurance Co., (Tenn.) 1 S. W Rep. 689.

But in the absence of any provisions to the contrary, an insurance agent may modify or altogether waive the conditions of the policy. Schoener v. Insurance Co., (Wis.) 7 N. W. Rep. 544; Silverberg v. Insurance Co., (Cal.) 7 Pac. Rep. 38, Alexander v. Insurance Co., (Wis.) 30 N. W. Rep. 727. As to the power of an agent to waive a condition in the policy that it shall not be binding until the actual payment of the premium, or to waive a forfeiture occurring by reason of the failure to pay any of the premiums at the stated times, see O'Brien v. Insurance Co., 22 Fed. Rep. 586; Wagon Co. v. Insurance Co., 20 Fed. Rep. 232; Tennant v. Insurance Co., 31 Fed. Rep. 322; Cohen v. Insurance Co., (Tex.) 3 S. W. Rep. 296.

SKINNER v. JAMES and Wife.

(Supreme Court of Wisconsin. November 1, 1887.)

TRUSTS—RESULTING—CONVEYANCE TO HUSBAND—PURCHASE MONEY FURNISHED BY WIFE.

A wife furnished one-half of the purchase price of a homestead, by an agreement with her husband that the deed was to be made to her, but at the time the conveyance was made she knew it was made directly to her husband, and raised no objection. *Held*, that in the absence of fraud, under Rev. St. Wis. § 2071, abolishing uses and trusts, except as "authorized and modified;" and providing (section 2077) that "when a grant * * * shall be made to one person, and the consideration therefor shall be paid by another, no trust shall result in favor of the person by whom such payment is made, but the title shall vest in the person named as alienee;" and providing (section 2078) that "every such conveyance shall be presumed fraudulent," etc., and "a trust shall result in favor of creditors,"—no trust resulted in favor of the wife, notwithstanding, at the time, she thought her husband took the deed in trust for her.[1]

Appeal from circuit court, La Fayette county.

This action of ejectment was commenced October 31, 1883. To establish his legal title, the plaintiff relies upon the facts, in effect, that January 9, 1860, the legal title to 80 acres of land in La Fayette county, being the W. ½ of the S. W. ¼ of section 33, township 3 N., of range 2 E., was conveyed to the defendant William James by warranty deed from Robert Bently and wife, and then recorded, which deed recited a consideration of $1,000; that thereupon the defendants went into the possession of said premises, and continued to live on the south 40 thereof, as husband and wife; that November 30, 1877, Nichols, Shepard & Co. obtained and docketed a judgment in the circuit court for La Fayette county, against said William James and another, for $339.71; that December 6, 1877, the same party obtained and docketed another judgment in the same court, against said William James and another, for $975.35; that December 24, 1877, an execution was issued on each of said judgments to the sheriff of said county, who levied the same upon the north 40 of said premises, and March 29, 1878, sold the same at sheriff's sale on said executions, and in satisfaction thereof, to the plaintiff; that, said premises not having been redeemed from said sale, the said sheriff executed and delivered to the plaintiff a sheriff's deed of the same, July 23, 1881, which was recorded on the same day.

The defendants severally answered the complaint, which was in the statutory form, and pleaded a general denial, and that said Ann Moody was the sole owner in fee-simple of the land. Subsequently, and December 5, 1884, Ann Moody amended her answer by adding an equitable counter-claim, to the effect that, about the time the land was so conveyed to William James, she handed him $500 of her own money, with the request that he buy the land for her home, and take the title in her name; that he paid said $500 thereon as a part of the purchase price; that said William took said deed in his own name, without her knowledge or consent; that, at the time of said purchase, she and her husband executed a mortgage on said premises to one John Moody to raise $500, with which she paid the balance of said purchase price; that she finally paid off the indebtedness created by said mortgage with her own money; that she had held possession of the land as her own separate property, claiming title

[1] In some states, when a conveyance is made to one person, the consideration for which moves from another, a trust results in favor of the latter. Bigley v. Jones, (Pa.) 7 Atl. Rep. 54; Donlin v. Bradley, (Ill.) 10 N. E. Rep. 11; Harris v. McIntyre, (Ill.) 8 N. E. Rep. 182; Springer v. Young, (Or.) 12 Pac. Rep. 400; Smith v. Brown, (Tex.) 1 S. W. Rep. 573; Bedford v. Graves, (Ky.) 1 S. W. Rep., note, 537; Ward v. Matthews, (Cal.) 14 Pac. Rep. 604. And such trust results, even though the consideration has been in fact advanced by the grantee for the other person, the grantee holding the title as security for such advances. Barroilhet v. Anspacher, (Cal.) 8 Pac. Rep. 804; Walton v. Karnes, (Cal.) 7 Pac. Rep. 676. But see, to the contrary, In re Wood, 5 Fed. Rep. 443; Bear v. Koenigstein, (Neb.) 20 N. W. Rep. 104.

to the same, ever since January 9, 1860; that until January, 1878, she supposed it had been deeded to her; that she then, for the first time, learned that it was deeded to said William; that she thereupon, and without delay, requested said William to convey the land to her in her own name, which he accordingly did, January 24, 1878, by deed reciting, in effect, that it was to confirm in her the equitable title which she always had; that said judgments, execution sales, and sheriff's deed were a cloud upon her title, which she prayed to have removed, and that she be adjudged to be the sole owner of the land.

The plaintiff, by way of reply, denied each and every allegation of the counter-claim. A jury was waived, and the whole cause was tried by the court.

At the close of the trial, the court, in addition to said several conveyances, mortgage, judgments, execution sale, and sheriff's deed, found, in effect, that the $500 paid down at the time of the purchase, January 9, 1860, was then the separate property of said Ann Moody; that at the time she and her husband talked over making the purchase of the 80, and it was then understood between them that it should be made for a home for them, and he considered it her property; that both were present when the deed from Bently was delivered to said William, and both then joined in giving the $500 mortgage to John Moody to pay the balance of the purchase price; that said deed to said William was by him recorded January 9, 1860, and soon thereafter taken by him, and delivered to his wife for safe-keeping, she being the custodian of all his papers, and that she had ever since had the custody thereof; that she knew that said deed was executed to her husband, but always believed that he held the title in trust for her; that the said mortgage indebtedness on said land was paid off by moneys derived from the stock and crops raised upon said land by the defendants; that they had lived upon the land ever since the time of said purchase, except three years, while they lived in Darlington, during which time said William rented the land for two years to one Troop, and one year to Logue, and used the rent as his own; that the indebtedness for which each of said judgments was recovered was incurred by said William and one Gallaghan as partners; that, at the time of the execution of said sheriff's deed to the plaintiff, the defendants were in possession of the 40 in question, adversely to the plaintiff, and have been ever since; that no demand was made upon the defendants to surrender the possession to the plaintiff before this action was commenced; that the rental value of the 40 in question is $80 per annum, or, for the three years intervening, $240; that the south 40 was the defendant's homestead, and that the same was agricultural lands, and not within any city or village.

As conclusions of law, the court found, in effect, that the 40 acres of land described was owned in fee-simple by said William up to January 24, 1878, subject to no implied or other trust therein in favor of said Ann Moody; that said judgments in favor of Nichols, Shepard & Co. became liens upon said 40; that said conveyance from said William to his wife, Ann Moody, January 24, 1878, was subject to said judgment liens upon said 40; that July 23, 1881, by virtue of said sheriff's deed, the plaintiff became seized in fee-simple of said 40, and has ever since that time been, and now is, the owner in fee-simple thereof, and well entitled to the possession thereof, and that during all of said time the defendants have unlawfully withheld the possession thereof from the plaintiff; that the plaintiff is entitled to judgment that the defendants surrender to him the possession of said 40, and that he recover from them $240 damages for the unlawful withholding of the same, and the rents and profits thereof from July 23, 1881, to the time of such findings, with costs,—and judgment was ordered accordingly. From the judgment entered in pursuance of said findings, December 19, 1884, the defendants bring this appeal.

Orton & Osborn, for respondent. *H. S. Magoon* and *M. M. Cothren*, for appellants.

CASSODAY, J. A careful examination of the record forces the conviction that the findings of the court are fully sustained by the evidence. This being so, the case must be determined with reference to the facts thus established. Among these facts it appears, in effect, that the defendant Ann Moody James and her husband talked over the making of the purchase of the 80; that they went together to consummate the purchase; that she handed her husband the $500, to be paid as a part of the purchase price; that they were both present, January 9, 1860, when the deed was delivered to the husband; and the mortgage on the land executed by her and her husband; that she then knew that said deed was executed to her husband; that he had the deed recorded on the same day; that soon thereafter he delivered it to her for safe-keeping; that the deed remained in her custody for 18 years prior to the deed to her from her husband.

Manifestly, the deed of purchase was so taken in the name of the husband with the knowledge and consent of the wife. There is nothing in the case indicating any fraud or mistake in so taking the deed in the name of the husband. This being so, the wife may well be conclusively presumed to have known the contents of the deed at the time it was taken, January 9, 1860. *Herbst* v. *Lowe*, 65 Wis. 321, 26 N. W. Rep. 751; *Hankins* v. *Insurance Co.*, *ante*, 34, (decided herewith.) True, it was found by the court that she always believed that her husband held the title in trust for her; but such belief was always necessarily accompanied with full knowledge on her part of the existing facts stated. She was, during all the time in question, conclusively presumed to know the law applicable to the facts thus within her knowledge. If the facts thus within her knowledge negative the existence of such trust, then her belief that her husband held the title in trust for her was certainly without any foundation.

Much was said on the argument as to a supposed equity in her favor, by reason of the payment of the $500, and the use or trust which would consequently result in her favor at common law. But all "uses and trusts, except as authorized and modified" by statute, were abolished in this state, before the purchase in question, by what is now section 2071, Rev. St. Had it appeared in the deed that the husband took the title in his name, "to the use of, or in trust for," his wife, then there would have been no difficulty in sustaining her right to the land. Section 2075. *Sullivan* v. *Bruhling*, 66 Wis. 472, 29 N. W. Rep. 211. But such is not the fact; and, in construing a like section in the Michigan statute, it has been held that where such purpose is expressed in some other writings, and not in the deed itself, the legal title will not vest in the person for whose use or benefit it is taken. *Loring* v. *Palmer*, 118 U. S. 343, 6 Sup. Ct. Rep. 1073. Much less would it so vest where there is no such writing, and both parties know all the facts.

But our statute goes further, and expressly precludes any use or trust resulting in favor of the wife by reason of her paying a part of the consideration, by section 2077, declaring that "when a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment is made; but the title shall vest in the person named as alienee in such conveyance, subject only to the provisions of the next section." The "next section" thus referred to, provides that "every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration, and, when a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent," etc. Section 2078, Rev. St.

Had the judgments in question been recovered against the wife, instead of the husband, prior to such conveyance, a trust might have resulted in favor

of such judgment creditor; but even then, according to the New York decisions under like statutes, no interest, legal or equitable, would have vested in the wife, to which a judgment and execution could have attached, as the statute would merely have imposed "*a pure trust*" in favor of such creditor "upon the legal estate" in the hands of the husband, which would have been enforceable in equity only. *Garfield* v. *Hatmaker*, 15 N. Y. 475. Of course, the present case does not come within the exception in favor of the creditors of the person paying the consideration mentioned in the last section cited, because this is a creditor of the husband who held the legal title. True, the statute provides that "section 2077 shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name, *without the knowledge or consent* of the person paying the consideration, or when such alienee, *in violation of some trust*, shall have purchased the lands so conveyed with moneys belonging to another person." Section 2079, Rev. St. A struggle has here been made upon the facts, to bring the case, if possible, within the provisions of this last section, in order to relieve it from the effect of section 2077, *supra;* as in the case of *Kluender* v. *Fenske*, 53 Wis. 118, 10 N. W. Rep. 370. But the facts stated negative such contention, and take the case out of that rule. Here it appears affirmatively, as indicated, that the deed was taken in the name of the husband, with the knowledge and consent of the wife, and in her presence; which precluded any violation of any trust imposed in the husband by the wife.

It is very clear that the facts bring the case squarely within the provisions of section 2077, and the rights of the parties must therefore be determined by it. In the language of this section, substantially, and in accordance with its uniform construction by this and other courts, under like provisions, the deed of January 9, 1860, vested the title to the lands in question in the husband, the person named as alienee in such conveyance, with no use or trust resulting in favor of the wife, the person by whom a part of the consideration was paid. *Week* v. *Bosworth*, 61 Wis. 85, 20 N.W. Rep. 657; *Cerney* v. *Pawlet*, 66 Wis. 265, 266, 28 N.W. Rep. 183. Such title remained in the husband until some time after the rendition and docketing of the judgment against him. By the docketing of those judgments, they respectively became liens upon the separate real estate of the husband, as one of the judgment debtors. Section 2902, Rev. St.; *Evans* v. *Virgin*, 33 N. W. Rep. 569. Such liens were not destroyed, nor in any way frustrated, by his subsequent conveyance to his wife. The executions recited the judgments, and the time of docketing them, and were against the real property belonging to the debtors, respectively, on the day when the judgments were so docketed. Id.; section 2969, Rev. St. sub. 1. And the right and title of such judgment debtor, at the time of such docketing, in and to the land in question, was sold to the plaintiff on such executions, and conveyed to him by the sheriff's deed. Sections 3016, 3017, Rev. St.

It follows that, before the commencement of this action, the plaintiff acquired the legal title to the 40 acres of land in question, and the defendants have failed to make out any defense. The judgment of the circuit court is affirmed.

RAWSON MANUF'G CO. *v.* RICHARDS.

(*Supreme Court of Wisconsin.* November 1, 1887.)

1. SALE—CONDITIONAL—MUST BE IN WRITING AND RECORDED.

A contract for the sale of personal property by the terms of which the title is to remain in the vendor until the purchase price is paid, is not valid except between the parties thereto, and those having notice thereof, unless the contract shall be in writing, subscribed by the parties, and filed in the office of the clerk of the town, city, or village where the vendee resides, as provided in Rev. St. Wis. § 2317.

2. SAME—FAILURE TO RECORD—RIGHTS OF ATTACHING CREDITORS.
A contract for the sale of harvesting machines, by which the title was to remain in the vendor until the machines were paid for, was not filed as required by Rev. St. Wis. § 2317, until after an attachment had been levied by the sheriff. *Held* that, as to the attaching creditors, the ownership of the machines must, in the absence of actual notice of the terms of the contract, be presumed to have been in the vendee.

Appeal from circuit court, Grant county.

The defendant was, during the times herein mentioned, sheriff of Grant county. August 26, 1886, there was placed in his hands, as such sheriff, a summons, complaint, and attachment papers, in an action wherein the Milwaukee Harvester Company was plaintiff, and one Thomas L. Lomas, of Fennimore, Grant county, was defendant, with direction to serve and execute the same, and which he did then and there so serve and execute; that in doing so he attached a large number of agricultural implements as the property of said Lomas; that the complaint in said attachment suit alleged, in effect, the incorporation of the Milwaukee Harvester Company, aforesaid; a contract between it and Lomas, under which it furnished Lomas certain agricultural implements and extras, described, at prices named, during the summer of 1886, to the amount of $4,310.95, to be sold by him for it, and all the moneys and notes received therefor, thereupon to be remitted and turned over to it; that Lomas had sold all of such machines and extras, and received therefor cash and notes; that Lomas had not paid the Milwaukee Harvester Company for any portion of said machines or extras; that he had failed and neglected to account to it for any of the cash or notes so received by him, and had converted all of said property to his own use; that there was due and owing from him to it, therefor, the sum of $4,310.95; that he had refused to settle or turn over to it said cash or notes, after being duly demanded. Among the machines so attached by the defendant herein, as such sheriff, were three Rawson reapers and four Rawson mowers, which Lomas had previously received from the plaintiff herein. September 6, 1886, the plaintiff herein demanded of said sheriff said seven Rawson machines, which he refused to deliver, and thereupon the Rawson Manufacturing Company brought this action against said sheriff to recover $485, as the value of said seven machines. The said sheriff justified under said attachment. At the close of the trial the jury returned a verdict for the defendant herein, and from the judgment entered thereon the plaintiff brings this appeal.

C. M. Bice, for respondent. *Orr & Lowry*, *John D. Wilson*, and *Carter & Cleary*, for respondent.

CASSODAY, J. It is urged that the complaint in the attachment suit "alleges a cause of action *ex delicto*," and hence that the attachment was improvidently granted, and no justification in the hands of the sheriff. The substance of the complaint is stated above. It is to the effect that Lomas converted to his own use the moneys and notes he received as agent. There is no allegation that such conversion was wrongful, unlawful, or fraudulent. The evidence in that case probably tended to prove that such conversion was tortious. But in such cases it is always competent to waive the tort, and sue on the contract. *Walker* v. *Duncan*, 32 N. W. Rep. 689. This is just what was done. The contract between the plaintiff herein and Lomas was in writing, dated December 10, 1885, and is to the effect that the plaintiff agreed to furnish to Lomas, on the conditions therein mentioned, the machines therein described, at the respective prices therein mentioned, "net," payable by cash or good indorsed notes, taken of farmers, to be indorsed by Lomas, or to contain a true property statement, showing each purchaser to be worth $1,000 over and above all liabilities and exemptions; and in case any of such notes proved to be uncollectible, Lomas therein agreed to make them good to the plaintiff, and to settle for all machines ordered by November 1,

1886, and to pay for all repairs sold, in cash, at such time of settlement. Said machines were to be delivered by the plaintiff on the cars at Milwaukee, and Lomas was to pay all freight and charges on the same. The machines were to be sold in Grant county only. A discount was to be allowed by the plaintiff on all cash paid by October 1st; and if the whole account was then paid in cash, 10 per cent. discount was to be allowed. Lomas therein agreed to settle for all machines, drawing notes to the order of the plaintiff, and on their blanks, and to sell as per plaintiff's printed warranty, so that the test would be a matter of fact, not of choice. The plaintiff therein agreed to furnish all posters, circulars, and pamphlets free of charge, save the transportation on the same, and Lomas was to distribute the same. No deductions or promises were to be allowed save those mentioned in that contract; and the plaintiff was not to be held liable—in case of fire, or should the demand exceed the production—in case it could not fill orders sent it. The contract also contained this clause: "Any machines, extras, or notes, taken for machines on hand, are such that the title and right of ownership do not pass from the * * * [plaintiff] until this account is paid in full." The plaintiff also therein reserved the right to revoke the contract at any time it deemed itself insecure, and take possession of said machines and extras.

The court charged the jury, in effect, that whatever machinery Lomas had received from the plaintiff under the contract, and not paid for at the time of the attachment, was, as between it and Lomas, the property of the plaintiff; that the proof showed that the contract was not filed before the attachment, as required by section 2317, Rev. St. That section provides that "no contract for the sale of personal property, by the terms of which the title is to remain in the vendor, and the possession thereof in the vendee, until the purchase price is paid or other conditions of sale are complied with, shall be valid as against any other person than the parties thereto and those having notice thereof, unless such contract shall be in writing, subscribed by the parties, and the same or a copy thereof shall be filed in the office of the clerk of the town, city, or village where the vendee resides," etc. Exception is taken because the court, in effect, submitted to the jury the question whether, at the time of levying the attachment, the defendant knew of, or had reasonable cause to believe in, the existence of such contract, or that Lomas was not at the time the owner of such machines. The court also charged, in effect, that, in making the attachment, the sheriff acted, in a sense, as the agent of the Milwaukee Harvester Company, and any notice the company, or its authorized agent in the matter of said suit, might have had at the time of the attachment, would be notice that would bind the defendant as such sheriff. There can be no question that the charge was sufficiently favorable to the plaintiff, if the contract was "for the sale of personal property" upon the condition named in the section, and we are clearly of the opinion that it was. The contract being of the nature indicated, and not having been filed as required by the statute, the title to the seven Rawson machines mentioned must be conclusively presumed to have been in the vendee, Lomas, who was still in possession at the time of the levy of the attachment thereon in favor of his creditors, having no such notice as is mentioned in the section. *Kimball* v. *Post*, 44 Wis. 476. The evidence sustains the verdict of the jury, and the verdict conclusively negatives the existence of any such notice.

The judgment of the circuit court is affirmed.

THOMAS and others *v.* RICHARDS.

(*Supreme Court of Wisconsin.* November 1, 1887.)

1. SALE—CONDITIONAL—FAILURE TO RECORD—ATTACHMENT—NOTICE TO SHERIFF—PROVINCE OF JURY.

Plaintiffs claimed title to certain attached property under a written contract of sale, by the terms of which the property was to remain in them until paid for. The

proof showed that the contract was not filed as required by the statute, and the court submitted to the jury the question whether at the time of levying the attachment the defendant, a sheriff, had notice of such contract. *Held*, not error.

2. SAME—FINDING COPY OF CONTRACT AT TIME OF LEVY.
The court instructed the jury that to charge the sheriff with notice, they must find that he knew, either that the machines had been shipped under the contract and not paid for, or that he had reasonable cause so to believe. The only notice disclosed by the evidence was, in effect, that in executing the attachment a copy of the contract was found. *Held*, that such discovery at such a time is not such notice as would defeat the attachment, and the error, if any, in the instruction, was immaterial.

3. SAME—NOTICE TO SHERIFF NOT SUFFICIENT.
Notice of such conditional sale, if the contract is not filed as required by law, to be effectual as against an attaching creditor, must be brought home to the creditor, and not merely to the sheriff who makes the levy.

4. ATTACHMENT—SERVICE OF PAPERS—WAIVER BY ABSCONDING FROM STATE.
A defendant in attachment waives service of copies of the writ, affidavit, undertaking, and inventory, by absconding from the county and state.

Appeal from circuit court, Grant county.

Among the machines attached by the defendant herein as sheriff of Grant county, by virtue of the attachment mentioned in the statement of the case of *Manufacturing Co.* v. *Richards*, *ante*, 40, decided herewith, were 33 sulky hay rakes and two Thomas hay tedders, alleged to be the property of the plaintiffs herein, doing business at Springfield, Ohio, under the firm name of J. H. Thomas & Sons, and of the value of $700, and wrongfully taken and wrongfully detained by the defendant; which rakes and tedders were received by Lomas from the plaintiffs under the contract hereinafter mentioned, and for the recovery of which, and damages for such detention thereof, this action is brought, and, in case a recovery of said rakes and tedders cannot be had, then additional damages to the amount of their value. The sheriff justified under said attachment. The sheriff's return in the attachment suit as to the service of the summons and complaint is to the effect that he served them on the defendant herein, Thomas L. Lomas, on August 26, 1886, "by leaving a true copy thereof at his last usual place of abode, in the presence of S. W. Rogers, a member of his family, he being a person of suitable age and proper discretion, to whom 'he informed its contents at Fennimore' aforesaid;" "said Lomas, after due and diligent search, not being found in" said "county, or within the state of Wisconsin." The contract between the plaintiffs herein and Lomas was in writing, dated February 23, 1886, and is to the effect that said plaintiffs therein bargained and agreed to sell to Lomas, on the conditions therein named, the several machines therein described, to be delivered on the cars at Springfield, Ohio, between January 1, and June 15, 1886, at the respective prices named, with interest at the rate of 7 per cent. after due—discount for cash, 1 per cent. per month between May 1, and September 1, 1886; but failure to ship between said dates, unless machines have been otherwise ordered, by letter or in person, by Lomas, and reasonable time allowed for such shipment, is not to release him from his obligation to take them. Said machines were warranted to be made of good materials, and to do good work when properly set up and adjusted and used according to directions. If any part of said machines proved defective, the plaintiffs were to have the right to replace them, and no machine was to be condemned on account of such defect if the same be made good. Lomas agreed to examine the machines on arrival, and to notify the plaintiffs if there should be any shortage or defective parts, and give reasonable time to replace them, or the plaintiffs were not to be held responsible for any shortage or defects. Lomas agreed to see that all machines sold by him were properly set up and operated as per directions when started to work, and be governed by instructions on the back of the contract. Lomas agreed to receive the machines on arrival, pay freight and charges thereon from the factory, and take proper care thereof; and, in case of neglect or re-

fusal, the plaintiffs were at liberty to take the care of, and control over, the same, to avoid damage, injury, or loss, and hold them on storage for Lomas, or dispose of them to the best advantage; but without releasing him from his obligation to pay for the same as therein provided, and from any loss, damage, or expense the plaintiffs might sustain, or be put to, in looking after, taking care of, or reselling the same by reason of the neglect or refusal of Lomas to carry out his agreement therein made. Lomas agreed to make all reasonable effort to sell said machines, and not take the agency, nor in any way become interested in the sale, of other sulky rakes or hay tedders. Lomas agreed that the title to, and ownership of, all machines shipped under the contract, should remain in, and their proceeds in case of sale be the property of, the plaintiffs, and subject to their order until full payment should be made for the same by Lomas to their acceptance; but without in any way releasing Lomas from making payment as agreed. The plaintiffs therein reserved the right to revoke the contract at any time, if Lomas failed to discharge any obligations thereby entered into, or if they had reason to believe Lomas unable to perform them; and without being liable to Lomas for damages by reason of such revocation; and upon such revocation all the indebtedness of Lomas should then be due. Lomas agreed to give his note to the plaintiffs for said machines whenever so requested after shipment, but final and entire settlement to be made by September 1, 1886. If Lomas found he had more machines than his trade required when the retail selling season came, and if at his desire the plaintiffs should order away any machines, Lomas was to ship them promptly, in good order, and complete, as directed by the plaintiffs, free and clear of all freight and charges whatsoever; but nothing therein was to be construed as obligating the plaintiffs to order away any machine unless they elected so to do. At the close of the trial the jury returned a verdict in favor of the defendant herein; and from the judgment entered thereon the plaintiffs bring this appeal.

Clark & Mills, for appellant. *Orr & Lowry, Carter & Cleary*, and *John D. Wilson*, for respondent.

CASSODAY, J. The substance of the contract between the plaintiffs and Lomas, thus stated, made the shipment under it a conditional sale within the provisions of section 2317, Rev. St. It is stated in the charge of the court to the jury, that "the proof shows that this contract was not filed as required by this section." We find no exception to this statement of fact, and it must be treated as a verity in the case. Besides, this statement is not contradicted by the manifest inadvertence that it was not filed "prior to February 26, 1886," only three days after its date and before any shipment had been made, and hence before there was any occasion to file it. Had there been any evidence contrary to this statement in the charge, the court's attention should have been called to it at the time. The court submitted to the jury the question, in effect, whether, at the time of levying the attachment, the defendant, or the Milwaukee Harvester Company, or its agent, knew of, or had reasonable cause to believe in, the existence of such contract, or that Lomas was not at the time the owner of such machines. This was not error. *Manufacturing Co.* v. *Richards*, *ante*, 40, (decided herewith.) Exception is taken because the court instructed the jury, in effect, that to charge the sheriff with notice under that section, they must find that he knew, either that such machines had been shipped under the contract and not paid for, or that he had reasonable cause to so believe. Assuming this to have been error in the abstract, still the only notice disclosed in the evidence is, in effect, that in executing the attachment, a copy of the contract was found with other papers of Lomas in the safe. Such a discovery made at such a time, should not, in our judgment, defeat such attachment; and hence the error, if any, was immaterial. Besides, we are inclined to think that such notice, to be effectual, must be brought home to the

party in interest, and not merely to the sheriff, who is the agency of the law and a mere nominal party. The return of the sheriff, as to the service of the summons and complaint as stated, seems to have been in compliance with subdivision 4, § 2636, Rev. St., and hence sufficient to give the court jurisdiction to enter judgment on default, as it did, against Lomas. *Healey* v. *Butler*, 66 Wis. 9, 27 N. W. Rep. 822.

It appears from the return indorsed upon the writ of attachment, that the machinery in question was attached on the day the summons and complaint were served; that 16 days thereafter other property described, of Lomas, was also attached by the same writ, and all held subject to the order of the court. The sheriff further returned thereon, that, after due and diligent search, he was unable to find the defendant therein, Lomas, within Grant county, or within the state of Wisconsin. No objection is made to the sufficiency of the affidavit, undertaking, inventory, or appraisement. The attachment papers were all filed with the clerk of the court, September 13, 1886, and within 20 days from the receipt of them by the sheriff, as required by section 2734, Rev. St. The court certainly acquired jurisdiction over the machinery in question by virtue of the seizure on the attachment. But it is urged that the attachment became a nullity by reason of failure to leave copies of the writ, affidavit, undertaking, and inventory with Rogers, as provided in section 2736, Rev. St. The reason given in the return for leaving copies of the summons and complaint with Rogers, were, that he was then a member of Lomas' family, of suitable age and proper discretion. On the motion for a new trial, based in part upon such alleged defective service, it appeared, in effect, that Rogers was the keeper of a hotel at Fennimore during the year 1886; that in August of that year, and for several months immediately prior thereto, Lomas was a guest and boarder of his at said hotel; that during that time Lomas was a single man having no other family; that in August, 1886, Lomas' absconded to parts unknown. Upon these facts, the failure of the sheriff to leave such copies of the attachment papers with Rogers, the same as he had of the summons and complaint 18 days before, seems to have been excusable. The only purpose of leaving such copies is to furnish information of what has been done, to the defendant in the attachment. The same section provides that "in case of a non-resident or a foreign corporation, the sheriff shall serve such copies on *any agent* of such defendant in the county, *if any be known to him.*" We are not aware of any statute purporting to nullify such attachment by reason of such failure to leave copies. A statutory condition subsequent to the acquisition of jurisdiction may be dispensed with or waived; especially where such statute is for the benefit of the party waiving the same, and no public right or policy is thereby invaded. *Winner* v. *Hoyt*, 32 N. W. Rep. 133. Certainly, the defendant in attachment may waive such service by absconding from the county and state. There seems to be no other questions presented, requiring attention.

The judgment of the circuit court is affirmed.

CROW v. DAY, Adm'r, etc.

(*Supreme Court of Wisconsin.* November 1, 1887.)

EXECUTORS AND ADMINISTRATORS—MORTGAGE OF LANDS BY DECEASED—JURISDICTION OF COUNTY COURT.

The wife and heirs of the deceased conveyed mortgaged land belonging to the deceased, by a quitclaim deed, to the mortgagee. The administrator claimed the right of possession of the land, and to rent it for the benefit of the common creditors. The mortgagee petitioned the county court to order the administrator to pay over the rents collected, not necessary to pay expenses of administration, to the mortgagee, and to deliver possession of the land to him, and sell it subject to the mortgage. The county court ordered the surrender of the widow's dower interest to the mortgagee, and that the administrator sell or mortgage the remainder for

the benefit of the common creditors. *Held*, that in Wisconsin the county court had jurisdiction to order the surrender of the widow's dower interest, but that it was without jurisdiction as to the other matters.

Appeal from circuit court, Grant county.

Clark & Mills, for appellant. *W. E. Carter* and *Orr & Lowry*, for respondent.

ORTON, J. The appellant filed his petition in the county court of Grant county, setting forth the following facts, viz.: One Wesley Crow died intestate October 8, 1883, leaving his widow, Mahala Crow, and adult children, Charles M. Crow, Arabella Crow, Leroy W. Crow, Ladora Crow, Albert Crow, and Celia Crow. The respondent was appointed administrator, and made an inventory of the personal property appraised at $671.20, and allowance to the widow, $200. On March 20, 1884, the administrator, under an order of the court, sold all the personal property applicable to the payment of the debts, for $408.20. Commissioners for that purpose allowed unsecured claims of $824.08. On the twenty-eighth day of January, 1879, the said Wesley Crow, deceased, and his wife mortgaged all the land the deceased owned at the time and when he died, of certain description, situated in said county, valued at the sum of $3,200, to Nelson V. A. Crow, the appellant, for the sum of $2,155 borrowed money, with interest at 10 per cent., none of which has ever been paid. The land is worth much less than the amount of the mortgage debt and interest, and on the eighth day of January, 1884, the said widow and the said heirs, being unable to pay the same, conveyed said land by quitclaim deed to said mortgagee, and surrendered the possession, and their right of possession, of the said land to him. All the other property of said estate, and proceeds thereof, as aforesaid, were insufficient to pay the unsecured claims so proved and allowed. The respondent administrator claims the right of possession to said land, and to rent the same, and apply the rents to the payment of said claims, and $40 of rents was in the hands of the administrator to await the order of the county court. The prayer is that the administrator account, pay over said $40, if not necessary to pay expenses of administration, deliver possession of said land to the petitioner, and sell or lease the same for the payment of such indebtedness, subject to said mortgage. The county court ordered the administrator to surrender to the petitioner the dower of said widow, when admeasured, and that he sell or mortgage the remainder on the best possible terms, for the benefit of the common creditors. In compliance with said order the said administrator leased the same. The petitioner appealed from said order to the circuit court. The circuit court affirmed that part of the order that directs the administrator to surrender the widow's dower interest in the land to the petitioner, and as to all other matters ordered that the appeal be dismissed for want of jurisdiction in the county court.

The appellant assigns as error: (1) That the circuit court made no order for the distribution of the money now in the hands of the administrator, nor directed the county court to do so. (2) That the circuit court did not order the administrator to procure a license to sell said real estate, or to surrender the possession of said land to the petitioner, or direct the administrator to pay the petitioner the interest on his mortgage debt.

It is supposed that the money that the petitioner desires to have the administrator distribute, or to be applied to the payment of the interest on the mortgage debt, is the $40 so received for rents upon the land. It is very clear that the petitioner has no interest in the distribution of the other moneys of the estate which are to be applied to the payment of claims proved and allowed. The petitioner as mortgagee has never proved his claim, or filed the same in the county court. The administrator had the right to the possession of the land pending the administration, and to collect the rents of the same for the benefit of the creditors, unless he had been prevented by some proper proceed-

ing by the petitioner, as mortgagee, to have the same applied upon his mortgage, and no such proceeding has ever been taken. Section 2823, Rev. St. The administrator is charged with that $40, so legitimately collected as rents, and is required to pay the same to the common creditors who had proved their claims. The county court had no jurisdiction to protect the rights of the petitioner as mortgagee merely, and he is an utter stranger in that court. He should have applied in proper time to the circuit court for such relief, if he was entitled to any. The county court could know nothing of that $40, except that it was collected as rents from the real estate in the possession of the administrator, and is applicable, as part of the assets, to the payment of the allowed claims. That court does not, and cannot, know the petitioner as mortgagee simply. If, as mortgagee, he had proved his claim in the county court, and it had been determined in some proper way that there was a deficiency after sale of the land, then, for such deficiency, he might stand as one of the creditors, and have an interest in said $40 as collected rents; but in no other way could the county court consider or adjudicate upon his claim. Neither could the county court order the surrender of the possession of the land to the petitioner as mortgagee. It has no jurisdiction in such matter. It could as well adjudge a common or strict foreclosure of the mortgage. As to the failure of the county court to order the administrator to sell the land subject to the mortgage, the same want of jurisdiction exists. That court knows nothing of the mortgagee, for he has not proved his claim as a creditor of the estate. The conditions upon which the land can be sold to pay debts are specifically prescribed in chapter 167, Rev. St., and there is no jurisdiction in the county court of that matter, outside of the statute. If the county court had clear jurisdiction in the matters, as claimed by the petitioner, it certainly ought not to have put this insolvent estate to the expense of selling the land, when it is absolutely certain that it could not have been sold at such price as would more than pay the mortgage debt. According to the petition, neither the estate, the creditors, nor the administrator, the widow, nor the heirs, nor any one except the petitioner himself, has any interest in such a sale, except to pay the expenses, or would in any respect be benefited by it. It is too plain for argument that the petitioner's only remedy in respect to his mortgage or mortgage interests must be sought by foreclosure or some proper proceeding in the circuit court. He is certainly an intruder in the county court as to the matters he complains of. The circuit court proceeded sufficiently far in the order made, and very properly dismissed the appeal as to all other matters.

The judgment of the circuit court is affirmed.

GERMAN BANK v. PETERSON, Garnishee.

(*Supreme Court of Wisconsin.* November 1, 1887.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—INVENTORY—RESERVATION OF HOMESTEAD AND EXEMPTIONS.

In an assignment for the benefit of creditors of all a debtor's property, both real and personal, "except such as are exempt from levy and execution under the laws of Wisconsin," an inventory of the property assigned, wherein the assignor states that he reserves the right to claim any of the lots assigned and inventoried as his homestead, and to select certain articles of personal property as being exempt from levy and sale on execution, is not such an insufficient inventory under the law as to render the assignment void, for it contains all the property assigned.

Appeal from circuit court, Calumet county.

Seaman & Williams, for appellant. *T. R. Hudd* and *Jos. B. Reynolds*, for respondent.

TAYLOR, J. The respondent was garnished in the case of *German Bank* v. *Adolph Moeller*. The garnishee answered denying that he had any property in his possession belonging to said Adolph Moeller, or that he was indebted to him, and further alleges that before the garnishee process was

served in the case, the said Moeller had made a voluntary assignment to him of all his property for the benefit of his creditors; and that he held, at the time the garnishee summons was served, a large amount of real and personal property under such assignment, which had formerly belonged to the said Moeller.

The only reason which the appellant urges for holding said respondent liable as garnishee is that the assignment on its face assigned all his property, "except such as are exempt from levy and sale under the laws of the state of Wisconsin;" and that in the inventory which the assignor made of his property thereafter he enumerates all his real and personal property, but in the inventory of the real estate, after describing the same, there is added the following: "The above is listed by said debtor, he reserving to himself the right to claim any and all of the above-described tracts, lots, or pieces of land, as his homestead, or in any way exempt from levy and sale on execution or attachment under any law or statute of this state, and reserving to himself all his exemptions and reserved rights therein." To the inventory of the personal property was appended the following: "The statutory exemptions in favor of debtors, or stock in trade, or any other right of exemption, have not yet been selected from the above property of this inventory. This inventory is filed subject to any such right of exemption which the said Adolph Moeller, assignor, may have therein."

The learned counsel for the appellant does not claim that the provision in the assignment, reserving to the assignor his exempt property, renders the assignment void. That question, it is admitted, has been decided against him by this court in *Bates* v. *Simmons*, 62 Wis. 69, 22 N. W. Rep. 335; *Bank* v. *Hackett*, 61 Wis. 335, 21 N. W. Rep. 280; *Goll* v. *Hubbell*, 61 Wis. 293, 20 N. W. Rep. 674, and 21 N. W. Rep. 288; and *Cribben* v. *Ellis*, 34 N. W. Rep. 154. In addition to the long list of cases cited by counsel in this last case, sustaining assignments which contain a reservation of exempt property, we cite the case of *Muhr* v. *Pinover*, decided June 23, 1887, by the court of appeals of Maryland, and reported in 10 Atl. Rep. 289. It being settled that an assignment containing a reservation of exempt property is valid, it would seem to follow that a claim of such exemption in the inventory afterwards filed could not destroy the assignment. But the learned counsel for the appellant insists that the inventory filed, containing such reservation, is not such an inventory as the law requires, and therefore the assignment under the law, as it was when this assignment was made, is rendered void, because no sufficient inventory was filed within the time prescribed by law. The inventory filed purports to be an inventory of all the property, both real and personal, of the assignor, and is sworn to by the assignor, and certified by the assignee, as required by the statute. The fact that the assignor says that he will claim some of the inventoried property as his homestead, and some of the personal property as exempt to him, does not show that the inventory does not contain all the property which he assigned to his assignee, but is an intimation that it contains the exempt property which he did not assign. It certainly does not show that it is not an inventory of all the property which he assigned to the assignee.

The assignment is clearly a valid assignment, and the only possible question that can arise is whether, having scheduled the property as the property assigned by him, this reservation in the inventory is sufficient to entitle him to reclaim the homestead and other exempt property from the assignee, if such assignee has the property in his possession. That question is not in this case, and need not be determined. That is a question to be determined between the assignee, the assignor, and the general creditors in the assignment proceedings, and not in this case, which must necessarily proceed upon the ground that the assignment itself is void. Upon this question, I refer those interested to the remarks of the court in the case of *Muhr* v. *Pinover*, *supra*.

The judgment of the circuit court is affirmed.

McKee v. Hull.

(*Supreme Court of Wisconsin.* November 1, 1887.)

1. Highways—Proceedings to Establish—Assessment of Damages—Failure Invalidates Proceedings.

Rev. St. Wis. § 1270, provide that, in proceeding to lay out a highway, the town supervisors may agree in writing with an owner of land through which the highway is to pass as to the amount of damages which the town shall pay him, and that, unless the owner has so agreed, or has given a written release of all claims for damages, the supervisors shall assess such damages. *Held*, that a failure on the part of the supervisors to award damages to an owner of the land, or, in lieu thereof, to procure from him a written agreement as to the amount of damages, or a written release thereof, is such a defect as invalidates the proceedings of the supervisors, and that such defect may be taken advantage of by any person interested in the laying out of the highway.

2. Same—Waiver—Release—Estoppel.

Held, also, that a statement to the supervisors by a party that he would allow the road to be run on his land, and that he did not, and would not, claim any damages therefor, was not such a waiver as would bind him, was not a valid release under the statute, and did not raise an estoppel *in pais*.

Appeal from circuit court, Grant county.

Carter & Cleary, for appellant. *W. H. Beebe*, for respondent.

Taylor, J. The respondent brought an action in justice's court against the appellant for wrongfully breaking and entering the plaintiff's close, and throwing down and destroying his fences. The defendant answered that the *locus in quo* was a public highway; that he did the acts complained of for the purpose of removing the fences of said plaintiff from said highway, and that what he did was by order of the board of supervisors of the town, for the purpose of opening such highway. The defendant gave the proper bond, and the case was sent to the circuit court of the county, where the same was tried. On the trial the jury assessed the plaintiff's damages at $3.75, and, by consent of the parties, the court was to order judgment either for the plaintiff for said damages, or for the defendant, if he found that as a matter of law the entry and alleged trespass were justified by the evidence in the case. Thereupon the court ordered judgment in favor of the plaintiff for the said damages, and the costs of the action. From the judgment so ordered the defendant appealed to this court. The counsel for the appellant in a very able brief contended that the evidence clearly established the following facts, viz.: That the supervisors of the town had regularly laid out a highway in said town over the *locus in quo*, and, after laying out the same, had ordered the same opened as a highway, and notified the plaintiff to remove his fences from within the bounds of such highway; that the plaintiff had neglected to so remove said fences for more than 30 days after the service of such notice, and thereupon the supervisors directed the defendant, the overseer of the highway of the district in which said alleged highway was located, to remove such fences and open such road, and that in pursuance of such order the defendant did the acts complained of.

After a careful consideration of all the evidence in the case showing all the proceedings taken by the supervisors in their attempt to lay out a highway over the place where the alleged trespass was committed, we find no irregularity which would render the proceedings void, except the omission to make an award of damages to Hook, one of the owners of the lands over which the road was attempted to be laid. This question has been the main point argued in this court by both parties, and we are led to believe that it was the point upon which the circuit judge declared the proceedings of the supervisors void, and no protection to the defendant. The evidence shows that Hook was a petitioner for the highway, and that such proposed highway led from an ex-

isting highway across the lands of the plaintiff for about 80 rods west, and then extended west 80 rods more on the line between the lands of the plaintiff and of the said Hook, and terminated upon the lands of said Hook. The evidence also shows that there was an award of damages to the plaintiff, but no award of damages to Hook. It also appears that Hook stated orally to the supervisors that he did not want any damages, and waived all damages for his lands taken by the highway. There was no agreement in writing between said Hook and the supervisors in regard to his damages, and no written release of damages given by him to the supervisors or to the town.

This court has held that the supervisors of a town must comply with every substantial requirement of the statute regulating the laying out and opening of highways, otherwise their proceedings will be void. It has also held that certain provisions of the statute are provisions in which the public are interested, such as the presentation of the required petition, the giving of the public notice, the making of the order within the time prescribed by law, and other matters of a like nature; and as to such matters, neither one nor all the persons peculiarly interested can waive their performance. This court has also held that there are other matters which are personal to some of the people; among these is the requirement that written personal notice shall be given to the owners of the land required to be taken for the road. The service of this notice may be dispensed with when the owner expressly waives such personal notice. And so with the award of damages which the statute requires should be made to each owner of land over which any part of the proposed road is to be laid. This award may be waived, and if waived in the manner prescribed by statute, the proceedings will be valid. In the case of the notice, if the person entitled to receive it has waived such notice in a manner that will bind him, no other party interested in the highway can allege the want of such notice as an irregularity in the proceeding. At the same time, this court has held that when such personal notice has been given, and has not been waived by the party entitled to receive it so as to bind him, such irregularity in the proceedings may be taken advantage of by any other party, and the proceedings will he held void for such irregularity, unless the party complaining has in some way estopped himself from attacking the legality of the proceedings, as by receiving the compensation awarded to him for his lands taken for the highway. A failure to award damages, or in lieu thereof, to procure a release of damages, from an owner or owners of land taken for the highway, may be alleged by any other person interested in defeating the laying out of the highway as an irregularity. This we think was clearly decided in the case of *Dolphin* v. *Pedley*, 27 Wis. 469. The head-note in this case reads as follows: "A highway is not legally laid out unless the commissioners, within the time prescribed by the statute, file with the town clerk their order describing such highway, and an award of damages to *all* the persons through whose land it passes, and who have not released the damages." The word "all" is italicized in the head-notes, and seems to have been justified by the language of the opinion in the case. There should have been another qualification added to the last clause of the head-note, "or who have not made an agreement in writing with the supervisors in regard to their damages." The omission of this qualification in the head-note and in the opinion does not detract from the force of the decision. In the opinion in this case the present chief justice says: "Now the statute expressly provides that where the supervisors lay out a highway, they shall make out an order containing a description thereof and file such order, together with the award of damages, in the office of the town clerk; and that, if they fail to file such order and award within the ten days after laying out the highway, they shall be deemed to have decided against such application. So it is evident that the supervisors did not comply with the provisions of the statute in laying out the highway in question, by omitting to award damages to all the persons through whose lands the highway was laid

out, and who had not released such damages. This was the omission of a very important matter, and showed that the requirements of the statute were not complied with by the supervisors." This opinion, it seems to us, settles the question that any one interested in defeating the highway may take advantage of the neglect to award the damages as required by the statute; and that such objection is not confined to the person whose damages have not been assessed or released, and is in harmony with the cases which hold that any one interested may take advantage of the want of personal notice to the owners of the land, required to be given by the statute, and that such want of personal notice will render the proceedings void, in the absence of proof showing that such notice was waived by the person or persons entitled thereto and who were not served. It is urged by the learned counsel for the appellant that this case is not in point because it does not appear but that the party complaining was one of the persons whose damages had not been assessed. The facts of that case do not show that the complaining party was a land-owner whose damages had not been assessed, and if that had been considered a material matter by the court, it seems to us it would have been mentioned. Independent of the fact that it is the command of the statute and must therefore be performed, there is a sufficient reason why any party may allege the defect, other than the person entitled to the notice or damages. There can be no question but that the person who had not received the notice, as required by law, or whose damages had not been assessed, and who had not waived such notice, or award of damages, could defeat the opening of the highway, and it would work hardship to every one if it could be opened on one day, notwithstanding the objection of a party who had had notice, or whose damages had been awarded, and on the day after it could be closed by the party who had no notice, or whose damages had not been awarded. Every one having an interest in the highway has an interest to see to it that it is so laid out and opened that it cannot be closed at the will of some other party on the line thereof.

While we think this court has settled the rule that any one interested may attack the validity of the proceedings of the supervisors in laying out a highway, and defeat such proceedings, when they have not complied with the statute, although the irregularity relates to matters which may be personal to some of the parties interested, we think it is equally well settled that, as to such matters as are personal to some of the owners of the lands taken, such persons may waive the doing of such acts. *Ruhland* v. *Supervisors*, 55 Wis. 664–668, 13 N. W. Rep. 877; *Roehrborn* v. *Schmidt*, 16 Wis. 546; *Karber* v. *Nellis*, 22 Wis. 215; *Austin* v. *Allen*, 6 Wis. 134–142.

The only other material question is whether Hook has waived his right to damages for taking his land, in such a way as would have estopped him from objecting to the opening of this proposed highway at the time the same was opened by the defendant in this action. The statute, (section 1270, Rev. St.,) provides, first, that the supervisors may agree with the owners through whose land a highway shall be laid out, as to the damages a town shall pay, and it requires that such agreement shall be in writing, signed by the owner and the supervisors, and filed in the office of the town clerk, and then prescribes "that every such agreement and every release of damages given shall forever preclude such owner," etc. Immediately following this language the same section provides: "If there be any owner, etc., * * * who shall not agree with the supervisors as to the compensation he shall receive for damages sustained by him by reason of the laying out, etc., * * * of such highway, and who shall not, previously to the making of the order laying out, etc., * * * deliver to said supervisors a written release of all claims for such damages, said supervisors shall at the time of making such order assess the damages which such owner will sustain by reason of the laying out, etc., * * * through his lands, and make an award in writing, specifying therein

the sum awarded by them to each of said owners for their respective damages."

The evidence in this case shows that no written agreement was made between the supervisors and the said Hook as to the damages he should receive; that no written release was given as prescribed by law; and that no award of damages was made by the supervisors to him. On the face of the proceedings it is clear that the supervisors have failed to proceed in the manner prescribed by the statute, and consequently these proceedings are irregular and void, unless the evidence discloses facts which would have estopped the said Hook from objecting to the opening of said highway, at the time the same was opened by the defendant. The only evidence upon which an estoppel can be based is the testimony of Hook himself. He says: "I did not claim any damages of the town for running that road there. It was the understanding that I was not to claim any and I never did claim any." "I told them when they were there that I was willing to have that road run on my land, after it struck my land." This at most was a parol license to the supervisors to lay out the highway over his land, without awarding him any damages, and it is clear that it could be revoked at any time before the supervisors actually opened the road for public use. This was so decided in the case of *Squiers* v. *Neenah*, 24 Wis. 588. In that case it was held that the parol consent of the owner that the village authorities might lay out a street across his lands without the payment of damages or condemning the same, as required by the constitution, could be revoked at any time before the street was in fact open for public use, and he was himself allowed to maintain an action of trespass against the authorities for opening the street against his consent. Under the authority of that case it is evident that Hook could have prevented the opening of the highway in question, notwithstanding his statement that he did not claim any damages, and that it was understood that he was not to claim any damages. If Hook could at that time have prevented the opening of the highway, then under the authority of *Dolphin* v. *Pedley*, *supra*, we think the plaintiff could. What the effect of a written release of damages given to the supervisors by Hook, after the order laying out the highway had been made, or what would have been the effect if the highway had been opened by the supervisors at the express request of Hook, are questions not in this case and are not decided.

There are certainly two reasons why this parol arrangement did not estop the said Hook from objecting to the opening of the highway across his land: *First*, the right to maintain a highway across his land is an interest in real estate, and cannot be granted except by writing. The fact that the justice is ousted of his jurisdiction by the plea that the *locus in quo* was a highway shows this. *Second*, because the statute in very clear terms declares that the only way he can bar himself from claiming damages is either by an agreement in writing or by a written release, and, outside of the statute, he could only be barred by an estoppel *in pais*. There is some reason for this provision of the statute. It is to make a public record accessible to all, which will show that such a waiver of damages has been made in a way to bind the party effectually, and so assure other parties interested that he has no power to avoid the proceedings on that account. Without such a provision, there would always remain a very great uncertainty as to the validity of the proceedings, which could only be conclusively settled by an action to try their validity. The learned counsel in his supplemental brief says the statute does not require that the written release spoken of in the statute should be filed in any public office, and so there is no force in this reason. We think this is a mistake. Section 1279, Rev. St., provides that all applications and other papers relating to laying out any highway shall be filed in the office of the town clerk, as soon as the supervisors have decided thereon. Under this section we think a release of damages taken in such proceedings should be filed in said

office. Hook not having estopped himself from objecting to the opening of the highway, when the defendant proceeded to open it against the objection of the plaintiff, the proceedings of the supervisors were no protection to the defendant.

The judgment of the circuit court is affirmed.

POWERS v. POWERS and others.

(*Supreme Court of Wisconsin.* November 1, 1887.)

1. PARTNERSHIP—FIRM AND PRIVATE CREDITORS—PRIORITY AGAINST FIRM ASSETS.
A separate creditor of one of the partners of an insolvent partnership obtained judgment against the individual partner, and levied upon all the partnership property, but, before sale under the execution levy, a partnership creditor attached the same property, and afterwards got judgment. The sheriff sold the property on the execution in favor of the separate creditor, and held the proceeds subject to the order of the court. On petition of intervention by the partnership creditor, *held*, that, as the partnership creditor had obtained a lien on the property before the same had been appropriated to the debt of the separate creditor, the proceeds must first be applied in payment of the debt of the firm creditor, and that it was immaterial that the separate creditor had obtained a lien first, so long as the property had not been sold before the lien of the firm creditor attached.[1]

2. SAME—FUND IN COURT—RIGHTS DETERMINED BY PETITION.
Held, also, that since the fund to be distributed was in the hands of the court, and no persons were interested in it except the separate creditor and the petitioning firm creditor, the rights of the contesting creditors to the fund could be determined upon petition, without the necessity of resorting to an action in equity; and allegation and proof of fraud on the part of the separate creditors was not necessary to give the court the right to proceed by petition.

Appeal from circuit court, Grant county.

John D. Wilson, for appellant. *Clark & Mills*, for respondents.

TAYLOR, J. The petition of the respondents shows that the appellant obtained a judgment against Frank L. Powers for the sum of $3,463.25 damages, and $23 costs, on the eighth of February, 1886. On the same date execution was issued on such judgment, and placed in the hands of the sheriff of the proper county. On the same day, by virtue of said execution, said sheriff seized upon all the goods and chattels of Frank L. Powers and S. Stone, as partners, and that all the goods and chattels seized upon said execution were the goods and chattels of the said firm of Powers & Stone. The petition further sets forth that the respondents were creditors of the firm of Powers & Stone, for goods theretofore sold to said firm, and that on the eleventh day of February, 1886, they commenced an action against said Powers & Stone, to recover the amount due them; that in said action a writ of attachment was issued against the property of said Powers & Stone, and by virtue of such attachment, the goods and chattels in the hands of said sheriff, by virtue of his levy and seizure upon the execution above mentioned, were duly attached and duly appraised at the value of $2,548.34. The petition further alleges that at the time of the levy of said attachment, the only property owned by Powers & Stone, or by either of them, liable to execution, were the goods and chattels seized by them on such attachment. The petition further alleges that Powers & Stone are both insolvent, and that the execution issued upon their judgment obtained in the attachment action was, on the second day of April, 1887, returned unsatisfied. The petition further sets forth that the sheriff proceeded to sell the property of said Powers & Stone upon the execution issued upon the judgment in favor of the appellant, and upon such sale

[1] As to priorities between firm and private creditors in making disposition of the assets of an insolvent firm, see Johnston's Appeal, (Pa.) 9 Atl. Rep. 76, and note; Machine Co. v. Bannon, (Tenn.) 4 S. W. Rep. 831, and note; Succession of Pilcher, (La.) 1 South. Rep. 929, and note.

he realized a large sum of money, more than sufficient to satisfy the judgment of the petitioners, and that such money is still in the hands of said sheriff, who holds the same under the order of the court to be paid over to such party or person as may be entitled thereto. The petition asks for an order of the court, directing the sheriff, or other officer or person having such money, to pay over to the petitioners the amount of their said judgment, etc. They also ask the court to make an order requiring the said Lyman A. Powers, the respondent, to answer their petition. The circuit court thereupon made an order requiring said Lyman A. Powers to answer said petition within 20 days after service of a copy of the order and a copy of the petition upon him.

After the service of such order and petition, the said Lyman A. Powers appeared in court and filed a demurrer to said petition, stating the following grounds of demurrer: "(1) That the court has no jurisdiction of the person of the plaintiff, or defendant, or of the subject-matter set forth in the petition, or of the above-entitled action. (2) That the petitioners have not legal capacity to sue or intervene herein. (3) That there is another action pending between the parties hereto for the same cause. (4) That there is a defect of parties, both plaintiff and defendant, for the reason that Samuel Stone and Ora Richards, sheriff, should be made a party to this proceeding. (5) That several causes of action and grounds for relief have been improperly united. (6) That the petition does not state facts sufficient to constitute a cause of action, or entitle the petitioner to the relief prayed for. (7) That the action was not commenced, or petition filed for leave to intervene, within the time limited by law." The circuit court overruled the demurrer, and from the order overruling such demurrer the said Lyman A. Powers appeals to this court.

The case presents the following facts in brief: A creditor of one of the partners of an insolvent partnership obtains a judgment against such partner upon his individual indebtedness, and levies upon all the partnership property. A creditor of the partnership commences an action upon a demand due to him from the partnership, before the sale under the execution levy, and attaches the same partnership property for his partnership debt, and afterwards obtains judgment against the partnership. In the mean time, and after his attachment, the sheriff sells the property of the partnership, upon the execution, in favor of the individual creditor, and retains the proceeds of the sale in his hands to be paid over by order of the court, to the party entitled thereto. The parties having the attachment and judgment against the partnership ask the court to direct the money in the hands of the sheriff to be appropriated, in the first place, to the payment of their judgment. That the petitioners are entitled to have the money so applied by some process of law cannot well be denied. All the cases hold that in a contest between a creditor of one of two or more partners and a creditor of the partnership, the creditor of the partnership is to be preferred, if he shows that he has in any way obtained a lien upon the partnership property, before the same has been appropriated to the payment of the debt of the creditor of the individual partner. The petition clearly shows that the petitioners, the creditors of the partnership, had attached the partnership assets before the same had been sold on the execution in favor of the creditor of the individual partner. In such case it is wholly immaterial that the creditor of the individual obtained a lien first, so long as the property has not been sold before the lien of the creditor of the firm attaches. *Conroy* v. *Woods*, 73 Amer. Dec. 605, 606, 13 Cal. 626; *Greenwood* v. *Brodhead*, 8 Barb. 594; *Wilder* v. *Keeler*, 3 Paige, 167; *Jackson* v. *Cornell*, 1 Sandf. Ch. 348; *Coover's Appeal*, 29 Pa. St. 9, 70 Amer. Dec. 150. In this case the court say: "But when the joint creditors acquire a lien on the joint assets, either by assignment or levy, no subsequent disposition of the property by the several partners, or by their separate execution creditors, can defeat such lien. It differs from a lien against a single member of the firm

in this important particular: that the former is a lien on the chattels themselves, while the latter is a lien on the surplus only after payment of the partnership debts. The lien of the partnership creditor is in time if acquired before the sale. The moment their equity to the partnership property is thus secured, their rights become paramount, and no arrangement of the order of sale can give the separate creditors a preference over him." This case, it appears to us, correctly states the law as to the relative rights of an individual creditor, and the rights of a creditor of the partnership, when both have acquired a lien upon the partnership assets, before a sale of the same has been made by the individual creditor. The cases cited by the learned counsel for the appellant, which seem to hold a different rule, will be found upon examination to be cases in which the individual creditor of one of the members of the firm had been allowed to proceed and sell the property of the firm to pay his individual debts, before any steps were taken by the creditors of the firm to attach the property of the firm for their debts, or in any other way obtain a lien thereon. In such case the courts hold that the equitable lien of such creditors over the creditor of the individual is a lien to be worked out in the name of the partners, and not in their own names.

It is objected by the learned counsel for the appellant that if the petitioners have any right as against the claim of the appellant, it can only be enforced in an equitable action, and not by petition. We see no reason why the court cannot do justice in this matter upon the petition to distribute the fund in the hands of the court, as well as by an independent action. No persons appear to be interested in the fund except the appellant and the petitioners. The sheriff has no interest hostile to either, and there are no other creditors who would seem to have any interest. It is urged that the right to distribute the fund depends upon the good faith of the appellant in proceeding to sell, and as no fraud is charged, the petition should not be sustained. In the cases in which this court has held that the rights of contesting creditors to a fund arising from the sale of the property of the common debtor may be determined upon the petition of one of the claimants, it may have appeared that the rights of the petitioner in such cases did depend upon the fraud of the claimant; but we are not aware that it was decided that, in order to give the court jurisdiction to make an order distributing such fund, it was necessary to charge and prove fraud on the part of the other claimant. If the court has jurisdiction to determine a question of fraud in order to base an order for the distribution, it would seem the court might, with much greater propriety, make an order of distribution when no fraud was involved, and only a question of law upon an admitted state of facts. See *Breslauer* v. *Geilfuss*, 65 Wis. 378, 27 N. W. Rep. 47; *Nassauer* v. *Techner*, 65 Wis. 388, 27 N. W. Rep. 40.

The right of a court to distribute a fund brought into court by the sale of property upon its order or writ has always been recognized, and is the well-known method of proceeding whenever there is a surplus arising upon the sale of real estate in the foreclosure of a mortgage, or other judicial sales. But if it were necessary that the element of fraud should exist to give the court the right to proceed by way of petition, that element would exist in this case. The petition shows that the firm, and the individuals comprising the firm, are insolvent, and unable to pay their debts; and if the creditor of the individual partner is permitted to apply the assets of the firm to the payment of his debt, it would be a fraud upon the creditors of the firm. See *Keith* v. *Armstrong*, 65 Wis. 225–228, 26 N. W. Rep. 445, and cases there cited. This petitioner having acquired a lien upon the partnership assets out of which the fund in court was raised, he is in a position to intervene without the consent or co-operation of the partners.

The order of the circuit court is affirmed, and the cause is remanded for further proceedings.

STATE *ex rel.* TOWN OF WHITE OAK SPRINGS *v.* CLEMENTSON, Judge, etc., and another, Clerk, etc.

(*Supreme Court of Wisconsin.* November 1, 1887.)

TRIAL—VERDICT FOR NOMINAL DAMAGES—RECONSIDERATION BY JURY—DISAGREEMENT. In an action against a town to recover damages for personal injuries caused by a defect in the highway, the jury found that the town was liable, but assessed nominal damages of $1. The presiding judge refused to receive the verdict, and sent the jury out for further consideration, telling them that, if the plaintiff was entitled to recover at all, she was entitled to substantial damages. The jury, upon returning, announced that they had not agreed upon a verdict, and were not likely to agree. They were then discharged, and the clerk, by the direction of the judge, refused to enter up any verdict or judgment in the action. Upon *mandamus* to compel the judge and clerk to enter up the verdict of $1, *held*, that the jury, having silently acquiesced in the request of the court that they should reconsider their verdict, and having afterwards declared that they could not agree upon any verdict, and having been discharged, must be considered to have receded from the verdict as first brought in; and their final action being a disagreement, there was no verdict in the case upon which any judgment could be entered.

Mandamus.

Orton & Osborn, for relator, appellant. *P. B. Simpson* and *The Attorney General*, for respondents.

TAYLOR, J. This is a proceeding by *mandamus* issued out of this court on the petition of the said town against the judge and clerk of the circuit court of La Fayette county, to compel said judge to direct the clerk to enter judgment, and the clerk to enter judgment upon a verdict of the jury, which it is alleged was returned by said jury to said court on the trial of an action in which Susanah March was plaintiff and said town was defendant.

The petition sets forth, in substance, that one Susanah March commenced an action about the eleventh day of May, 1886, in the circuit court of the county of La Fayette, against said town of White Oak Springs in said county, to recover damages for an injury to her person, alleged to have been caused by reason of the insufficiency of a certain highway in said town. The petition then sets out a copy of the complaint in said action, and the answer of the defendant. The complaint alleges, in substance, that the plaintiff was thrown from her buggy while driving along a certain highway in said town, and was injured; that her left arm was broken, and she was also injured about the head. It alleges a defect in the highway as the cause of the injury, and claimed damages in the sum of $1,500. The answer denies that the highway was insufficient or out of repair at the time and place alleged in the complaint; denies all the other material allegations of the complaint, and alleges that if the plaintiff was thrown from her wagon and injured while traveling upon said highway in said town, it was caused by her own neglect and want of care, and not from any defect or insufficiency of said highway. The petition then alleges that said action came on for trial, and was tried in said circuit court before the court and a jury, and sets out at length the charges of the court to the jury in such action. It further shows that upon such trial the following questions were submitted to the jury for them to answer, but not as a special verdict: "(1) Was the highway at the place of the accident in a reasonably safe condition to accommodate the customary travel passing over it? *Answer*. No. (2) Was the team John March was driving at the time of the accident an ordinarily safe team? *A*. Yes. (3) Was John March driving in an ordinarily careful manner, under all the circumstances, at the time of the accident? *A*. Yes. (4) Was the plaintiff, at the time of the accident, exercising ordinary care? *A*. Yes. (5) At what sum, if you find for the plaintiff, do you assess the damages that she is entitled to recover for past pain and suffering? *A*. One dollar. (6) At what sum, if anything,

if you find for the plaintiff, do you assess the damages that the plaintiff is entitled to recover for future pain? *A.* $0."

The petition further shows that when the jury had been instructed by the court, they retired to consider upon this verdict, and after having remained out for a considerable length of time, returned into court, and being asked if they had agreed upon their verdict, they replied that they had, and handed to the clerk or judge the questions submitted to them, answered as above indicated, and also the following general verdict: "We, the jury, find for the plaintiff, and assess her damages at $1;" that the judge, after reading the verdict, then said to the jury: "Gentlemen, this is not a verdict that will stand in the law. If I should receive this verdict, and the plaintiff appealed to the supreme court, this verdict would not stand. If the plaintiff is entitled to recover anything, she is entitled to recover more than you have found. I do not say how much, but something substantial; more than nominal damages. It is not my duty to receive this verdict. You may retire for one hour, and if at that time you are unable to agree, I will discharge you." That the verdict with the questions and answers were returned to the jury by the court, and thereupon the jury again retired to their room. To the action of the court in making this statement to the jury, and refusing to receive the said verdict, and have the same entered, and in directing and permitting the jury to again retire to consider a verdict, the defendant's counsel objected and excepted, and then insisted to the court that the verdict as returned by the jury should be received, entered, and filed, and the jury be discharged from the further consideration of the case, all of which the court refused against the objection and exception of the defendant's counsel; that thereupon the jury again retired, and remained in their room until 12 o'clock, noon, unable to agree on any other verdict than as above set forth, and they handed such verdict and such questions and answers to the clerk, and they were duly filed on that day by the clerk, and the jury was discharged. That the defendant demanded of the clerk that he enter such verdict in the minutes of the court, which the said clerk refused to do, and still refuses; and that said clerk was directed by the judge of said court not to enter the said verdict, and, in fact, said verdict and the answers to said questions have not been entered in the minutes of the court, and that no judgment has been rendered or entered in said action.

The petition further alleges that on the twenty-eighth day of May, 1886, the defendant town, by its counsel, prepared and presented to the clerk of said court, George F. West, a judgment in said action upon said verdict, and demanded that the said clerk should file and enter said judgment in said action, and that he also enter said verdict, and tendered him his fees for so doing, and all his other fees in said action; that said clerk refused to enter said verdict, or file or enter said judgment in the action; and further alleges that the Hon. GEORGE CLEMENTSON, the circuit judge, refused to permit said verdict or judgment to be entered in said action. The petition gives a copy of the judgment presented for entry, which would be a proper judgment in form, to be entered upon the verdict as reported by the jury, when they came into court, and reported they had agreed upon their verdict. The prayer of the petition is for an alternative writ of *mandamus* commanding the said GEORGE CLEMENTSON, the circuit judge, and George F. West, the clerk of said court, to receive said verdict, and make proper entries in the minutes of said court, of the said verdict of said jury, and of the said questions and answers, and to enter a judgment upon said verdict in said action, upon and in accordance with said verdict. An alternative writ was issued as prayed for in the petition.

The Hon. GEORGE CLEMENTSON, circuit judge, and the clerk of said court, each made a return to said writ. These returns admit the allegations of the

petition of the relator as to the pendency of the action between Susanah March against the said town of White Oak Springs, the object of said action, and the proceedings taken therein, up to the time the jury returned into court and reported that they had agreed, and handed to the clerk the questions and answers by them, together with a general verdict for the plaintiff, assessing her damages at $1. As to what the court said to the jury at that time, and the action of the jury thereafter, is stated in the return of the circuit judge, as follows: The circuit judge in his return, after stating at considerable length what instructions were given to the jury, and the difficulty the jury seemed to have in arriving at a verdict, before they presented the verdict in question, admits that at the time alleged in the petition the jury came into court, and upon being interrogated as to whether they had agreed upon the verdict, replied that they had, and then handed to the clerk the questions submitted to them, with their answers to the same, together with their general verdict, as stated in said petition. He then sets out at length what he said to the jury upon their presenting such verdict, as follows: "Gentlemen, this verdict is not a verdict that will stand in the law. If I should receive this verdict, and the plaintiff appealed the case, the supreme court would reverse it and send it back, because they would say that if that woman was entitled to recover anything, she was entitled to recover something that was not simply nominal. I don't know that you can agree in this case, but it would be simply useless to receive this verdict. If you find that the plaintiff is entitled to receive anything at all, you will have to find that she is entitled to receive something substantial. The amount you have named in this verdict is simply nominal, and it will be my duty to return it to you, and request you to consider it further. I will send you out for one hour longer, gentlemen, and if you do not agree I will discharge you." These remarks and the whole proceeding were objected to by the defendant. The judge then says the verdict, the questions, and the instructions of the court, were returned to the jury, and they again retired. He then stated that the jury remained out until 12 o'clock M., when they were again brought into court, and after having been regularly called, and all answering to their names, the court asked them if they had agreed upon a verdict. The foreman replied that they had not. They were then asked if there was any prospect of their agreeing, and the reply was in the negative, and thereupon the court, without objection of any one, discharged them from the further consideration of the case.

The return of the judge also denies that, when the jury returned into court the last time, they announced that they were unable to agree upon any other verdict, and any other answers to said questions, than such as they had brought in about the hour of 10, as aforesaid; but, on the contrary, alleges the fact to be that after being sent out at the hour last named, the jury did not, at any time before they were discharged, state to the court that they had agreed upon the same verdict or any other verdict, but that they stated that they could not agree, and thereupon were discharged. The circuit judge further returns that when the said jury were brought into court the last time, at 12 o'clock, they brought back with them the instructions of the court, said questions, and said verdict that had been returned to them when they were last sent out, but they brought them back simply as papers placed in their care to be returned to the court with all papers in their hands connected with the case, as they knew from their experience as jurors should be done. He admits that after the jury were discharged, the defendant's attorneys demanded of the court that the verdict that the jury had offered at 10 o'clock be entered as the verdict in the case, and that he refused the demand, and directed the clerk to enter in his minutes that the jury disagreed and were discharged; but to file the instructions, questions, and answers, and said paper purporting to be a verdict, with the other papers in the case.

The clerk in his return admits that the attorneys for the defendant town presented a judgment, and demanded that he sign and file the same, as alleged in the petition, and that he refused to do as demanded.

The circuit judge also alleges in his return that the uncontradicted testimony in the case proved that the plaintiff was thrown from the buggy in which she was riding at the place in the highway alleged in the complaint; that by her fall her wrist was broken, and that thereby for a considerable length of time she had suffered great pain. Her own testimony tended to show that she had not fully recovered at the time of the trial, and that she still, at times, suffered pain on account of the injury, and that no testimony in the case tended to contradict her testimony upon this point.

The relator demurred to the several returns of the respondents. The case is therefore to be heard upon the theory that the allegations in the returns are true.

Taking the allegations in the return of the circuit judge as a correct statement of what took place on the trial, it is very clear to us that there has been no verdict rendered in the action upon which any judgment could be entered. If, after the judge had requested the jury to retire and consider further upon their verdict, they had returned into court and stated, as is alleged in the petition of the relator, that they could not agree upon any other verdict than that which they had before handed to the clerk as their verdict, and then returned the papers to the court in the same condition as before, that would present a question not raised upon this demurrer; but if after being requested to retire and further consider their verdict, they retired, and, when they finally came into court, stated that they could not agree upon any verdict, and were thereupon discharged from any further consideration of the case, it is very clear to us that they receded from their verdict as first handed to the clerk, and that their final action was a disagreement, and so there is no verdict in the case upon which any judgment can be entered. All the authorities hold that a jury may, after announcing a verdict, if they see fit before they are discharged, change the same and render a different verdict. And in many cases, where the jury have manifestly made an omission or mistake in their verdict, it is the duty of the presiding judge to call their attention to that fact, and return it to the jury for correction. See *High* v. *Johnson*, 28 Wis. 72–80; *Fick* v. *Mulholland*, 48 Wis. 413–419, 4 N. W. Rep. 346; *Schweitzer* v. *Connor*, 57 Wis. 177–182, 14 N. W. Rep. 922; *Blackley* v. *Sheldon*, 7 Johns. 32; *Labar* v. *Koplin*, 4 N. Y. 550; *Root* v. *Sherwood*, 6 Johns. 68; *Tyrrell* v. *Lockhart*, 3 Blackf. 136; *Smith* v. *Williams*, 22 Ill. 357; *Tifield* v. *Adams*, 3 Clarke, (Iowa,) 487; *Maclin* v. *Bloom*, 54 Miss. 365; *McRae* v. *State*, 4 S. W. Rep. 758; *Goodwin* v. *Appleton*, 22 Me. 453; *Nining* v. *Knox*, 8 Minn. 149, (Gil. 110:) *Bell* v *Hutchinson*, 2 McCord, 409; *Smith* v. *Keels*, 15 Rich. 318; *Edelen* v. *Thompson*, 2 Har. & G. 31, and numerous other cases. These cases show the power of the court as well as the jury over their verdict, and that the verdict which binds all parties is that at which the jury finally arrive and deliver to the court.

The question in this case is not whether the court committed any error in calling the attention of the jury to what appeared to him to be an inconsistency in their verdict, and requesting them to reconsider it, or in the other remarks he made to them at that time. That question might have arisen in the case if the jury had afterwards returned a verdict in favor of the plaintiff for such damages as were satisfactory to her, and judgment had been entered in her favor upon such new verdict, upon an appeal from such judgment by the defendant; but the jury having silently acquiesced in the request of the court to reconsider their verdict, and afterwards having declared that they were unable to agree upon any verdict, it cannot be said that their final conclusion in the case was that expressed in the verdict they had before presented to the court.

It is very clear to us that if the undisputed evidence was as the circuit judge in his return states it, then the verdict was clearly wrong, and it would have been the duty of the court to have set it aside, and granted a new trial, if he had received it as their verdict. See *Emmons* v. *Sheldon*, 26 Wis. 648; *Templeton* v. *Graves*, 59 Wis. 95–102, 17 N. W. Rep. 672.

By returning the verdict to the jury for further consideration, the jury have themselves, by a final failure to agree upon any verdict, accomplished the same result as would have been accomplished by receiving it, and then setting it aside and granting a new trial. Under the evidence in the case, it is very clear it was not a case for merely nominal damages. The verdict was very nearly as perverse as though the jury, after having found all the facts which entitled the plaintiff to a verdict, had found for the defendant. The consequences of the verdict first found by the jury were about the same. If judgment had been entered on it, she would have recovered one dollar damages, and the defendant would have been entitled to recover the costs of the action against her. Sections 2918 and 2920, Rev. St. The answer does not show that the relator is entitled to the relief asked for. The demurrer to the answers of the respondents is overruled.

Ross and others v. Miner and others.

(*Supreme Court of Michigan.* October 27, 1887.)

1. Fraud—In Purchase of Goods—Scheme to Prefer Creditor—Evidence.
   Defendant, a firm, purchased goods from plaintiff, in Detroit, Michigan, where it had opened a store. Before going to Detroit, defendant had been in business in Corunna, and contracted debts that were unpaid. After the purchase of the goods from plaintiff, it executed a chattel mortgage on them to N. for a debt contracted in Corunna, and, subsequently, made an assignment for the benefit of creditors. Plaintiff replevied the goods on the ground of fraud, alleging that opening the store in Detroit was only a scheme on defendant's part to obtain goods to liquidate the claim of N. *Held*, that it was proper to show how many goods defendant purchased on credit, from whom it bought them, if the parties with whom it dealt had any knowledge of N.'s claim, what assets it had when it came to Detroit, what money it put into the business afterwards, what goods it sold and what it did with the proceeds of such sales, and what its assets were when it failed, as tending to prove or to rebut the claim that the business in Detroit was a fraudulent scheme.
2. Same—Purchase with Intent to Mortgage to Third Party—Replevin.
   If a merchant buys goods, intending never to pay for them, and intending to avoid payment by mortgaging them to another creditor, in an action of replevin by the vendor, the fraud thus perpetrated will have the same effect in law as if defendant had made false and fraudulent representations as to his financial standing at the time of the purchase.
3. Same—Province of Jury.
   In an action by a vendor to replevy goods sold on credit, on the ground that defendant had fraudulently purchased them in order to mortgage them to a prior creditor, and had subsequently made an assignment for the benefit of his creditors, the agent of plaintiff, who sold the goods to defendant, testified that when he spoke to defendant in regard to a mortgage existing at the time of the sale, defendant falsely represented that such mortgage had been discharged, and that there was no other indebtedness against them. *Held*, that it was error to refuse to submit the question of fraud to the jury.

Error to circuit court, Wayne county; John J. Speed, Judge.

Replevin of goods sold by plaintiff to defendants on credit, on the ground that the purchase was fraudulent.

Prior to October, 1884, defendants, Miner and Agnew, had been in business at Corunna, in Shiawassee county. In the beginning of that month, they started in business at Detroit, in partnership with Alexander L. Kirby, as the firm of Kirby, Miner & Agnew, for the sale of teas, and other grocery articles of a similar character. The partners were to put in $2,500 in equal amounts, which was not completely done. On the fourth of December, 1884, the firm dissolved, and Miner and Agnew agreed to pay all the debts. On the third

of December, a chattel mortgage was made to Benjamin Miner and Mary E. Agnew, of Corunna, for $1,600, which was, on the next day, December 4th, discharged of record, and declared satisfied. This transaction is not explained, and is claimed to have been a fraud. On the eleventh of December, a chattel mortgage, covering the personal property and entire assets of the firm, was made to Albert T. Nichols, of Corunna, for $2,201, to secure several notes aggregating that amount; the first for $400, being dated September 26, 1884, at 3 months; one, October 9, 1884, at 60 days, for $1,150, marked "Duplicate;" one, December 2, 1884, at 30 days, for $200; one, December 5, 1884, at 30 days, for $101; and one, December 10, 1884, at 90 days, for $200. On the same day, December 11, 1884, a general assignment was made to Frank D. Andrus. It is claimed that the chattel mortgage was given at the same time to create a fraudulent preference, and Nichols, as a preferred security holder, will absorb all the assets, if successful. It does not appear that any false representations in fact, or any representations at all, were made when plaintiffs sold the teas.

Albert J. Chapman, for plaintiffs, appellants. *Corliss & Andrus*, for defendants.

MORSE, J. The controversy in this case, and the principal facts relating thereto, are set out in the opinion filed when the cause was first brought before us. See 31 N. W. Rep. 185. Another trial has taken place since then in the circuit, upon which trial the Hon. WILLIAM JENNISON directed a verdict for the defendants. He also shut out testimony tending to show the dealings of the defendants, Miner and Agnew, while in business at Detroit, and before they made a general assignment for the benefit of their creditors. Plaintiffs sold certain teas on the sixteenth and twenty-fourth of November, 1884, to the firm of Kirby, Miner & Agnew. Their theory, as stated by their counsel upon the trial, was that Miner and Agnew came to Detroit from Corunna, for the express purpose of ostensibly starting a *bona fide* business as retail grocers, but really to get all the credit they could, and then use the goods, obtained by such credit, to pay a claim of A. T. Nichols. There was evidence admitted sufficient to go to the jury to prove this fraudulent purpose. When Kirby went out of the firm he only took out what he put in. The goods on hand at the time of the assignment brought some $400 or $500 less than Nichols' claim. On the third of December, Miner and Agnew, without the knowledge of Kirby, mortgaged all their stock and fixtures to relatives, in the sum of $1,600. The next day the mortgage was discharged of record. The discharge stated that it was fully paid and satisfied. On the eleventh of December, Kirby having gone out of the firm, Miner and Agnew mortgaged the entire assets of the firm to Albert T. Nichols, for $2,201. One thousand seven hundred dollars of the notes, which this mortgage purported to secure, were in existence, by their dates, before the $1,600 mortgage was discharged, and marked paid, and the notes were indorsed by the parties, or some of them, to whom the first mortgage was executed. This $1,700, if ever a good-faith debt, was owing to Nichols before Miner and Agnew came to Detroit. It would look as if the first mortgage was a sham transaction, and if the debt to Nichols was *bona fide*, it would yet appear, as far this record is concerned, that it took all the goods they secured after they came to Detroit, to pay about the amount of their indebtedness to Nichols that existed before they left Corunna, and gives some color, at least, to the theory of plaintiffs' counsel.

Fraud is seldom capable of direct proof. It must be established by facts and circumstances taken together, and the natural inferences to be drawn therefrom, which will satisfy the ordinary unbiased man, either as a juror, or outside of the jury-box, that it exists. It was competent to show the whole business of Miner and Agnew, as far as it could be done, after they came to De-

troit, and up to the time of the assignment. It was proper, to this end, to show how many goods they purchased on credit, and of whom they purchased them, and whether the parties with whom they dealt had any knowledge or not of this alleged indebtedness to Nichols. This could be followed up by showing what their assets were when they came to Detroit, how much money, if any, they put in the business thereafter, how many goods were sold, and what was done with the proceeds thereof, and what were their assets and liabilities upon the day of their failure, as tending to show that their business in Detroit was but a scheme to acquire goods with which to liquidate an old debt, even if it was a valid one, to Nichols, or as rebutting such a presumption. Great latitude in the search for fraud must necessarily be allowed, or the ends of justice are liable to be defeated. If the debt to Nichols was a valid one, and their business in Detroit an honest venture, such an investigation, with the explanations the defendants themselves could furnish, could not harm them.

On the other hand, if they bought the teas of plaintiffs with the intent never to pay for them, but to swallow them and all their other property by this mortgage to Nichols, even though his debt was a valid one, it would be a fraud upon plaintiffs which would avoid the sale of the teas. And we know of no better way to ascertain the truth than that above indicated, and which plaintiffs' counsel undertook to do when he offered the testimony of Donnan and others to show how many goods they sold defendants, Miner and Agnew, and whether or not they had any knowledge of the Nichols indebtedness. The testimony was improperly rejected.

Frank E. Smith, who sold the teas as agent of plaintiffs, testifies that he knew nothing of this indebtedness when he sold the goods. He afterwards discovered this first mortgage of $1,600, and went to see Miner and Agnew about it. They told him that this mortgage had been discharged, and that there was no other indebtedness against them. This was a false statement, if the Nichols mortgage secured a valid debt, as shown by the notes. This was, also, a circumstance tending to show fraud from the beginning. Upon the testimony admitted, and in the case, there being no evidence on the part of the defendants explaining these transactions, the plaintiffs should have been permitted to submit the question of fraud to the jury.

It is contended on the part of the defendant that as it stands admitted that the defendants made no representations of their financial standing at the time the teas were sold, there was no fraud practiced upon them at that time, and that there was no evidence tending to show any intent on the part of defendants at that time to defraud plaintiffs. We think we have disposed of this argument in what we have already said. If they bought the goods intending never to pay for them, and intending to get rid of such payment by the interposition of this Nichols mortgage between the plaintiffs and defendants' assets, then it would be a fraud upon plaintiffs, having an equal effect in law, as regards this suit, as if they had made false and fraudulent representations as to their financial standing at the time they bought the teas.

The judgment of the circuit court for the county of Wayne must be reversed, with costs, and a new trial granted.

SHERWOOD and CHAMPLIN, JJ., concurred.

SEYMOUR and another *v.* PETERS.

(Supreme Court of Michigan. October 27, 1887.)

1. TAXATION—ASSESSMENT ROLLS—COPIES OF ORIGINAL ROLLS.
The Michigan statutes relating to taxation require that the taxes shall be entered and extended upon the original assessment rolls in the hands of the supervisors,

and that the assessment rolls and tax-lists sent to the treasurer shall be copies of the original rolls; and a failure to observe these requirements is fatal, and invalidates the tax deeds founded upon the taxes extended upon the collection rolls.

2. SAME—DELINQUENT LIST—AFFIDAVIT OF TREASURER—VALIDITY OF TAX TITLE.
Where the return of delinquent taxes is not subscribed nor sworn to by the township treasurer, a tax title for such taxes is void.

3. SAME—HIGHWAY TAX—EXCESSIVE ASSESSMENT.
The commissioners of highways levied a tax of one mill on the dollar for highway purposes. By the Michigan statute the commissioners are required to assess upon the valuation appearing on the assessment roll of the preceding year. The valuation of certain lands was $50, and the assessed tax on these lands should have been 5 cents in addition to the tax of 50 cents for highway labor, whereas the lands were taxed $1. *Held*, that the excess made the tax void.

4. SAME—UNOCCUPIED LANDS OF NON-RESIDENTS—SEPARATE ROLL.
The provisions of the statutes requiring that all lands unoccupied and not claimed to be owned by any resident of the township where they are situated, and not exempt from taxation, shall be entered on a part of the roll separate from that on which estates of residents are entered, are mandatory, and tax titles based on assessments made in disregard of them are invalid.

5. SAME—TAX DEEDS PRIOR TO 1869—STATUTE PROSPECTIVE.
The right to contest the validity of tax deeds prior to 1869 is not abridged by How. St. Mich. § 1166, providing that no one shall question a title acquired by the auditor general's deed, without proving that he, or the person through whom he claims, had the title to the land at the time of the sale thereof for non-payment of taxes; for the statute was not passed till 1869, and the act was prospective. *Clark* v. *Hall*, 19 Mich. 373, followed.

6. TROVER AND CONVERSION—TITLE IN THIRD PARTY.
In an action of trover it is competent for defendant to impeach plaintiff's right of action by showing the title to the chattel to be in a third person, a stranger to the action.

Error to circuit court, Manistee county; J. BYRON JUDKINS, Judge.

A. J. Dovel, for defendant, appellant. *Ramsdell & Benedict* and *A. V. McAlvay*, for appellees.

CHAMPLIN, J. The action in this case is trover for a quantity of pine saw-logs. The suit was commenced by declaration filed and served on the second day of February, 1886. The conversion of the logs is alleged to have occurred on the thirtieth day of January, 1886. The logs were cut by plaintiffs, marked with their mark, and deposited upon skidways near a railroad owned and operated by defendant, from whence they were to be transported by rail to Manistee lake. They were cut from the S. E. ¼ of the S. E. ¼ of section 5, in township 20 N., range 17 W. Defendant, claiming to have bought the logs from one Carrie L. Munn some time in January, 1886, took possession of the logs, and removed them in the night-time, cut out the plaintiff's marks, and placed his own upon them. The plaintiffs claimed ownership of the logs through tax titles from the state of Michigan, by auditor general's deed, for delinquent taxes for the years 1859 to 1864, both inclusive. The defendant attacked the validity of these tax titles for several reasons, which will be stated further on.

Counsel for plaintiffs deny the right of the defendant to contest the validity of the plaintiffs' tax deeds, and he invokes the provision of section 1166 of Howell's Statutes to support his position. This section of the statute was not enacted until 1869, and stood as section 164 of that act. That act was prospective, and the point raised was adjudicated in *Clark* v. *Hall*, 19 Mich. 373, and need not be further noticed.

Objection is made to the validity of the tax deeds for the reason that corrected assessment rolls in the hands of the supervisors did not contain the taxes assessed against the several parcels of land in the township, and the assessment rolls and tax-list placed in the hands of the treasurer for collection for the years 1859, 1861, and 1863, were not copies of the assessment rolls remaining in the hands of the supervisors. It appears that the supervisor of the

town of Freesoil, in which these lands were situated, did not in any of the years mentioned extend the taxes upon his corrected assessment roll, except one year, and then only partially so, and in that case the taxes on the corrected roll did not agree with those upon the copy of the assessment roll and tax-list delivered to the township treasurer. It is claimed by defendant's counsel that this is a fatal defect, and renders the levy and tax deeds void. On the other hand, plaintiffs' counsel contend that the law neither required nor contemplated that the supervisor should extend the taxes assessed by him upon the corrected assessment roll, but only that he should copy the assessments upon such roll as corrected, and extend the taxes upon such copy. The question is an important one, for, if the defendant's position is correct, it disposes of the merits of the controversy, for the reason that the titles through which the plaintiffs claim would thereby be invalid, so far as it depends upon those years. It certainly has been the understanding of this court that the taxes assessed must be extended upon the corrected assessment roll which the supervisor receives from the board of supervisors, and which the law requires shall remain in his office. In *Ferton* v. *Feller*, 33 Mich. 203, Mr. Justice GRAVES, speaking for the court, said: "The roll first made by the supervisor is carried before the board, and after final correction there, and after its authentication by the chairman, it is delivered to the supervisor, who is required to file and keep it in his office. Section 995, Comp. Laws 1857. No other roll is brought to the attention of the board, and this alone receives the sanction of the board. With this before him, and the requisite certificates and statements in regard to the taxes to be levied, and their destination, the supervisor is required to proceed to assess according and in proportion to the particular and individual estimate and valuation specified in the assessment roll. Section 999, Comp. Laws 1857. He is next to make the collection roll, and this is required to be a copy of the corrected roll in his office. Section 1002, Comp. Laws 1857. As this correspondence is indispensable in the first instance, its continuance is equally indispensable. The symmetry of the proceedings, the consistency of the records, and the dependence of the collection roll upon the first roll and their legal connection, all alike require it. As the first is to remain in the supervisor's office as a public record or memorial, so the collection roll is to go ultimately to the county treasurer's office for the same purpose. Section 1023, Comp. Laws 1857. The entire theory of the system and all the regulations contemplate that these documents shall be and continue substantially alike, and in all essential particulars speak the same language when referred to. No lawful change can be made in the collection roll, unless warranted by the state of the roll having the sanction of the board of supervisors, and consequently the collection roll cannot legally be changed so as to be in substantial disagreement with the other."

Notwithstanding this decision, which is directly in point, counsel for plaintiffs insist that we have misconceived the intention of the legislature, and the language of the law relative to the assessment and collection of taxes, and that it did not require the assessment of the taxes to be entered upon the original assessment roll. And they call attention to the language of the statute, which designates the copy to be delivered to the treasurer for collection as the "assessment roll and tax-list." Sections 818, 819, 821, Comp. Laws 1857. It is so designated in these sections, but that is merely to distinguish it from the corrected assessment roll from which it is copied. Section 815, Comp. Laws 1857, provides that "the supervisor of each township shall proceed to assess taxes for the amount specified in such certificate, together with the amount of money to be raised by his township, adding thereto, and to all other taxes required by law to be assessed by him, not more than four, nor less than two per cent. for collecting expenses upon the taxable property in the township, according and in proportion to the individual and particular estimate and valuation as specified in the assessment roll of the township for

the year." The supervisor is required to assess, that is, to set, fix, or charge a certain sum to each tax-payer in the proportion named. When shall he set these sums or enter these charges? Certainly not upon fugitive sheets of paper, nor in the copy of the assessment roll, for as yet the statute has said nothing of the copy of the corrected roll. That is made a subsequent duty by a succeeding section. The law has always required the supervisors to make their assessments upon blanks furnished by the auditor general, and it is common knowledge that the blanks furnished, whereon to assess the property, do and always have contained the proper columns for extending the tax upon and against the original assessment. In arriving at the intention of the legislature the whole law must be taken and construed together. In so doing, it is beyond question that the legislature intended that the taxes should be entered upon the original assessment roll. This is apparent from section 830, which reads as follows: "The production of any assessment roll on the trial of any action brought for the recovery of a tax therein assessed may, upon proof that it is the original assessment roll, or the assessment roll with the warrant annexed, of the township named as the plaintiff in such action, be read or used in evidence; and if it shall appear from said assessment roll that there is a tax therein assessed against the defendant in such suit, it shall be *prima facie* evidence of the legality and regularity of the assessment of the same," etc. It there appears that the legislature intended that the tax should be entered upon the original roll, and that the roll to which the warrant is annexed should be a copy thereof, and either shall be *prima facie* evidence of the tax therein assessed. This provision relative to the correspondence of the original and copy of the assessment rolls, is enacted for the benefit and protection of the tax-payer, as well as for the protection of the public. It was designed to protect the tax-payer against unauthorized meddling with the amount of taxes assessed against him, after the roll has passed from the hands of the supervisor, as was the case of *Ferton* v. *Feller*. It is also designed to protect the township against the loss or destruction of the collection roll, and to afford means for the collection of the taxes assessed. It was not, therefore, a mere irregularity in the procedure, but a fundamental requirement, which cannot be dispensed with, and the omission to observe this requirement invalidated the tax deeds founded upon the taxes extended upon the collection roll.

The counsel for defendant also claimed that the highway tax for 1860 was excessive. He introduced the records of the commissioners of highways held in May, by which it appears that they voted to levy a tax of one mill on the dollar upon the valuation of the real and personal property in the town for highway purposes. He also introduced the records of the township board, to show that no highway tax was voted by the township board. By the statute, the valuations upon which the commissioners are authorized to assess for highway purposes are those appearing upon the assessment roll of the preceding year. This valuation of the parcel in question was $50. The one-mill tax authorized to be assessed would be five cents. It was assessed upon the roll for highway tax for 1860, at $1. The law would authorize an assessment for highway labor of $1 on each $100 of valuation, and this would authorize an assessment against this land of 50 cents, making a total of 55 cents. The excess rendered the tax void. For the year 1862, the return of delinquent taxes was not subscribed nor sworn to by the township treasurer. The tax title for this year was invalid for that reason.

The bill of exceptions contains a statement that "the non-resident lands were not assessed in a separate part of the roll from the resident lands in any of the foregoing assessment or tax-rolls for any of the years." The law required that all lands unoccupied, and not claimed to be owned by any resident of the township where they are situated, and not exempt from taxation, should be "entered on a part of the roll separate from that upon which the estates of residents are entered." This court has held this provision man-

datory, and that, when it was disregarded, the title based upon assessments so made is invalid. *Hanscom* v. *Hinman*, 30 Mich. 419; *Rayner* v. *Lee*, 20 Mich. 384.

Defendant offered to show title to the logs in a third person, a stranger to the action. Plaintiffs contend that this is not permissible in an action of trover. The law has been settled otherwise in this state. Such testimony was admissible. *Ribble* v. *Lawrence*, 51 Mich. 569, 17 N. W. Rep. 60, and cases cited.

Other objections are urged against the validity of the tax deeds introduced by plaintiffs in evidence, but it is unnecessary to examine them, as those pointed out are sufficient to show that the circuit judge erred when he instructed the jury that the tax deeds were valid.

The judgment must be reversed, and a new trial ordered.

SHERWOOD and MORSE, JJ., concurred.

RAWLINGS *v.* COLE and another.

(*Supreme Court of Michigan.* November 3, 1887.)

1. PLEADING—NOTICE OF DEFENSE—SPECIAL PLEA.
   Under the Michigan practice, (How. St. § 7363,) notice of an intended defense must be given wherever the common law would require a special plea.
2. SAME—ACTION ON NOTE—GENERAL ISSUE—EVIDENCE OF RELATIONSHIP AND RELEASE OF SURETY.
   In an action on a promissory note one of the joint defendants offered to prove that he signed as surety only, and was released by an unauthorized extension of time to the principal debtor. *Held*, not admissible under the general issue, no notice having been given.

Error to circuit court, St. Clair County; HERMAN W. STEVENS, Judge.

W. E. Leonard, (*W. M. Cline*, of counsel,) for defendant, appellant. *P. H. Phillips*, for appellees.

SHERWOOD, J. The plaintiff sued the defendants in justice's court in *assumpsit* on the following promissory note:

"$50. PORT HURON, MICH., January 17, 1884.

"One year after date we promise to pay to the order of Robert S. Rawlings fifty dollars, at the First National Bank, Port Huron, Mich., value received, with interest at 7 per cent.

HENRY COLE.
his
"CHAS. X COLE."
mark.

Two payments of $25 each were indorsed upon the note. Henry Cole pleaded the general issue. The defendant Charles Cole filed the plea of the general issue, and an affidavit denying his execution of the note under oath. Also gave notice that if he ever did sign the note, he did so as an indorser Upon these pleadings the cause was tried before the justice, who rendered judgment for the plaintiff for $57.15, and $10 costs. On the trial in the circuit before a jury, the verdict was for $60.34, in favor of plaintiff, and from the judgment rendered thereon the defendant Charles Cole brings error. Upon the trial, after the plaintiff had introduced his proofs and rested, the defendant offered to show that he signed the note as surety, and that he was released from any liability on said note by reason of a contract made by the plaintiff with the defendant Henry Cole to extend the time of payment of said note, without the consent of the surety, one year. To the introduction of this testimony the plaintiff objected, on the ground that no notice had been given of this defense, and that the testimony was inadmissible under the general issue. The court sustained the objection, and counsel for defendant excepted. This ruling includes the substance of all the assignments of error in the case.

The circuit judge was correct in his ruling. Under the common-law rule, this defense must have been specially pleaded before it could be introduced in evidence, and the notice under our practice is substituted for the special plea. How St. § 7363; Archb. Crim. Pl. 179; *Rosenbury* v. *Angell*, 6 Mich. 521.

The general issue is a denial of all the material facts and allegations contained in the plaintiff's declaration. The material matters contained in a declaration are those facts and allegations necessary to be proved in making out the plaintiff's case. The testimony offered was in no sense a denial of the matters necessary to be proved by the plaintiff in making out a liability on the part of the defendant. The proof offered was for the purpose of establishing another and different contract from the one declared upon, made at a different time and place and between different persons. The plea and notice should have informed the plaintiff that such a defense was intended, that he might be prepared to meet it, if untrue. *Miller* v. *Finley*, 26 Mich. 249; *Wheeler* v. *Curtis*, 11 Wend. 654; *Bank* v. *Weed*, 19 Johns. 300; *Hollister* v. *Bender*, 1 Hill, 150; 1 Chit. Pl. 506, and cases cited; *Taylor* v. *Hilary*, 1 Cromp. M. & R. 741; *Taylor* v. *Hilary*, 3 Dowl. 461; *Harden* v. *Clifton*, 1 Gale & D. 22.

There was no error in the ruling of the court, and the judgment must be affirmed.

CHAMPLIN and MORSE, JJ., concurred.

SHARP v. TOWNSHIP OF EVERGREEN.

(*Supreme Court of Michigan.* November 3, 1887.)

1. HIGHWAYS—DEFECTS—LINE ROAD—LIABILITY OF TOWNSHIP.
   A state road ran north and south on the line between two townships. Plaintiff was injured in an accident caused by the unsafe condition of the road, and occurring on that portion of the road which had been assigned, by the action of proper officials, to the care and repair of the defendant township. The Michigan act of 1836 placed all state roads under the control, care, and supervision of the several townships "through which the same shall pass." How. St. § 1445, makes it the duty of townships to keep in good repair the roads in their jurisdiction; and section 1442 gives a right of action to persons injured by neglect to keep roads in safe and good condition. *Held* that, under these statutes, the defendant was liable.
2. SUNDAY—INJURY RECEIVED WHILE TRAVELING.
   Plaintiff was driving on a township road on Sunday, for a lawful purpose, and was injured by an accident resulting from the township's neglect to keep the road in good and safe repair. *Held*, that the township was liable.[1]

Error to circuit court, Montcalm county; VERNON H. SMITH, Judge.

Lemuel Clute, (*N J Brown*, of counsel,) for defendant, appellant. *Ellsworth & Barden*, for appellee.

SHERWOOD, J. The state road running from Ionia to Houghton lake was built by the state under Act No. 117 of the Laws of 1859, p. 310. It runs north and south on the line between the townships of Evergreen and Sidney, in the county of Montcalm. Evergreen lies on the east, and Sidney on the west, side of the road. The plaintiff is the wife of James Sharp, and they reside in the city of Stanton. Mr. Sharp owned a farm in the town of Bushnell, about eight miles from Stanton, and on Sunday the eighth day of July, 1883, Mrs. Sharp rode out to their farm with her husband, in the morning, and on returning in the afternoon came over the road in question, and at a point about two miles south of Stanton they descended a sand hill in the highway, where the road had been raised to the height of 15 feet, and left about 16 feet wide, unprotected on either side by any railings or other structure to prevent persons or teams from going off the bank at the sides in case of accident.

[1]See note at end of case.

When about half way down the hill, the horse after which the plaintiff and her husband and child were riding shied to the west side of the track, which was planked at this point, and, becoming unmanageable, went off the embankment, carrying with him and the buggy the plaintiff, her husband, and child, seriously injuring Mrs. Sharp, and disabling her from performing any kind of labor, and entailing upon her much pain and suffering. It is for this injury she brings her suit against the defendant, under Act No. 214, Laws of 1879, and amendments thereto made in Act No. 244, Laws of 1885, counting upon the negligence of the defendant in not providing proper safeguards at said embankment to prevent persons and horses from being precipitated down the precipice. The defendant pleaded the general issue. A trial was had in the Montcalm circuit, which resulted in a verdict and judgment for the plaintiff for $1,500. The defendant brings error.

At the close of the trial counsel for the defendant asked the court to charge the jury as follows:

"(1) There is no evidence in the case which shows the township was under any legal obligation to keep the road in repair at the place where the accident occurred, and your verdict should be for the defendant. (2) The undisputed evidence shows that the road at the place where the injury occurred was a state road not within the jurisdiction and control of defendant, therefore your verdict should be for defendant. (3) The plaintiff avers in his declaration that there was no railing or other protection provided at any time to prevent horses or teams from running off from said plank road on the west side thereof, and that it was the duty of defendant to have built and maintained a railing or guard at the place where the accident occurred; but the road was as the state built it, so far as the railing is concerned, and we have no statute which imposes any duty on townships to complete state roads, and defendant was not in fault for leaving the road in question without a railing at the place named in the declaration, and your verdict should be for the defendant. (4) If you find the injury to plaintiff occurred in part because of the road not having a railing, and in part because of the careless driving of a blind horse, plaintiff cannot recover. And in considering this question of contributory negligence you should find that greater care should be used in driving a blind horse than one that is not blind. (5) Plaintiff testified that she had been to see her daughter regarding threshing; that she went on Sunday, and was returning on Sunday, the day of the accident. She was not, then, under the terms of our statute, which forbids any one performing any labor, business, or work on Sunday, entitled to recover for any damages she sustained while engaged in violating our Sunday laws, which are intended to promote morality, and to keep people from engaging in any work other than work of necessity or charity, and your verdict should be for defendant. (6) The burden of proof is on the plaintiff to show that the accident did not occur on account of careless driving, and if you find in this point the evidence equally balanced, your verdict should be for defendant."

The court refused to charge as requested in numbers two, three, and five, and counsel for defendant excepted to these several rulings. These requests and the rulings thereon raise all the questions presented in the case. Upon these rulings also depended the questions upon the admissibility of testimony.

From the record it appears that the place where the plaintiff was injured was in the highway, and in the township of Sidney, but it still further appears that, under a verbal agreement made by the commissioners of the two townships, after the road was laid out and built, it was arranged that the township of Evergreen should keep that portion of said road where the accident occurred in repair, and the defendant's commissioner took possession of the same for that purpose more than 20 years since, and that from that time to the present the township and its commissioners have kept that portion assigned to it in the division in repair. That in the division made by the com-

missioners of the two townships each township was assigned alternate miles across the end of the township for care and repairs. This division of the highway, although not recorded, has always been acted upon, it would appear, by the townships. How. St. § 1307, requires such division to be made of town-line roads for the purpose of care and repairs. Section 11 of the Laws of 1859 provides that no moneys of the state shall be used in the construction of state roads, except that derived from the sale of swamp lands.

The following is the section of the statute referred to, requiring division of the road to be made and kept in repair, and the township's liability therefor, upon township lines: "Whenever a line road shall have been laid out and established pursuant to the last two preceding sections, the officers or authority having jurisdiction in the premises shall forthwith jointly determine as to the time when the same shall be opened and improved, and shall at the same time determine and allot what portion shall be opened, improved, and maintained by either of such townships or municipalities; and such township or municipality shall have all the rights, and be subject to all the liabilities, in relation to the part of such road so allotted, as if the same was located wholly in such township or municipality, and the damages which may be assessed in any case, together with the costs and expenses of the proceedings, shall be apportioned by the joint action of such authorities to, and paid by, the townships or municipal corporations on the line between which said line road may be located, in proportion to the benefit to be derived therefrom by such townships or municipal corporations." The other two sections refer to the laying out of highways upon the line between townships by the town authorities.

In 1836 the legislature of our state placed all state roads under the control, care, and supervision of the commissioner of highways in the several townships. The statute reads as follows: "All state roads, which are now or may hereafter be laid out in this state, shall be under the care of the commissioners of highways of the several townships through which the same shall pass, and subject to be by them opened and kept in repair in the same manner as township roads, but such state roads shall be altered or discontinued only by the boards of supervisors of the counties in which they may be situated." See section 1321, How. St. Section 1445, How. St., makes it the duty of townships to keep in good repair, so that they shall be safe and convenient for public travel at all times, all public highways, streets, bridges, crosswalks, and culverts that are within their jurisdiction, and under their care and control. And section 1442 provides that "Any person or persons sustaining bodily injury upon any of the public highways or streets in this state, by reason of neglect to keep such public highways or streets, and all bridges, cross-walks, and culverts on the same, in good repair, and in a condition reasonably safe and fit for travel, by the township, village, city, or corporation whose corporate authority extends over such public highway, street, bridge, cross-walk, or culvert, and whose duty it is to keep the same in good repair, such township, village, city, or corporation shall be liable to, and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction."

Under the facts above stated, and the several statutes cited, the plaintiff claims it was the duty of the township of Evergreen to keep the road where she was injured in repair, and properly protected, so as to prevent such accidents and injury as overtook the plaintiff when she was precipitated down the embankment and injured. The defendant claims that these several statutes impose no duty to keep the state road in repair by said township, and have no application to a line road laid out and built by the state.

The verdict of the jury has settled the question of negligence of the parties in favor of the plaintiff, but if the statutes do not apply to state roads, the

plaintiff cannot recover. I think, however, that a fair and reasonable construction of these several statutes places the said line road under the jurisdiction of the townships between which it passes, and, under the testimony, that portion of the road where the plaintiff received her injury, under the jurisdiction of the township of Evergreen, and its care and control under its commissioner; and that said township is liable to this plaintiff for any injury she may have received, without her fault, in consequence of the neglect of said township or its commissioner to keep the same in good repair; and whether it did or not, the determination of the jury upon that subject was final. There is no other question needing consideration in the case.

The plaintiff had the right to travel on this town-line road on Sunday, as well as upon any other day, for any lawful purpose, and the duty of the township, in case of injury through its neglect to persons or property, is the same on that day, under such circumstances, as on any other, under the statute.

The judgment must be affirmed.

CHAMPLIN and MORSE, JJ., concurred.

NOTE.

SUNDAY—LIABILITY FOR INJURIES RECEIVED ON. One injured while traveling on Sunday, through the negligence of another, is not required to show, in order to recover damages, that he was engaged in a work of necessity at the time of the accident. Black v. City of Lewiston, (Idaho,) 13 Pac. Rep. 80. The right of recovery exists in such a case though the plaintiff was traveling for pleasure, Knowlton v. Railway Co., (Wis.) 18 N. W. Rep. 17; and in violation of statute, Opsahl v. Judd, (Minn.) 14 N. W. Rep. 575. So one who receives injuries while working on Sunday, in violation of the Sunday laws, is not precluded by that fact alone from recovery. Railway Co. v. Frawley, (Ind.) 9 N. E. Rep. 594. And under the *Nebraska* statute, which prohibits common labor on Sunday, but permits a railroad company to run necessary trains, it is held that a section hand working on that day to put the track in passable condition for such trains, may recover for injuries received through the negligence of the company Johnson v. Railroad Co., 26 N. W. Rep. 347. So, on the other hand, a railroad company does not become liable for injuries inflicted on stock on Sunday, from the mere fact that in running its trains on that day it is violating a statute which imposes a fine for working on Sunday. Tingle v. Railway Co., (Iowa,) 14 N. W. Rep. 320. But under the laws of *Massachusetts* it has been held that, unless engaged in a work of necessity or charity, a plaintiff could not recover for injuries received on Sunday, without regard to the question of the negligence of the defendant. Read v. Railroad Co., 4 N. E. Rep. 227.

PETRIE and others *v.* LANE.

(*Supreme Court of Michigan.* November 3, 1887.)

DAMAGES—BREACH OF CONTRACT BEFORE PERFORMANCE BY PLAINTIFF—PROFITS.

Plaintiffs owned a saw-mill, and contracted to saw 4,000,000 feet of logs to be furnished by defendant. In an action for defendant's breach of contract in not furnishing the logs as agreed, plaintiffs filed a bill of particulars, claiming for "loss of profits on sawing four million feet of logs," etc., and "loss of profits on account of defendant's failure to perform his contract." They did not offer to show that they had incurred actual damage, by reason of expenses in preparing to perform the contract, or stoppage of the mill for want of work, nor claim nominal damages. *Held*, that under their bill of particulars, plaintiffs could not recover.

Error to circuit court, Muskegon county; FRED. J. RUSSELL, Judge.

Delano & Bunker, for plaintiffs, appellants. *F. W. Cook* and *Fletcher & Wanty*, for appellee.

MORSE, J. In this case the plaintiffs set out in their declaration an agreement with the defendant that the defendant should deliver to the plaintiffs at their saw-mill, situated in the village of North Muskegon, to be sawed into lumber and piled on the dock of plaintiffs, as the defendant should direct, all the pine saw-logs belonging to defendant at that time in the store booms of the Muskegon Booming Company, at the city of Muskegon, as well as all the

pine saw-logs which should thereafter, by the defendant, be floated down the Muskegon river, during the sawing season of 1882, in all about 4,000,000 feet; and that the plaintiffs should manufacture the same into lumber, and should receive therefor the sum of $2 per thousand, board measure, for all lumber so manufactured and flat piled on their docks, and $2.25 per thousand for the lumber so manufactured and cross piled. The same to be sawed and piled during the sawing season of 1882, as the defendant should direct. The contract was oral, and made on the twenty-first of July, 1882. They also aver that on the same day the defendant notified the booming company, in writing, to deliver his logs to plaintiffs. And that they received from said defendant, under said agreement, in partial fulfillment thereof, 200,000 feet of logs delivered by the booming company to them. That they prepared and procured at great expense, everything essential, necessary, or needful, to the full and perfect discharge of the agreement upon their part. But that the said defendant caused the logs so delivered to plaintiffs by the booming company, to be surreptitiously removed from the possession of said plaintiffs, and out of their custody and control, and did not, and would not perform his contract, but wholly neglected and refused so to do, without any reason or excuse whatever. Whereby, and by means whereof, the mill of said plaintiffs was, from the time of the default of defendant, to-wit, July 24, 1882, to the close of the sawing season of that year, more or less stopped and unable to work, and said plaintiffs put to great expense, and made to suffer great losses.

They further aver that the actual costs and expense to them of manufacturing said logs into lumber and flat piling the same on their docks would not have exceeded the sum of $1 per thousand feet, board measure, and would not have exceeded the sum of $1.25 per thousand for sawing and cross piling, and that they could and would have made in the sawing and piling of said lumber, under said contract, a profit of one dollar per thousand feet, board measure, on each and every thousand feet thereof, whereby they have suffered damages in the sum of $10,000, and therefore they bring suit, etc. Upon demand of defendant, who pleaded the general issue, the plaintiffs filed the following bill of particulars of their claim under said declaration:

"SIR: Take notice that the following is a bill of particulars of the plaintiff's demand in this cause, and for the recovery of which this action is brought:

1882. Loss of profits on sawing four million feet of logs to be furnished by defendant as per verbal contract with defendant, as set forth in plaintiffs' declaration, @ $1 per M., - - $4,000

1882. Loss of profits on account of defendant's failure to perform his verbal contract, as set forth in plaintiffs' declaration, $5,000

"*Dated Muskegon, Michigan, March* 10, 1883.

"Yours, etc.,

"MCLAUGHLIN, DELANO & BUNKER, Plaintiffs' Attorneys.

"*To R. J. Macdonald, Esq., Defendant's Attorney.*"

Upon the trial of the cause in the circuit court for the county of Muskegon, before a jury, the plaintiffs first called, as a witness, Albert H. Petrie. Upon his being sworn, the counsel for the defendant interposed an objection that the plaintiffs were not entitled to the admission of any proof under their declaration, and the bill of particulars furnished in the cause. Upon inquiry by the court, Mr. Bunker, one of the counsel for the plaintiffs, stated that the only claim they had was the one set up in the bill of particulars, and that he knew of no other injury which the plaintiffs had suffered. The court then said: "If you desire to amend your bill of particulars, I think I will allow you to do so." *Mr. Bunker.* "We have no desire to amend the bill of particulars." The court then ruled that under the bill of particulars, as filed, the plaintiffs could not recover. The counsel for plaintiffs were then permitted to make offer, as fully as they desired, of the proofs they intended to

adduce in support of their case. The offer, as made by them, was to prove the contract as set out in their declaration, and a breach of the same as therein set forth, and that, if they had been allowed to perform the agreement, they could have made in profits the difference between $1.16 per thousand feet, reduced by $320, and the total value of the slabs, and two dollars, the contract price. *The Court.* "The damage you claim is for loss of profits." *Mr. Bunker.* "The damage we claim is loss of profits as stated in the bill of particulars." The court, thereupon, instructed the jury to find a verdict for the defendant, and upon such verdict, judgment passed against the plaintiffs, who bring the case here for review.

It will be noticed that the plaintiffs did not offer to show that they had incurred any damage by reason of expenses, necessarily incurred in getting ready to perform this contract, or that the mill had been stopped, or laid up for any time for want of work, by reason of the breach of the contract on defendant's part. Nor did they even claim nominal damages. They put themselves deliberately upon the naked proposition that as a matter of law they were entitled to the profits upon all the logs mentioned in said contract, independent of any fact or thing showing actual damages. In other words, although they incurred no expense on account of preparing to perform this contract, and their mill was not closed because of the breach of the same, but was at work all the time manufacturing other lumber to its fullest capacity, they were, nevertheless, entitled to the profits they might have made in the fulfillment of this contract, and also all the profits they might make in the same time in sawing other lumber, thereby in effect doubling the capacity of the mill, and increasing its profits twofold.

The compensation arrived at, and which the law intends to give in an action for a breach of a contract or agreement of this kind, is the damages actually incurred on account of such breach. The law seeks to make good the party injured by such breach, and to put him, as far as possible, in the same condition that he would have been in had the contract been performed. It is not intended that he shall profit by the breach, and receive compensation for injuries that he has not suffered. Here actual damages were in effect disclaimed, and the circuit judge was right in his ruling. The damages sought to be recovered must be considered as quite uncertain and speculative. But I do not consider it necessary as the case stands, to discuss the question, whether under any circumstances such profits might or might not be recovered. The cases bearing upon this question, in this state, do not seem favorably inclined towards allowing the recovery of mere prospective profits in the running of a saw-mill. They are said to be "proverbially uncertain, indefinite, and contingent." *Allis* v. *McLean*, 48 Mich. 433, 12 N. W. Rep. 640; *Talcott* v. *Crippen*, 52 Mich. 633, 18 N. W. Rep. 392; *Petrie* v. *Lane*, 58 Mich. 527, 25 N. W. Rep. 504.

The judgment is affirmed with costs.

SHERWOOD and CHAMPLIN, JJ., concurred CAMPBELL, C. J., did not sit.

PEOPLE *v.* COUGHLIN.

(*Supreme Court of Michigan.* November 3, 1887.)

1. HOMICIDE—DRAWING JURY—TOWNSHIP NOT REPRESENTED—CHALLENGE.
The defendant in a prosecution for murder challenged the array because two townships of the county (including the vicinage of the crime) were not represented on the panel. The order in this case directed a jury to be drawn from the body of the county, as authorized by How. St. Mich. § 7578. It was not shown that the officers who drew the jury had arbitrarily left out the townships from which jurors were not drawn, nor that the lists of such townships had not already been exhausted. *Held*, that the challenge was properly overruled.

2. SAME—PRESUMPTION THAT OFFICER DRAWING JURY DID HIS DUTY.
In the absence of evidence to the contrary, it will be presumed that the officers charged with the drawing and summoning of jurors have faithfully and correctly performed their duty in the premises.

3. SAME—CHALLENGE TO ARRAY—SUMMONING TOO MANY JURORS.
How. St. Mich. § 7578, authorizes an order of court for the summoning of a jury for the general purposes of the term, when the regular panel has not been summoned 14 days before the term, or when a sufficient number of the regular panel do not appear. Under this section, the summoning of 35 jurors, instead of 24, is not cause of challenge to the array.

4. SAME—CONFESSIONS—NEWSPAPER ARTICLE AS EVIDENCE.
After defendant's arrest, and before trial, an article in a newspaper was shown to him which purported to give, among other things, a summary of his statements before the coroner, the crime charged being murder. Defendant read the whole article, and admitted that it was correct. On the trial, after proof of these facts, the prosecuting attorney cut out that portion of the article which related solely to defendant's statements, and offered such portion in evidence. *Held*, that it was properly admitted, without putting in the whole article.

5. SAME—PROCEEDINGS BEFORE CORONER.
The proceedings before the coroner are not admissible as evidence for the defendant, when the object is merely to corroborate the defendant's testimony upon the trial.

6. SAME—SELF-DEFENSE—INVASION OF DWELLING.
In a prosecution for murder, the defense was that the killing was done in self-defense. At the time of the homicide the defendant was in his "root-house," or out-door cellar, and resisting an invasion of it. The court gave the same instructions as would have been applicable if this "root-house" had been defendant's dwelling-house. *Held* no error.

7. SAME—SELF-DEFENSE—BURDEN OF PROOF.
An instruction that "the burden of proof was upon the prosecution to satisfy the jury, beyond a reasonable doubt, that the killing was not in self-defense, and that no reasonable belief existed in defendant's mind at the time that he was in great bodily danger, as the facts and circumstances then appeared to him," *held* correct.[1]

8. SAME—FEAR OF BODILY HARM—REASONABLE BELIEF.
An instruction: "If you should find, beyond a reasonable doubt, that defendant shot and killed Perault through mere cowardice, or from intentionally pointing his gun at him, and carelessly shooting to frighten him away, and under circumstances which, as they appeared to him at the time of the shooting, were not sufficient to induce in him a reasonable belief that he was in danger of bodily harm, the law will not justify the killing on the ground of self-defense," *held* correct.

9. SAME—INSTRUCTIONS—TENDENCY OF EVIDENCE.
It is not error for the court to refuse to instruct the jury that certain evidence has a certain tendency.

Error to circuit court, Chippewa county; J. H. STEERE, Judge.

Brennan & Donnelly, (*Lawrence F. Bedford*, of counsel,) for defendant, appellant. *Moses Taggart*, Atty. Gen., and *John H. Goff*, Pros. Atty., for the People.

MORSE, J. The respondent was convicted of the crime of manslaughter in the circuit court for the county of Chippewa, for shooting and killing one Joseph Perault.

It is complained, first, as a reason for the reversal of this conviction, that a legal jury was not summoned at the term of court in which his trial took place. A motion was entered challenging the array for the following reasons: "*First*. Said panel was not drawn fourteen days before the first day of the term. *Second*. Because more than the lawful number was summoned, thirty-five being drawn instead of twenty-four. *Third*. Because there are eight townships and supervisor districts in the county of Chippewa, and it appears from the certificate of the officers drawing said jury that no jurors

[1] As to the burden of proof in prosecutions for homicide, see People v. Coughlin, (Mich.) 32 N. W. Rep. 905, and note.

were summoned or drawn from two of said townships, one of which, 'Sugar Island,' was the scene of the killing, and such certificate does not state whether the jurors drawn from Sault Ste. Marie were summoned from the village or township of that name. *Fourth*. Because the order directing the drawing and summoning of said jury is irregular and insufficient." The prosecuting attorney stood on said challenge as of a demurrer. The court sustained the demurrer, and overruled said challenge. In the argument in this court the first objection is abandoned, but the others are insisted upon. We think the challenge was properly overruled.

The second and fourth objections may be considered together. At the opening of the term the circuit judge made the following order: "No petit jurors having been drawn and summoned for this term of court, and it satisfactorily appearing to the court now here that the attendance of said jurors is necessary, it is therefore hereby ordered and directed that thirty-five qualified jurors be forthwith drawn and summoned in pursuance of the statute in such cases made and provided, to be and appear in said court at the court-house, in the village of Sault Ste. Marie, in said county, without delay, to serve as such petit jurors." It is claimed, upon the authority of *People* v. *Hall*, 48 Mich. 482, 12 N. W. Rep. 665, that this order should have specified the townships from which the jurors were to be drawn, and that the vicinage of the alleged offense should have been included in such order. Under section 7578, How. St., the court could order the jury drawn from the county at large, or from specified townships near the county-seat. In this case the order was that the jurors be drawn and summoned according to law, which would be from the county at large, as specified and directed by the statute. The objection to the jury drawn in the case of *People* v. *Hall* was that they were neither a jury of the vicinage, nor a jury of the county at large, nor one desired by the judge himself for the general purposes of the term. "It was therefore not sanctioned by law." See *People* v. *Hall*, at page 487.

The order in this case was legal, as it directed a jury to be drawn and summoned from the body of the county for the general purposes of the term, and it appears that 35 were none too many for the exigencies of the term, as talesmen had to be summoned to complete the panel in this case. There is no cause of complaint because 35 men were drawn instead of 24.

In relation to the third objection, if it anywhere appeared that the officers who drew the jury had arbitrarily left out the townships from which jurors were not drawn, it would have been a good cause for quashing the array. But it does not so appear. The burden of proof was on the respondent to show the invalidity of the proceedings by which the jury was obtained. In the absence of a showing to the contrary, it must be presumed that these officers faithfully and correctly performed their duty in the premises.

We held in *People* v. *Coffman*, 59 Mich. 1, 26 N. W. Rep. 207, that the omission of the supervisor to return a list of names from one township would not destroy the legality of a jury drawn from the body of the county, and from the lists returned from the other townships according to law. And it will be seen by examining the whole statute, as to the selection of jurymen from the lists returned, that it may often happen that within any year the lists from one or more townships may be exhausted by previous drawings. The lists are made in reference to the population of the supervisor districts, and therefore some of them may send but a very few names to the clerk. How. St. § 7556. The names of those drawn at any trial are not to be returned to the packages until the list shall have been exhausted. How. St. § 7567. It is also a cause of challenge to a juror if within a year he has been a member of a panel of jurors in the same court. How. St. § 7582. It was evidently intended by the legislature that when a person had been drawn from the list of any township, and served once on a panel, he should not be drawn again within the year. It is also provided that if any name is drawn of one who is dead or

insane, or who has permanently removed from the county, such name shall be withdrawn and destroyed, and another name drawn from the same package instead thereof. How. St. § 7567, subd. 4. It is therefore possible that the lists from the townships omitted in this drawing had been exhausted. There being no showing that such lists had not been exhausted under the provisions of the statute, it must be presumed that they had been, and for that reason no jurors were drawn and summoned from those townships. It was for the respondent to clearly show a violation of duty upon the part of the summoning officers. We cannot presume it.

Shortly after the shooting of the deceased by the respondent, and while Coughlin was under arrest and in the county jail, one Oren, a reporter for a newspaper called the "Chippewa County News," interviewed the respondent. He had with him an article from another newspaper, the Sault Ste. Marie Democrat. The article was handed to the respondent, who read the whole of it. When Oren was on the stand as a witness for the prosecution, he gave an account of this interview, and stated that the respondent, after reading the article, said it was correct, with the exception of one or two things. The whole article appears in the bill of exceptions, with the portions not admitted in evidence erased with red ink. From a perusal of this article it appears that it starts out with a report of the shooting, and some general particulars of the tragedy gleaned from several sources. The article then proceeds to state the circumstances of the case as taken from the evidence of Coughlin before the coroner's inquest, heading it "Coughlin's Statement." After giving such statement, the article reads: "These are the principal statements as made by Mr. Coughlin." Then the article proceeds to give the testimony of one Dr. Ennis before the coroner's jury, the verdict of the jury, and the dying declaration of John Perault, a brother of the deceased, who was killed at the same time as his brother, Joseph, for whose killing the respondent was on trial. The article further proceeded to state that the persons killed were the only support of a widowed mother, who had just buried a sister the day before, and might lose her reason. It also described the scene of the homicide.

After the testimony of Oren, the prosecuting attorney cut out that portion of the article beginning with "Coughlin's Statement," and ending with the same, and offered such portion in evidence. Before it was admitted, counsel for the defendant asked the witness if Coughlin had read the whole article. He replied that he did. The counsel then objected to the admission of the paper offered, as incompetent and immaterial. This objection, we think, was broad enough to include the claim made here that it was error to introduce this portion without putting in the whole article.

To digress a little, we think it is proper to remark here that in a case where any documentary evidence is excluded by the trial court, or a portion is admitted, and the claim is that the whole should have been introduced, such evidence not introduced or excluded should be made a part of the bill of exceptions, so that the court can judge of its admissibility. We speak of this because in this case the circuit judge refused to make that portion of the article not introduced in evidence a part of the bill of exceptions. It was not in the record as printed, and the counsel for respondent only succeeded in getting it returned with the manuscript record as mutilated, and this was accomplished with some difficulty, and against the protest of the prosecuting attorney, who insisted that it should not come here at all. If the whole article were not here, so that we could get its tenor and effect, it would be our duty to reverse the conviction of the respondent, because we would be entirely unable to say that the admission of a portion of the article, the whole of which was read by Coughlin, did not prejudice his case before the jury. But as it is, we are satisfied that the prosecuting attorney but performed his duty when he put in evidence only that part of the article which related solely to the re-

spondent's own statements. The admission of the balance could have had no other effect, in our judgment, than to injure instead of benefiting the respondent. He therefore cannot complain, and ought to be well satisfied with the action of the prosecution in this respect.

The respondent's counsel offered in evidence the proceedings before the coroner's jury, including the evidence, and the verdict of the jury. It was properly excluded. The object, as admitted by defendant's counsel, was to show that Coughlin testified before such jury substantially as upon the trial, and that such jury found the shooting was done in self-defense. It was not offered for the purpose of contradicting any witness sworn upon the trial, or for impeachment, but simply to corroborate the respondent's testimony upon the trial by his statement before the coroner. This could not be done.

The remaining errors are assigned against the charge of the court to the jury. Without going into detail, it is sufficient to say that the case of the defendant was fairly put to the jury in the instructions of the circuit judge. When the shooting took place, the defendant was in a root-house or out-door cellar, or in the door of it. The man killed was claimed to have been attempting to enter against the protest and warning of Coughlin. It was contended on the trial that the shooting was done in self-defense. The judge in his charge made this root-house the same as his dwelling-house, and instructed the jury that he was not obliged to flee therefrom, but that he was authorized to repel force by force, and protect himself and *his house* from intrusion, and if in the reasonable exercise of his rights of self-defense, as appeared to him at the time, he killed his assailant, the killing would be justifiable homicide. That the burden of proof was upon the prosecution to satisfy the jury, beyond a reasonable doubt, that the killing was not in self-defense, and that no reasonable belief existed in defendant's mind at the time that he was in great bodily danger, as the facts and circumstances then appeared to him. We do not perceive how the case of the respondent could have been better stated within the law.

It is complained that the court erred in further stating to the jury, in this connection, that Coughlin would have no right to at once shoot deceased simply because he would not go away when told, or because he insisted on entering when forbidden, and further as follows: "But in no case is human life to be lightly disregarded, and if you should find, beyond a reasonable doubt, that defendant shot and killed Perault through mere cowardice, or from intentionally pointing his gun at him, and carelessly shooting to frighten him away, and under circumstances which, as they appeared to him at the time of the shooting, were not sufficient to induce in him a reasonable belief that he was in danger of bodily harm, the law will not justify the killing on the ground of self-defense." We think the law was properly stated as to the right to shoot, and as the circuit judge expressly charged the jury that they could not convict the respondent of any higher crime than manslaughter, that portion of the instructions as to carelessly shooting to frighten him away was also correct.

The court was asked to instruct the jury that the evidence offered on the behalf of the respondent tended to show that the act of killing was done while the defendant was under the belief that he was in danger of death or serious bodily harm. The court refused to so charge. Authorities are cited to the effect that it is within the province of the court to instruct the jury as to the tendency of evidence. We find, however, no authority holding it error for the court to refuse to instruct the jury that certain evidence has a certain tendency.

The judgment of the court below must be affirmed.

SHERWOOD and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

PEOPLE v. ROUNDS.

(Supreme Court of Michigan. November 3, 1887.)

1. ARREST—WITHOUT WARRANT—BREACH OF PEACE IN PRESENCE OF OFFICER.
Defendant was on trial for obstructing and resisting an officer while the latter was endeavoring to keep the peace. The officer, without a warrant, arrested defendant for an alleged breach of the peace committed in his presence. An instruction was given, as follows: "The officer could arrest without a warrant only for a breach of the peace actually being committed in his presence, and if you believe, from all the evidence in the case, that no such breach of the peace took place until the arrest was made, and then only in resisting such arrest, such resistance was justifiable. If an officer does not keep within the law, he is not acting as an officer, nor entitled to protection as one. Defendant had a right to resist an illegal arrest." *Held* no error.

2. SAME.
The jury were also instructed. "For a breach of the peace, committed in his presence, the officer may arrest without a warrant, for the purpose of taking the offender before a magistrate for examination or trial. And when an officer sees a breach of the peace being committed in his presence, it is his duty as a peace officer to arrest the offender without a warrant." *Held* correct.

3. OBSTRUCTING JUSTICE—INFORMATION—SURPLUSAGE.
The information charged that defendant "did obstruct, resist, and oppose" the officer "in the lawful execution of his office in attempting to arrest respondent for being then and there drunk, and disturbing the peace." At the time of the alleged offense, drunkenness was not an offense recognized by statute or ordinance. *Held*, that the words "being drunk" might be treated as surplusage, and that the information substantially complied with the act (How. Mich. St. § 9257) making it a felony to "obstruct, resist, and oppose officers in their lawful acts, attempts, and efforts to maintain, preserve, and keep the peace."

4. BREACH OF THE PEACE—EVIDENCE.
Evidence was admitted that defendant made some disturbance at the place of the alleged offense before the officer's arrival, this, as tending to show a continuous disturbance at the place during the whole evening. But the jury were instructed not to regard this evidence as bearing against defendant. And he was permitted to show that he was engaged in helping to keep quiet and good order at the place for some time before the officer arrived. *Held* no error.

Exceptions from circuit court, Livingston county; WILLIAM NEWTON, Judge.

Rollin H. Persons, (*D. Shields*, of counsel,) for defendant. ***Moses Taggart***, Atty. Gen., for the People.

MORSE, J. The respondent was tried and found guilty in the circuit court for the county of Livingston of "knowingly and willfully obstructing, resisting, and opposing Seth B. Rubert, marshal of the village of Howell, while in the lawful execution of his office in attempting to arrest said Elbert C. Rounds for being then and there drunk and disturbing the peace in the presence of said Seth B. Rubert, marshal as aforesaid, the said Seth B. Rubert being then and there engaged in maintaining, preserving, and keeping the peace." Upon the trial it was conceded that the marshal had no warrant or other process against the respondent at the time of the arrest.

Upon the part of the people the evidence tended to show that on the evening of November 30, 1883, the salvation army were holding services in a building in Howell, known as the "Salvation Army Barracks." The marshal came along, and saw Rounds and some others standing outside the barracks. He heard Rounds say, "When he comes out, I am going to give it to him." Rubert said to Rounds he must not have any trouble there that night, if he did he should arrest him. Told him he better go home. Rounds then grabbed hold of him, saying "Seth, come here, I want to talk with you," and took him off a distance of 15 paces. He told the marshal he was a fool to think he could arrest him, and offered to bet five dollars that he could not do it. After some parley, Rubert broke away from him and went into the barracks. He had not been in there but a short time when Rounds entered, came up to Rubert,

grasped him by the coat and said "Seth come here, I want to talk with you," and jerked him along towards another corner of the barracks. Rounds talked in a loud voice, and disturbed the services then going on. The marshal told him several times that he must keep quiet, or he should arrest him. As Rounds did not desist, the marshal finally took hold of the lapels of his coat and said, "I arrest you." Thereupon Rounds drew back, and struck Rubert in the face, and kept on striking him until another officer came to the assistance of the marshal. In going out of the building, Rounds grabbed for a stick of wood, as did also the marshal. The marshal struck Rounds over the head with a stick of wood.

The respondent's version of the transaction was substantially as follows: He is 22 years of age, and resides in Howell. Had drank two glasses of beer that evening, but was not intoxicated. Towards the close of the meeting he was standing outside with some other boys talking quietly. Rubert came rapidly up to him within arms-length, shook his fist in his face, and in a loud tone of voice said Rounds must not have any trouble there that night; that he had better go home, for if there was any disturbance there he would have to put him in jail. Denies that he told Rubert that he was a fool to think he could arrest him, or that he offered to bet he could not do so. Asked Rubert to step one side, and may have placed his hand upon his shoulder, but did not pull him. He simply wanted Rubert to explain what he meant, but could get no satisfaction. Admits that he went into the barracks, and walked up to Rubert, and put his hand upon his shoulder, and said to him: " 'I want to speak to you.' We stepped out one side and I asked what I had done, and what he meant. I did not talk loud or so as to disturb anybody. He would not tell me what I had done, or why he talked so to me, but said that he meant just what he said, and should arrest me if I made any disturbance. His refusal to explain matters, or to let me know what he blamed me for, so as to have things understood, and his repetition of the threat, made me mad, and I said to him he could not get to arresting too quick. At that he grabbed me, and I presume I struck him. They say I did, but I was so much excited that I don't know what I did do." He also testified that he did not grab for a stick of wood, but only put his hand upon the wood-box to straighten himself up. Rubert grabbed a stick, and struck him over the head. "The blow struck through the scalp to the bone, and somewhat stunned me."

There was testimony introduced tending to corroborate both theories of the transaction. We think the circuit judge fairly submitted the case to the jury. He gave the following instructions, as asked by the respondent's counsel: "(1) That no such drunkenness has been proved in this case on the part of the defendant as would justify the officer in making the arrest for that cause alone. The question for the jury to consider is this, was the respondent actually disturbing the public peace, in the salvation army barracks at the time the arrest was made? and not whether he was about to do so, as the latter is not charged in the information filed in this cause. The officer could arrest without a warrant only for a breach of the peace actually being committed in his presence, and if you believe, from all the evidence in the case, that no such breach of the peace took place until the arrest was made, and then only in resisting such arrest to the extent of striking several blows with the fist, then such resistance was justifiable, and you should acquit the defendant. If an officer does not keep within the law, he is not acting as an officer, nor entitled to protection as one. Rounds had a right to resist an illegal arrest. You must remember that you cannot take into consideration anything that happened at the barracks before Rubert got there; and that you must find Rounds not guilty if it is reasonably possible to reconcile the facts with innocence."

He also further instructed the jury, substantially: "Again, an officer has no right to arrest without warrant for any breach of the peace not committed in his presence. But for a breach of the peace committed in his presence, he

may make an arrest without a warrant, for the purpose of taking the offender before a magistrate for examination or trial. And when an officer sees a breach of the peace being committed in his presence, it is his duty as a peace officer to arrest the offender without a warrant. The supreme court of this state, in the case of *Davis* v. *Burgess*, 20 N. W. Rep. 540, has defined what is understood by a breach of the peace. The court says: 'By peace, as used in the law in this connection, is meant the tranquility enjoyed by the citizens of a municipality or community, where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is a "breach of the peace." It is the offense of disturbing the public peace, or a violation of public order or public decorum. Actual personal violence is not an essential element in the offense. If it were, communities might be kept in a constant state of turmoil, fear, and anticipated danger by the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens, but of public morals, without the commission of the offense.' That section (9302, How. St.) gave the marshal authority to apprehend and arrest on sight any person disturbing a religious meeting,"—quoting the section in full. That if the jury found that Rounds followed Rubert into the barracks, knowing that he was an officer, for the purpose and intent of inviting a personal dispute and controversy with him, and did enter into such controversy, and they further found that he did, in a rude and insolent manner, in said barracks, take Rubert by the shoulders, or collar, or lapels of his coat, against Rubert's will, and pull or push him several feet from the place where he stood, these acts would constitute an assault and battery, and breach of the peace, and the marshal would have the right, without process, to arrest him, and take him before a magistrate.

Upon the arraignment of the respondent his counsel moved to quash the information filed against him, on the ground "that the same did not set out an offense within the original jurisdiction of the court," which motion was overruled. It is claimed in behalf of this motion that the information does not allege anything more than an assault and battery. That there was at the time of the arrest no such crime as drunkenness under the general statutes of this state, (see *People* v. *Beadle*, 26 N. W. Rep. 800,) and there was no averment that there existed any village ordinance against drunkenness. That to meet the requirements of the statute (How. St. § 9257) the information should have charged that Rounds "did obstruct, resist, and oppose Rubert in his lawful acts, attempts, and efforts to maintain, preserve, and keep the peace." That there is, in effect, no such allegation. The averment that he "did obstruct, resist, and oppose Rubert in the lawful execution of his office in attempting to arrest respondent for being then and there drunk and disturbing the peace," is claimed not to be sufficient under the statute.

We think the words "being drunk" may be treated as a mere surplusage, and that the information is a substantial compliance with the statute. It alleges clearly enough the appointment of the marshal, his authority to maintain and preserve the peace, and his being obstructed while acting in such capacity, and that he was thus obstructed, resisted, and opposed while he was attempting to arrest the respondent for disturbing the peace in his presence.

Error is claimed in that the circuit judge allowed evidence to be introduced showing that Rounds made some disturbance in the barracks before the officer came there, and not in his sight. It was admitted by the court on the ground that the evidence tended to show a continuous disturbance of the meeting during the whole evening. The jury were plainly told that they could not take this evidence, or any testimony of what happened at the barracks before the officer got there, into consideration in determining the guilt of the respondent. As the respondent was also permitted to show that he was engaged in helping to keep quiet and good order at the meeting for some time before the marshal arrived, we are of the opinion that the admission of this testimony,

with the instruction to the jury not to regard it as bearing against the respondent, did not prejudice the case, or influence the verdict against him.

Evidence was given on both sides that the meeting was disturbed more or less all the evening, and we are not prepared to say it was not admissible as part of the *res gestæ* showing a breach and disturbance of the peace.

It is complained that the circuit judge went outside of his legal duty, to the prejudice of the respondent, in quoting to the jury the statute against disturbing religious meetings, and in the remarks he made, to the effect that the humblest religious worshiper is protected by the law as fully as is the one who worships in the "costly temple which represents the monument of the faith and hope of the worshiper." We know not what was the occasion of this remark, but it is to be presumed that there was shown during the trial more or less prejudice against the "Salvation Army," as it is a matter of general knowledge that such prejudice exists in every place, and that these devotees are everywhere, because of their peculiar and not altogether pleasant methods of worship, subject to ridicule, persecution, and contumely. If such was the case here, the remarks were eminently proper, and could do no harm at any rate. It was but a statement that the law knows no distinction between the rich and the poor, and that religious liberty is guarantied to all alike.

There was no error committed upon the trial, and the proceedings are affirmed.

SHERWOOD and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

FENDER *v.* POWERS.

(*Supreme Court of Michigan.* November 8, 1887.)

1. GUARDIAN AND WARD—SALE OF REALTY—IRREGULARITIES — BONA FIDE PURCHASER.
In proceedings in the probate court for a guardian's sale of real estate, the petition for license to sell omitted to set out the circumstances of the estate; the guardian did not subscribe the oath before sale; no bond before sale was given; and it was doubtful whether a report of sale had been made. *Held*, that these were not such irregularities as to invalidate the title acquired by a *bona fide* purchaser at such sale.
2. APPEAL—EQUITY—REVIEW OF JUDGE'S FINDINGS.
In an equity appeal, where the testimony is contradictory and conflicting, the findings of the trial judge will not be disturbed.

Appeal from circuit court, Barry county, in chancery; FRANK A. HOOKER, Judge.

Action in equity to obtain the surrender and cancellation of a deed. Complainant's title was based upon a guardian's sale of real estate under license from the probate court. Eunice Sherman, the guardian, filed her petition for license to sell, in which, after setting out her guardianship, and a description of the property, she represented "that it is for the best interest of said minors that said land be sold, and the proceeds placed at interest for their benefit." The petition was duly verified. The guardian's "oath before sale" was found in the files, properly filled out, but not subscribed by the guardian. The court did not require of the guardian a bond before the sale, and none was given. The sale was duly and regularly confirmed. The probate judge testified that he had no doubt the report of sale was before him when the confirmation was made; it was the usual custom of the office; confirmations were generally drawn from the reports of sale. The succeeding probate judge certified that he had searched the files of the office for a report of sale, and found none, nor any record of its being filed. The additional facts in the case are stated in the opinion.

Walter S. Powers and *James M. Powers*, for defendant and appellant.

Petition for license to sell was defective in not setting out circumstances and condition of estate. *Ryder* v. *Flanders*, 30 Mich. 341; How. St. § 6086;

Pryor v. *Downey*, 50 Cal. 398; *Gregory* v. *McPherson*, 13 Cal. 562; *Hall* v. *Chapman's Adm'r*, 35 Ala. 553; *Jackson* v. *Robinson*, 4 Wend. 436; *Fitch* v. *Miller*, 20 Cal. 352; *Nichols* v. *Lee*, 10 Mich. 529; *Arnett* v. *Bailey*, 60 Ala. 435. As to oath before sale, How. St. § 6093; *Ryder* v. *Flanders*, 30 Mich. 343; Freem. Jud. Sales, § 22. As to bond before sale, *Stewart* v. *Bailey*, 28 Mich. 251; *Ryder* v. *Flanders*, 30 Mich. 343; Ror. Jud. Sales, § 347. As to report of sale, *Elwood* v. *Northrop*, 12 N. E. Rep. 590.

R. W. Shriner and *Clement Smith*, for appellee.

Irregularities in guardian's proceedings for sale will not affect title of purchaser in good faith, if essentials complied with. *Palmer* v. *Oakley*, 2 Doug. 433; *Howard* v. *Moore*, 2 Mich. 226; *Coon* v. *Fry*, 6 Mich. 506; *Woods* v. *Monroe*, 17 Mich. 238; *Osman* v. *Traphagen*, 23 Mich. 80; *Dexter* v. *Cranston*, 41 Mich. 448, 2 N. W. Rep. 674. Petition was sufficient to confer jurisdiction. *Ryder* v. *Flanders*, 30 Mich. 341; *Nichols* v. *Lee*, 10 Mich. 526; *Lynch* v. *Kirby*, 36 Mich. 239. Bond was unnecessary. How. St. § 6102, subd. 2; *Drake* v. *Kinsell*, 38 Mich. 236; *Norman* v. *Olney*, 31 N. W. Rep. 555; *Reynolds* v. *Schmidt*, 20 Wis. 394.

SHERWOOD, J. This case was brought before us on demurrer to complainant's bill at the June term last year. *Fender* v. *Powers*, 28 N. W. Rep. 880. The demurrer was overruled. Since then the defendant has answered the bill. Proofs have been taken, and the cause heard on the pleadings and proofs before Judge HOOKER, at the Barry circuit, and a decree rendered in favor of the complainant. The defendant appeals. The bill is filed for the purpose of quieting the title to 80 acres of land in the county of Barry; and alleges, in substance, that in 1868 William B. Sherman became the owner of the property, and died seized of the same before January, 1873, leaving two minor children, Fanny and Robert P., and Eunice Sherman, his widow, his only heirs at law. Eunice was appointed guardian of the minor children on the first day of September, 1873, and as such guardian, under a license granted to her for that purpose by the probate court for the county of Eaton, in which county William B. Sherman lived and died, she sold the land in question at public sale to one Gibson, for the sum of $400; that said sale was made in good faith and for a fair consideration; that the proceedings to sale and the sale were regular in all respects, except that no sale-bond was required; that before January 1, 1885, said minors became of age, and received of their guardian the proceeds of said sale, with the income thereof, and were entirely satisfied; that in 1881 the complainant became the purchaser of said land at the consideration of $1,200, and has since been in the quiet and peaceable possession of the same; that said Gibson, while he owned it, was in the peaceable possession of the property, and made valuable and permanent improvements thereon, and that at the time of filing the bill it was worth $1,500. The bill further avers that Walter S. Powers, who is a brother of the defendant, on the twenty-third day of April, 1885, applied to Robert and Fanny, and asked them to deed to him a certain parcel of land in Nashville, Michigan, and which was once the property of Fanny and Robert, to which request they assented; that in draughting the deed Powers inserted the name of his brother, the defendant, as grantee, and included therein, with the intent to cheat and defraud the complainant out of his property, the description of the land in question; that the grantors did not intend to convey the complainant's land, and, upon learning the imposition that had been practiced upon them, they disclaimed any such conveyance, and on July 13, 1885, made a conveyance to the complainant of any interest they had, either legal or equitable. The bill further avers that the deed thus obtained by Powers was without the complainant's consent or knowledge, and without consideration; that it is fraudulent and a cloud upon his title; and prays it may be delivered up and canceled.

The answer "admits the title to the land down to William B. Sherman, Sherman's death, heirship of his estate, and appointment of Eunice Sherman as guardian, as alleged in said bill; denies that guardian's sale to Gibson was regular, and alleges sale was void by reason of (1) defective petition for license to sell; (2) guardian did not take and subscribe oath before sale; (3) guardian did not give bond before sale; (4) no report of sale was ever made by guardian to probate court,—by reason of which the court had no jurisdiction; denies that the land has been enhanced in value by the improvements; denies that the minors were ever satisfied with the sale; denies all fraud on part of W. S. Powers; alleges the land was bought in good faith, for a valuable consideration, paid to Robert and Fanny Sherman."

The testimony in the case was taken in open court before Judge HOOKER, and all the parties interested were sworn and testified at length. We have examined that testimony with care. Upon several subjects much of it is contradictory and conflicting, and not as satisfactory as we would wish. The learned circuit judge, however, saw all the witnesses, and heard the testimony as they delivered it upon the stand. These circumstances placed him in a position which gave him the greatest advantage in determining the credibility of the witnesses and their testimony, and, upon the question of fraud, alleged in the complainant's bill, the finding is against the defendant, and we see no occasion for questioning the correctness of that finding.

We have also reviewed the record and briefs of counsel upon the question of the validity of the probate proceedings, which are the foundation of the complainant's title, and have been unable to discover any such irregularities therein as invalidate the title of the complainant to the property in question. The decree will therefore be affirmed.

CHAMPLIN and MORSE, JJ., concurred.

RUPPE and another *v.* PETERSON.

(*Supreme Court of Michigan.* November 3, 1887.)

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER.

A retail trader died indebted to plaintiffs for goods purchased. His widow continued the business, and orally promised plaintiffs to pay her husband's indebtedness if they would sell goods to her on credit. The credit was given. *Held* that, under How. St. Mich. § 6185, providing that "every special promise to answer for the debt, default, or misdoings of another person" must be in writing, and signed, etc., the widow was not liable for the husband's debt; her promise to pay being purely collateral, and no equitable consideration moving to her.[1]

Error to circuit court, Houghton county; WILLIAM D. WILLIAMS, Judge.

T. L. Chadbourne, for defendant and appellant. *Stone & Gray*, for appellees.

SHERWOOD, J. John Peterson, the husband of the defendant, died on the twenty-second day of November, 1886. During his life-time he was engaged in selling goods, consisting of groceries and family supplies, at Portage Entry, in the county of Houghton. The plaintiffs are general dealers in the same kind of goods, and have done business in the village of Hancock during the past 16 years, and John Peterson had been accustomed to purchase goods, to retail at his country store, of the plaintiffs' firm for 10 years previous to his death. And at the time of his death he owed the plaintiffs a balance of account of $934.71. After the death of her husband, Mrs. Peterson continued

[1] The mere fact that an advantage may result incidentally to one who orally promises to pay the debt of another is not sufficient to take it out of the statute of frauds. The resulting advantage must be the consideration upon which the promise was made. Clapp v. Webb, (Wis.) 9 N. W. Rep. 796.

the retail trade at the store in Portage Entry down to the time this suit was brought, which was on the thirty-first day of January, 1887, and during this period the defendant purchased goods of the plaintiffs' firm for her trade to the amount of $456.10. At the date last named the plaintiffs brought their suit in *assumpsit* against the defendant for the two sums above stated, in the Houghton circuit, where the defendant made, before the trial, a written offer of judgment for the balance she was owing the plaintiffs for goods purchased by her since her husband's death, viz., $456.10. This was not accepted, and the trial resulted in a judgment for the plaintiff for both items in their claim, amounting to the sum of $1,410.58. The defendant brings error.

At the close of the trial the defendant's counsel requested the court to charge the jury that "the plaintiffs are only entitled to a verdict for the price of the goods sold and delivered to her after the husband's death." This the court refused, and counsel for defendant excepted. At the request of counsel for the plaintiffs, the court submitted the following special requests for answers by the jury: (1) Did John Peterson, the husband of the defendant, owe plaintiffs a balance of $934.71, November 26, 1886? (2) Did the defendant on the twentieth day of November, 1886, promise plaintiffs to pay said indebtedness of her husband if they would thereafter furnish her goods on credit? (3) Did plaintiffs thereafter furnish goods to defendant upon credit, in consideration of such promise? These requests were each answered in the affirmative by the jury.

The court charged the jury that if they found the defendant promised to pay for the goods bought by her husband, and for which he was owing when he died, if the plaintiffs would extend to her a line of credit, and such credit was afterwards given, "according to the agreement," then the defendant was liable for such indebtedness of her husband. This charge, and the refusal by the court to give the defendant's request, raise the only question in the case, the defendant's counsel claiming that, under our statute, the defendant's promise relied upon by the plaintiffs should have been in writing to be of any validity. Some goods ordered by the husband had not been delivered when he died.

The following is the substance of all the testimony upon which the plaintiffs claim a promise on the part of Mrs. Peterson to pay her husband's indebtedness to them at the time he died, and upon which the judgment for that item was given. The testimony was that given by one of the plaintiffs, George Ruppe, and is as follows: "I did not see Mrs. Peterson until the day of her husband's funeral. I saw her that day with reference to business matters. She was here in Hancock that day, and I was taking her from my house on board the tug-boat. She wanted to know if I would not send down those goods her husband ordered that were not sent, and that she would pay all the accounts that Mr. Peterson owed, and she wanted to keep on continuing the business. I told her she was going on with the business, and I would assist all that I could, and would send the hams that day. *Question.* What, if anything, was said with reference to the old account? *Answer.* She said that she would pay her husband's account, if she was given more credit, so as to go on with the business; and she wanted me to give all the goods that was ordered, and not delivered yet. I told her I would. She said she would pay her husband's account, and would pay her own. She continued the trade upon credit, and run the bill mentioned here as having been offered. On the same day I gave her these hams. They amounted to $228. She felt bad, and said she would come up in a week or ten days. The goods went with her on the boat the same day, amounting to nearly $300. She continued to trade the balance of November, December, and January. * * * About a week or ten days afterwards she came up again. She ordered further goods on that day. She stated to me she had gone on with the business. We took no steps to have an administrator appointed. *Q.* Are these all the promises you rely

upon in this case? *A.* Yes, sir. There was another, which Mr. Stone thought was not material. This conversation that I have spoken of about business with Mrs. Peterson, wherein I claim she promised to pay her husband's debt, was had when she was passing out of my house, to get into the sleigh. *Q. By the Court.* What entry did you make upon your books, if any, at the time you had this talk with this woman? *A.* I did not make any entry at that time, except when the goods were delivered. *Q.* I am speaking of the debt of the husband; did you make any entry? *A.* No, sir. *Q.* I want to know if you charged it to anybody else at that time; you say not,—you did not charge them to anybody else? *A.* No, sir." Evidence was offered by the defendant tending to disprove the alleged promise of the defendant to pay the indebtedness of her husband to the plaintiffs.

It will be noticed that the jury found the promise of the defendant to be that she "would pay the indebtedness of her husband if they would thereafter furnish her goods on credit," and that goods were thus furnished. The section of our statute under which the invalidity of this promise is claimed says: "Every agreement, contract, and promise shall be void unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized; that is to say, * * * every special promise to answer for the debt, default, or misdoings of another person." I think this statute applies to the case, and the request of defendant's counsel should have been given to the jury. The debt incurred by the husband was not the defendant's debt. Upon the claimed promise made by her, the husband's debt was neither canceled nor discharged, but remained against his estate. The plaintiffs could have taken proceedings the next day for its collection against the estate, and the defendant had no agreement with the plaintiffs by which she could have prevented such proceedings. The extension of time promised, related entirely to the goods she should thereafter purchase, and even that time was indefinite. There is nothing in the record showing that the plaintiffs might not have brought their suit for the goods she bought as well in two days as in two months after their purchase. They did not agree to release their claim against the husband's estate for his indebtedness to them at any time or to any person, nor agree that they would not prosecute their claim against it; but they did speak discouragingly to her about taking out letters of administration upon it.

I am not able to discover what benefit or advantage she could derive from the arrangement the plaintiffs claim to have made with her, and upon which they claim the promise she made to them was based. Certain it is, there was nothing in the arrangement for her benefit which she could have enforced against the plaintiffs, either at law or in equity. She could not have forced them to sell her goods on credit, any more than they could compel her to buy them. There was no time fixed when she was to buy goods, neither was the amount she might buy stated, or the length of time the credit was to be given, nor was there any time fixed within which she was to pay her husband's debt. If there was any consideration for the claimed promise made by her to pay the debt of her husband, or any benefit or advantage to her offered by the plaintiffs, in the arrangement containing her alleged promise, the record does not disclose it; and, whatever the promise was, it is conceded not to have been put in writing, and that no memorandum thereof was ever made. I know of no case which holds a promise to pay the debt of another, made under such circumstances, valid under our statute.

It is true the plaintiff who let the defendant have the goods, in his testimony, says he would not have done so had it not been for the arrangement he states he made with the defendant; but, if the promise upon which he acted was void, what he might or might not have done under other circumstances does not affect the validity of the defendant's alleged promise. It appears,

however, he was quite anxious to sell and deliver to the defendant the plaintiffs' goods. In this case the defendant was not liable to pay her husband's debt. Her promise to pay was purely collateral. She could not legally receive or control any of the goods of the estate liable to be sold for the payment of such indebtedness under administration of the estate. She could receive no benefits from such goods, and none under the arrangement with the plaintiffs. She was therefore in the possession of no fund properly belonging to the estate applicable to the payment of her husband's indebtedness. There was therefore no equitable consideration requiring her to pay such indebtedness, and her case comes fairly within the statute. *Welch* v. *Marvin*, 36 Mich. 59; *Baker* v. *Ingersoll*, 39 Mich. 158; *Bresler* v. *Pendell*, 12 Mich. 224; *Gibbs* v. *Blanchard*, 15 Mich. 292; *Corkins* v. *Collins*, 16 Mich. 480; *Pratt* v. *Bates*, 40 Mich. 37; *Hake* v. *Solomon*, 28 N. W. Rep. 908; *Bates* v. *Donnelly*, 57 Mich. 521, 24 N. W. Rep. 788; *Calkins* v. *Chandler*, 36 Mich. 320; *Maule* v. *Bucknell*, 50 Pa. St. 53; Browne, St. Frauds, 24; *Fitzgerald* v. *Dresller*, 7 C. B. (N. S.) 374; *Durant* v. *Allen*, 48 Vt. 58; 13 Amer. Law Reg. (N. S.) 593; *Gower* v. *Stuart*, 40 Mich. 747.

The view we take of the case, as presented upon this record, will render a reversal of the judgment necessary, and, under the stipulation of the parties, judgment will be rendered in this court in favor of the plaintiffs for the sum of $456.10. Neither party will be allowed to recover costs against the other in the court below. The defendant is entitled to costs of this court.

MORSE, J., concurred. CHAMPLIN, J. I concur in the result.

BRENNAN, Adm'r, etc., v. PARDRIDGE.

(*Supreme Court of Michigan.* November 8, 1887.)

1. PARTNERSHIP—PRESUMPTION OF, FROM USE OF WORDS "& Co."
In a state where there is no statute prohibiting the carrying on of business under a name or an abbreviation, other than that of the individual, as in Michigan, there is no necessary presumption that when "& Co." is made use of after the dealer's name, he has a partner or partners, or that such title includes more than one person.

2. SAME—PURCHASE OF GOODS AFTER DEATH OF SOLE TRADER—UNAUTHORIZED PAYMENT.
W., an individual trader, was carrying on business under the name of "Thomas Walsh & Co." Three days after his death, defendant went to his store and there bought goods to a large amount, which were delivered. Payment was made by a check, which was first drawn to "Thomas Walsh & Co.," but afterwards changed by defendant to one running "to bearer," this being done on account of W.'s death. The check was cashed by W.'s bookkeeper, who paid over the money to the widow. The latter refused to deliver it to the administrator, who, thereupon, brought trover against defendant for the goods. The estate was insolvent. There had been previous dealings between W. and defendant. *Held*, that defendant was liable, notwithstanding his alleged belief that he was buying from a surviving partner of W.

Error to circuit court, Wayne county; JOHN J. SPEED, Judge.

Geo. W. Radford, for defendant, appellant. *Brennan & Donnelly* and *James T. Keena*, for appellee.

SHERWOOD, J. The deceased in his life-time, carried on the auction and commission business in the city of Detroit, first, under the name of Wardell & Walsh, and after Wardell retired, Walsh took a special partner, named Jennings, and the business was then conducted under the name of Thomas Walsh & Co. Jennings died, and after his death Walsh continued the business alone under the same name. The defendant resided in Chicago, and did business there, and carried on a branch store in Detroit under the name of Pardridge & Co., which was managed by Mr. Nye and Miss Randall.

Walsh died on the evening of September 16, 1885. On the day of Walsh's death an auction sale of property at his store was held, and the defendant,

Pardridge's agent, attended and bid off quite a large quantity of goods, but they were neither set apart nor delivered to him. A day or two after Walsh's death the defendant went to the store of Walsh and bought of the clerks goods to the amount $3,039.96, which were all delivered to defendant on the nineteenth day of September and paid for on the 21st following, by check given to the bookkeeper who had been in Walsh's employ and was in the store at the time doing business, and the bookkeeper turned over the money to the widow of Mr. Walsh. Thomas Walsh's estate was insolvent, and never received the money for the goods, or any part of it.

The plaintiff, after his appointment as special administrator, endeavored to obtain the money of the widow, for the use of the estate, but she declined payment. Failing to obtain the money for the goods, and the auction sale not having been completed, the administrator saw the defendant, Pardridge, and made demand upon him for the goods, which was refused, and the plaintiff then brought this suit in trover.

The defendant pleaded the general issue to the plaintiff's declaration, and gave notice therewith that he would show (1) that Walsh, in his life-time, was not the owner, or in possession of the goods in question; (2) that he bought the goods in good faith at the store of Walsh, and paid therefor supposing he was buying them of the surviving partner of Walsh, and was without knowledge to the contrary, and that Walsh did business under a sign and name which would represent a firm, and that the goods were receipted to him in the name of Thos. Walsh & Co. The trial of the cause was had in the Wayne circuit before Judge SPEED, who, at the close of the testimony, directed a verdict for the plaintiff, and the defendant brings error. A careful inspection of the record impels us to affirm this judgment. The errors assigned are upon the ruling of the court as to the admission of testimony, and the refusal of the court to give the defendant's requests.

The first question upon this record is, did Thomas Walsh at the time of his death, or at the time the goods were purchased, have a partner? This is placed beyond question upon the record. The party who was his principal clerk, and had been for many years, testified that Walsh had no partner, and this testimony is not disputed. That fact must be regarded as settled in the negative, and *prima facie* should dispose of the case. But the defendant claims that Mr. Walsh did business in such a way as led the defendant to believe that he had a partner, and that defendant had a right to act upon such appearances and representations that he had a partner, and did so act. We have examined the record through for testimony showing any representations made by Thomas Walsh in his life-time, or any made by his agent or clerks, to the effect that, at the time these goods were purchased, or for several months previous thereto, Thomas Walsh was doing business in company with some other person or persons, and have found none.

It is claimed that the defendant was misled upon this subject by the name under which Walsh was doing business; that its purport was that he was doing a company business. The undisputed facts, however, preclude any such conclusion. In the first place, it is matter of common knowlege that in this state there is no statute preventing the deceased when he was alive from doing business in the manner and under the name he did, and that many persons did business in that way under an assumed name, which would be appropriate for a firm; and it appears from the testimony in this case that the defendant himself did business in this manner, and under an assumed name, nearly opposite Walsh's place of business on the other side of the street. It further appears that, before the transaction was completed out of which this suit arose, the defendant showed knowledge upon the subject, or rather those acting for him, in completing the purchase of the goods. The defendant, for the goods he purchased, offered in payment a check made to Thomas Walsh & Co., but this was subsequently changed by the defendant

to one running to bearer. This was done on account of the death of Walsh, and at the request of his former clerk, so that there would be no trouble with the bank when the check was presented. Of course no such change in the check would have been necessary if Thomas Walsh had a partner when he died, and this circumstance, undisputed as it is, would seem to be sufficient to put the defendant on his guard as to the real person with whom he was dealing, or sufficient to lead him to make inquiry.

It appears further that the defendant had had dealings several years with Walsh previous to his death; and that after his death, and while the crape was still hanging upon the door of his place of business, which was not over 90 or 100 feet from the defendant's store, the defendant should make purchases at the deceased's place of business to the amount of between $3,000 and $4,000, without knowing from whom he was purchasing, and to whom he could legally make payment, seems almost incredible. The defendant's manager, Nye, certainly had some knowledge of the situation and of Walsh's death, and ordinary business prudence would require that the defendant and his manager should know with whom they were trading after the death of Walsh. Every creditor Walsh left was interested in the property and its disposition, and no person could acquire any title thereto, either legal or equitable, except through administration, the estate being insolvent.

In a state where there is no statute prohibiting the use of a name or an abbreviation to do business under, other than that of the individual, as in this state, there is no necessary presumption that, when "*& Co.*" is made use of after the dealer's name, he has a partner or partners, or that such title includes more than one person. *Robinson* v. *Magarity*, 28 Ill. 423. The plaintiff's right to recover was not limited in this case to the goods actually owned by Walsh, but to those the defendant received of the estate, which were held by Walsh in his life-time for sale on commission, as well. The owners had never proved claims for them against the estate before commissioners. *Cullen* v. *O'Hara*, 4 Mich. 133; *Emery* v. *Berry*, 8 Fost. 483; *Campbell* v. *Tousey*, 7 Cow. 64; *White* v. *Mann*, 26 Me. 361; *Hubble* v. *Fogartie*, 3 Rich. 413; *Whit* v. *Ray*, 4 Ired. 14; *Sharland* v. *Mildon*, 5 Hare, 469; *Edwards* v. *Harben*, 2 Term R. 596.

There being no delivery or acceptance of such of the goods as defendant claims came to him through the auction sale, he had no more right to detain those from the plaintiff than the others. We can discover nothing in the record that would enable the defendant to prevail against the claim of the plaintiff, and the direction given by the circuit judge must be sustained.

The judgment is therefore affirmed.

CHAMPLIN, J. I concur in affirming the judgment. MORSE, J., concurred in affirmance.

PEOPLE v. GREISER.

(*Supreme Court of Michigan.* November 3, 1887.)

INTOXICATING LIQUORS—PAYMENT OF MANUFACTURER'S TAX—SALE AT RETAIL.

Defendant manufactured beer, and sold the same at wholesale and retail. She had paid the manufacturer's tax, and this, by How. St. Mich. § 1281, exempted her from paying a wholesale tax. She paid no retail tax. The amount of tax for "selling at wholesale," "selling at retail," or "selling at wholesale and retail," is the same. *Held*, that defendant was not authorized to sell at retail.

Appeal from recorder's court of the city of Detroit.

John G. Hawley, for appellant. *Geo. F. Robison*, Pros. Atty., for the People.

MORSE, J. The respondent was convicted in the recorder's court for the city of Detroit, for selling beer at retail without paying the tax in full in ad-

vance to the county treasurer, as required by section 1281, How St. The respondent is a brewer and manufactures beer at the corner of Sherman street and St. Aubin avenue, in the city of Detroit. She sells on the premises, where the beer is brewed, at wholesale and retail, beer of her own manufacture. She had paid the manufacturer's tax, but no wholesale or retail tax. It is claimed that as the payment of a manufacturer's tax exempts the person so paying from the payment of the wholesale tax, it also exempts her from paying the retail tax, as the amount of the tax for selling at wholesale is the same as the tax for selling at wholesale and retail. The statute as to the manufacture and sale of malt liquors provides the following taxes: *First.* Upon the manufacture, if less than 1,500 barrels, $65 per annum. *Second.* Selling at wholesale, $200. *Third.* Selling at retail, $200. *Fourth.* Selling at wholesale and retail, $200. "No person paying a manufacturer's tax on brewed or malt liquors under this act shall be liable to pay a wholesale dealer's tax on the same." How. St. § 1281.

The argument seems to be in the brief of respondent's counsel that because the payment of the manufacturer's tax excuses the payment of the wholesale tax, and the wholesale tax, being the same in amount as the tax for selling at wholesale and retail, the tax for selling at wholesale and retail is in effect a wholesale dealer's tax. We do not so consider it. The legislature evidently intended that the manufacturer might sell at wholesale as an adjunct of his business without paying an additional tax. But it was not intended he might also sell at retail, which is not a necessary part of the business of manufacturing. If the intention had been different, the legislature would, in all probability, have exempted the manufacturer from paying the wholesale and retail tax in so many words. We must take the law as it reads. It does not authorize the manufacturer to sell at retail, unless either the retail or the wholesale and retail tax is paid, to-wit, $200.

The conviction is affirmed.

SHERWOOD and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

PEOPLE *v.* KUHN.

(*Supreme Court of Michigan.* November 3, 1887.)

1. CRIMINAL PRACTICE—FORMER JEOPARDY—NOL. PROS. BEFORE JURY IMPANELED.
   A *nolle prosequi* to an information will not operate as an acquittal where no jury has been impaneled in the case.[1]
2. SAME—PRELIMINARY EXAMINATION—FUGITIVE FROM JUSTICE.
   Defendant was convicted of a crime and sentenced to imprisonment. An information for another offense was then pending against him, but this, on his incarceration, was *nolle pros'd.* He escaped from prison, and fled to Canada. Another information on the second offense was then made, and on this, after his extradition, he was tried without examination before a magistrate. *Held*, that defendant was a "fugitive from justice" within the meaning of a statute (How. Mich. St. § 9555) providing that informations may be filed, without preliminary examination, against fugitives from justice.

Error to recorder's court, city of Detroit.

Geo. Y. M. Collier, for defendant, appellant. *Moses Taggart*, Atty. Gen., for the People.

CHAMPLIN, J. Frank Kuhn was convicted in the recorder's court of the city of Detroit on the twenty-first of February, 1882, of assault with intent to commit the crime of rape, and was sentenced to the state house of correc-

[1] Where the defendant in a criminal case obtains a new trial the prosecuting attorney, with the consent of the court, may enter a *nolle prosequi* to the information without prejudice to a fresh prosecution. State v. Rust, (Kan.) 3 Pac. Rep. 428.

tion and reformatory, at Ionia. At the time of his conviction there was also an information pending against him in the same court for the crime of robbery. He was committed to the prison at Ionia, and between one and two months later the prosecuting attorney of Wayne county, of his own motion, entered a *nolle prosequi* to such information for robbery. About March 1, 1885, Kuhn escaped from prison and fled to the Dominion of Canada. In April, 1885, the prosecuting attorney filed a petition in the recorder's court, setting up the facts as above stated, and alleging that said Frank Kuhn was a fugitive from justice, and asked leave on such sworn petition to file an information under section 9555 of Howell's Statutes, which was granted, and such information was filed, containing an allegation that said Frank Kuhn was "a fugitive from justice of the state of Michigan, and is sojourning in the jail of the county of Essex, in the Dominion of Canada, awaiting an examination on a complaint in this matter before an extradition commissioner of said Dominion." Kuhn was extradited on the charge of robbery for which the information was filed, and on being arraigned interposed a plea in bar setting up his conviction and sentence above stated, and commitment, and also that the information filed against him for robbery was *nolle prosequi'd*, at which time he was serving his time at the state house of correction upon the sentence given upon the conviction for assault with intent to commit a rape, and that he had not been examined upon any charge for any offense since the said *nolle prosequi* was entered. This plea was overruled, and the defendant required to plead to the information, which he refused to do, and thereupon the court ordered a plea of not guilty to be entered. He was tried and convicted. The court thereupon sentenced him to confinement in the state house of correction and reformatory, at Ionia, at hard labor for the period of five years.

The case is brought here by writ of error. Section 9555, How. St., reads as follows: "No information shall be filed against any person for any offense, until such person shall have had a preliminary examination thereof as provided by law before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination: provided, however, that information may be filed without such examination against fugitives from justice; and any fugitive from justice against whom an information shall be filed, may be demanded by the governor of this state of the executive authorities of any other state or territory, or of any foreign government in the same manner, and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed." Two questions are raised upon the record—*First*. Did the *nolle prosequi* entered operate as an acquittal of Kuhn upon the information filed against him upon the charge of robbery? *Second*. Was Kuhn at the time the information in this case was filed by leave of court a fugitive from justice within the meaning of the above section? We think the first question must be answered in the negative. A *nolle prosequi* to an information will not operate as an acquittal where no jury has been impaneled in the case. Upon this the authorities are agreed. 1 Whart. Amer. Crim. Law, § 513, and cases in notes; *State* v. *Lopez*, 19 Mo. 255, 256; *State* v. *Rust*, 31 Kan. 509, 3 Pac. Rep. 428; *Com.* v. *Wheeler*, 2 Mass. 172; 1 Bish. Crim. Law, §§ 1014–1016. The second question must be answered in the affirmative. "A person who commits a crime within a state, and withdraws himself from such jurisdiction without waiting to abide the consequences of such act, must be regarded as a fugitive from justice of the state whose laws he has infringed." *In re Voorhees*, 32 N. J. Law, 141. When Kuhn escaped from the prison at Ionia, and fled to Canada, he was a fugitive from the justice of this state. He had committed a crime for which he had not been tried; and it matters not that he had escaped from prison before his sentence had expired, and became a fugitive,—he retained his character as such, and his escape formed no obstacle to his extradition and trial for the

crime of robbery. It is true that he committed another offense by escaping from prison, but a multiplication of crimes for which he may be hereafter punished cannot operate to shield him from being brought to the jurisdiction of the state to stand trial for a crime committed before he escaped from prison and fled from justice. It follows that under the statute no previous examination before a magistrate was required.

There was no error in the record, and the judgment is affirmed.

SHERWOOD and MORSE, JJ., concurred. CAMPBELL, C. J., did not sit.

PEOPLE *v.* CAULKINS.

(*Supreme Court of Michigan.* November 3, 1887.)

RECEIVING STOLEN GOODS—REQUISITES OF INFORMATION—JUDGMENT.

In a prosecution for receiving stolen property, knowing it to have been feloniously stolen, it is not necessary for the information to allege that the prosecution is for a first offense of that character, nor that the act of stealing the property received by defendant was not a simple larceny, nor that defendant has made no restitution or satisfaction of any kind to the owner of the property. Nor, when judgment follows upon a plea of guilty, need any of these matters appear in the judgment.

Error to circuit court, Hillsdale county; ANDREW HOWELL, Judge.

Allan Howard Frazer, for defendant, appellant. *Moses Taggart*, Atty.-Gen., for the People.

CHAMPLIN, J. Defendant was convicted upon his plea of guilty to an information charging him with receiving stolen property of the value of $25, knowing it to have been feloniously stolen. He had the aid of counsel before entering the plea, and, after a private examination as required by statute, the circuit judge sentenced him to imprisonment in the state prison at Jackson for the term of four years. By another counsel he sued out a writ of error, and afterwards, upon an application to, and allowance by, the chief justice, a writ of *certiorari* was issued to the circuit judge, who has made return negativing all the material facts stated in the affidavit for the writ upon which the allegations of error were based.

It is now assigned as error that there is no allegation or averment of any kind in the information: "(*a*) that defendant's conviction of receiving stolen property was other than a first conviction for a like offense; (*b*) that the act of stealing said stolen harness received by defendant, and for which he was convicted, was not a simple larceny; and (*c*) that defendant made no restitution or satisfaction of any kind to the party from whom the harness received by defendant was stolen; nor is any of said matters *a*, *b*, and *c* set forth in said information. (2) Nor are the same things above mentioned, or any of them, entered or contained in the judgment of said court in said case, or in any of the proceedings therein. (3) Nor is there any inquiry, finding, or determination of any kind by the court, or by a jury of record, or otherwise, showing any or all the matters set forth in *a*, *b*, and *c*, above mentioned."

It is not necessary that the information should contain any allegation of the kind specified in the first assignment of error. These are all matters which are proper to be brought before the court by the defendant, and go in mitigation of the punishment to be inflicted. Unless charged as a second offense it is presumed that the prosecution is for a first offense. The judgment followed upon the plea of guilty, and it was not necessary that any of the matters alleged in the first assignment of error should appear in the judgment.

No error appearing upon the record the judgment is affirmed.

SHERWOOD and MORSE, JJ., concurred. CAMPBELL, C. J., did not sit.

PEOPLE v. GOBLES.

(*Supreme Court of Michigan.* November 3, 1887.)

1. CONSTITUTIONAL LAW — TITLE OF ACT—INCORPORATION OF CITY — MUNICIPAL COURT NECESSARY INCIDENT.
   A statute entitled "An act to incorporate the city of Kalamazoo," is not unconstitutional because it provides for the organization of a recorder's court in such city. The establishment of municipal courts is one of the necessary things in the incorporation of cities, and does not infringe the constitutional provision against legislation on subjects not embraced in the title of the act.

2. CERTIORARI—TITLE TO OFFICE OF JUDGE CANNOT BE COLLATERALLY TRIED BY.
   The title of a person to the office of judge of the recorder's court of a city cannot be tried in a collateral proceeding arising by way of *certiorari* to his judgment as such recorder, it not being alleged that any other person is the duly elected and qualified recorder.

3. COURTS—CITY RECORDER—POWER TO SENTENCE TO HOUSE OF CORRECTION.
   A city recorder (having the same jurisdiction in criminal cases as a justice of the peace) before whom a person is tried and convicted of a misdemeanor, triable by a justice, and punishable by "imprisonment in the county jail * * * not more than ninety days," cannot sentence such person to imprisonment in the state house of correction, notwithstanding the act creating such house of correction, which was earlier in time than that creating the specific offense charged, provides that "all courts having criminal jurisdiction may sentence" to imprisonment in it "all male persons duly convicted before them of a misdemeanor, when the imprisonment shall not be less than ninety days." How. St. Mich. § 9755.

Error to circuit court, Kalamazoo county; ALFRED J. MILLS, Judge.

O. T. Tuthill, for defendant, appellant. *Moses Taggart*, Atty. Gen., and *Frank E. Knappen*, Pros. Atty., for the People.

CHAMPLIN, J. Complaint was entered against respondent before the recorder of the city of Kalamazoo for furnishing liquor to Nellie Rafter, a minor of the age of four years, said respondent not being a druggist. He was arrested and convicted, and removed the record into the circuit court for the county of Kalamazoo, where the judgment was affirmed. The errors assigned in the affidavit for *certiorari* (being the same which are assigned here) raise three questions of law. (1) The recorder had no authority to hear, try, and determine the case. (2) The recorder had no authority to sentence the respondent to be confined in the state house of correction and reformatory at Ionia. (3) The offense of which respondent was convicted was not such as authorized a sentence to the prison aforesaid.

The respondent claims that the recorder had no jurisdiction to act in the matter because he was elected to fill that place under an act of the legislature constituting and organizing the recorder's court, being Act No. 337, Sess. Laws 1883. The legislature in 1885 substantially re-enacted that portion of Act No. 337 organizing the recorder's court. The material changes consisted in omitting a clause in the former act which declared the recorder's court to be a court of record, and in giving to the recorder exclusive jurisdiction in cases of bastardy arising within the city. It also contained this provision: "All acts heretofore done under and by virtue of chapter 16, Act No. 337 of the local acts of the legislature of the state of Michigan, passed at the regular session of 1883, are hereby declared valid, and nothing in this act contained shall affect the term or title to the office of the recorder heretofore elected by the city of Kalamazoo." The argument of counsel for respondent is that the act of 1883 was unconstitutional, for the reason that it was entitled "An act to incorporate the city of Kalamazoo," and the organization of the recorder's court was not embraced in the title of the act. But this would not render the act unconstitutional. The establishment of municipal courts in the organization of cities is one of the necessary things in the incorporation of a city, and does not infringe the constitutional provision. *Hargrave* v.

Weber, 32 N. W. Rep. 921; *Boyce* v. *Sebring*, 33 N. W. Rep. 815; *Harris* v. *People*, 59 N. Y. 599.

The recorder was elected under the act of 1883, qualified and acted as judge of the recorder's court, and, for aught that appears, he was legally elected, and he is still acting as such recorder. We cannot try his title to the office in this collateral proceeding, and his acts while exercising the functions of his office must be held legal and valid, whether he was properly elected or not. It is not like the case of an officer whose term of office has expired and another elected and qualified to fill his place. Here there is no claim that any other person is the duly elected and qualified recorder of the city of Kalamazoo. The errors assigned based upon this objection are overruled.

The second and third objections may be considered together. The statute confers upon the recorder's court the same criminal jurisdiction as that conferred upon justices of the peace of the several townships of this state. The contention of counsel for respondent is that, as justices of the peace have jurisdiction only over such offenses as are committed within their counties, therefore they cannot sentence a person to be imprisoned outside of the county, and, as the jurisdiction of the recorder is limited to the limits of the city, he can only sentence to the county jail. Justices of the peace have such jurisdiction and power as the legislature confers upon them within the limits of the constitution, and section 9755, How. St. provides: "From and after the time when the state house of correction shall have been opened for the reception of all offenders, all courts having criminal jurisdiction in Michigan may sentence all male persons duly convicted of a felony before them, and who shall be at the time of the sentence of the full age of sixteen years, and not more than twenty-five years of age; and also all male persons duly convicted before them of a misdemeanor when the imprisonment shall not be less than ninety days." It was under this section of the statute that the respondent was sentenced to 90 days' imprisonment in the state house of correction and reformatory at Ionia. The prosecuting attorney of Kalamazoo county, who appeared and argued the case before us in behalf of the people, claims that this section authorizes the punishment inflicted by the recorder, and affirmed by the circuit court. The offense of which respondent was convicted was created by section 2271, How. St., which forbids any person not a druggist to sell, furnish to, or give any liquors, or beverage containing liquors, to any minor, or to any intoxicated person, etc. The next section forbids any person to keep any billiard room, etc., in the same room where intoxicating liquors are sold or kept for sale, and it also forbids any person to play billiards or any other game of chance where such liquor may be sold or kept for sale. Section 2273 makes it unlawful to sell, furnish, or give such liquors in any concert hall or other place of amusement. Section 2274 provides for the closing of places where liquors are sold on Sundays, election days, and from 9 o'clock in the evening until 9 o'clock in the morning. The penalty for these infractions of the law is provided for in section 2275, and reads as follows: "Any person who shall violate any of the provisions of the preceding sections shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, and costs of prosecution, and imprisonment in the county jail not less than ten days nor more than ninety days, in the discretion of the court. And in case such fine and costs shall not have been paid at the time such imprisonment expires, he, the person serving out such sentence, shall be further detained in jail until such fine and costs shall have been fully paid: provided that in no case shall the whole term of imprisonment exceed ninety days." The act of which section 9755 forms a part was passed originally in 1877, and is entitled "An act to regulate and govern the state house of correction and reformatory at Ionia." It contained the clause relative to sentencing to that institution for misdemeanors where the imprisonment was to

be not less than 90 days, and this clause has remained unchanged to this time. It was a general law, applying in terms to all courts, and yet I think it exceedingly doubtful if the legislature intended it should apply at all to sentences pronounced by justices of the peace.

Although the prison at Ionia is called "a house of correction and reformatory," it is no less than a state prison. Persons convicted of felony are sentenced to that prison, and confined there. The legislature originally intended it to be a sort of intermediate prison where youthful offenders could be confined, and it limited the offenders who could be sentenced there to males between the ages of 16 and 25 years; but by Act No. 77, of the legislature of 1887, all male persons convicted of felony, without regard to age, as for the first offense, except rape, murder, and treason, may be sentenced to that prison. If there can be any reason why those convicted for felonies, such as burglary, robbery, arson, and other serious crimes, for the first time, or those between 16 and 25 years of age should not be brought in contact or imprisoned with the more obdurate and confirmed criminals, there is a much stronger reason why those who have committed that class of crimes denominated misdemeanors, which are within the jurisdiction of a justice of the peace, should not be imprisoned with felons, and thus be brought within the immoral atmosphere which surrounds all criminals who are imprisoned for the graver offenses, whether it be under a first conviction or not. There is a class of misdemeanors punishable in the circuit courts where the fine may exceed $100, and the imprisonment in the county jail may not exceed one year, and where the gravity of the offense approaches very near to a felony, and it is quite probable that it was these misdemeanors which the legislature had in view in section 9755 of the statute. This construction of the law is at least plausible when another section of the law is considered. The statute conferring criminal jurisdiction upon justices of the peace limits their power to try misdemeanors to those cases where the fine does not exceed $100, or the imprisonment does not exceed three months in the county jail, or both such fine and imprisonment. How. St. § 7092, subd. 8. It is by virtue of this section that a justice of the peace has jurisdiction to try the offense for which respondent was convicted. The punishment named in this section is the test and limit of his jurisdiction, and if a misdemeanor arising from the infraction of a so-called liquor law is punishable by imprisonment in the state house of correction, the justice would have no jurisdiction to try the offender. The views above expressed are those of first impression, and as the question mooted is not necessary to a disposition of the case before us, and was not fully argued, we do not make it a basis of our decision. The case was properly disposed of by a consideration of the two sections above quoted. As before stated, section 9755 was enacted in 1877, and, while it was upon the statute book, the act under which respondent was convicted was passed in 1881.

This act, after declaring the doing of the prohibited acts to be misdemeanors, expressly provided what punishments should be inflicted, and in terms limited the imprisonment, if any was imposed, to the county jail. The legislature did not intend that other or more odious punishment should be imposed than that specified in the act. It is a greater and more odious punishment to be imprisoned with convicted felons in a state house of correction than in a county jail. Had the legislature intended that an infraction of the law might be punished by sentence to the state house of correction, they should, and probably would, have said so. The intention that the county jail is the prison to which persons transgressing this statute should be sentenced, is rendered clear by the provision which declares that if the fine and costs have not been paid at the time such imprisonment expires, the persons serving out the sentence shall be further detained *in jail* until such fine and costs shall have been fully paid: provided, etc. This being the later enactment, and expressing the intention of the legislature in positive terms, must prevail.

I do not think that the sentence imposed upon respondent in this case was authorized by law, and it follows that the judgment must be reversed, and the respondent discharged.

SHERWOOD and MORSE, JJ., concurred. CAMPBELL, C. J., did not sit.

WHIPPLE *v.* STEBBINS, Receiver, etc.

(*Supreme Court of Michigan.* November 10, 1887.)

CHATTEL MORTGAGES—ON EVE OF ASSIGNMENT—INTENT TO PREFER—BONA FIDE MORTGAGEE.

A corporation gave a mortgage to secure a *bona fide* indebtedness, and immediately afterwards made a general assignment, without preferences, for the benefit of creditors. The mortgage was filed and recorded before the assignment. The evidence showed that the corporation intended to make an assignment when it executed the mortgage; also, that the mortgagee did not know that the corporation was embarrassed, or was intending to assign when she accepted the mortgage, and that she acted in good faith in the whole matter. *Held*, that the mortgage was valid, and that the mortgagee was entitled to have it paid out of the fund in the hands of the assignee.[1]

Appeal from circuit court, Wayne county, in chancery; JOHN J. SPEED, Judge.

Hoyt Post, (*Geo. W. Radford*, *Frank D. Andrus*, *Julian G. Dickinson*, and *Edmund Haug*, of counsel,) for Stebbins, appellant. *Griffin & Warner*, for Mary W. Whipple, appellee.

CHAMPLIN, J. Defendant is the receiver of the Scranton & Watson Lumber Company, who, on the nineteenth day of August, A. D. 1886, executed a common-law assignment for the benefit of all their creditors, without preferences, to one James Dewey. He having failed to qualify, defendant was, on application of certain creditors, appointed receiver by the circuit court for the county of Wayne to execute the trusts of the assignment. The assignors were a corporation organized under the laws of this state. The corporators were J. P. Scranton, Harvey M. Mixer, and Joseph E. Watson. Prior to the incorporation Scranton and Mixer were engaged in the lumbering business in the city of Detroit, as co-partners, under the name of J. P. Scranton & Co. Watson was also engaged in business at East Jordan, Michigan. In forming the corporation it was agreed that J. P. Scranton & Co. should put into the corporation as capital the assets of that firm, and that the corporation should assume and pay the debts and liabilities of the firm, and the same agreement was made with respect to the assets and debts of Watson. The corporation was organized about the first of October, 1885, and carried on business and acted as a corporation to the time of the assignment. The firm of J. P. Scranton & Co. was indebted to Mary W. Whipple for money borrowed to the amount of $5,000, which was one of the debts which the corporation assumed and agreed to pay. At the time of the assignment, such indebtedness was evidenced by two promissory notes, one dated October 1, 1885, payable in one year to the order of Mary W. Whipple, for $2,000, signed by J. P. Scranton & Co., and indorsed, "SCRANTON & WATSON LUMBER CO., H. M. MIXER, Treas." The other note was dated August 2, 1886, payable three months after date to the order of Mary W. Whipple, signed by J. P. Scranton & Co., and indorsed, "SCRANTON & WATSON LUMBER CO., H. M. MIXER, Treas." On the eighteenth day of August, 1886, the corporation

[1] In the absence of statutory prohibition, a debtor, though known to be in failing circumstances, and contemplating an assignment, may pay or secure one or more of his creditors, though the effect of such action is to render him unable to pay or secure other claims equally meritorious. Gilbert v. McCorkle, (Ind.) 11 N. E. Rep. 296. See Woonsocket Rubber Co. v. Talley, 30 Fed. Rep. 808, and note.

executed a chattel mortgage to Miss Whipple to secure the payment of the indebtedness evidenced by the above notes, which was filed in the city clerk's office on the nineteenth day of August, 1886, at 8 o'clock and 55 minutes, and the assignment was executed at 9 o'clock and 10 minutes on the same day. The corporation became embarrassed financially, and on the eighteenth day of August over $4,000 of its notes went to protest. A few days previously certain drafts, drawn by the corporation and sent to Cleveland to be accepted by one Smith as an accommodation, had been returned unaccepted, and Mr. Mixer and Mr. Scranton took advice of their counsel as to the best course to pursue under the circumstances in which the corporation was placed. Their counsel advised them to secure Miss Whipple, and a chattel mortgage was then and there drawn up and executed, which Mr. Mixer handed to his wife to deliver to Miss Whipple, which she did, and Miss Whipple accepted the security and returned it to Mrs. Mixer, who handed it to Mr. Mixer the same evening. The next morning he handed it to his counsel, who caused it to be filed at the hour above stated. It appears that at the interview at which the chattel mortgage was drawn the advisability of making an assignment was talked over and contemplated. Both Scranton and Mixer testified that they had not finally concluded to make an assignment until they executed it on the morning of the 19th. But the testimony is convincing that they fully intended to do so on the 18th, when they executed the chattel mortgage. This conclusion inevitably follows from what was done on the 18th. They arrived at their counsel's office at about 2 o'clock, and stated to him their situation. At 3:55 o'clock they sent the following telegram to Mr. Watson, viz.:

"THE WESTERN UNION TELEGRAPH COMPANY.

"Time filed, 3:55. DETROIT, August 18, 1886.

"*To J. E. Watson, East Jordan, Mich.:* We find it necessary to make an assignment. Must have your concurrence this afternoon. Please wire your consent this afternoon. Answer by messenger. H. M. MIXER,

"J. P. SCRANTON."

Watson answered by telegraph, as follows:

"THE WESTERN UNION TELEGRAPH COMPANY.

"Time received, 8:20. Dated EAST JORDAN, MICH., Aug. 18, 1886.

"*To H. M. Mixer or J. P. Scranton, Franklin & Dubois Sts.:* I agree to the assignment. JOS. E. WATSON."

The attorney set about preparing the assignment on the afternoon of the 18th, although it was not fully completed until the next morning. When Mr. Dewey, the assignee, was notified does not appear, but he came to their counsels' office on the morning of the 19th, and joined in the execution of the assignment. I have no doubt but that the officers of the corporation intended to make the assignment which was prepared on the 18th and executed on the 19th, at the time they executed the mortgage to Miss Whipple, and that it was substantially one transaction, and that the two instruments were to all intents and purposes contemporaneous. It also appears that in the transactions between the firm of J P. Scranton & Co. and Miss Whipple she was represented by Mrs. Mixer, the wife of H. M. Mixer. Mrs. Mixer was Miss Whipple's sister-in-law. She made the loans to the firm for Miss Whipple, received the interest paid on the notes for Miss Whipple, and was the custodian of the notes for her. She says that she left her papers with Mrs. Mixer because she was boarding, and thought they would be safer with her than at her boarding place. She says that she had no knowledge or expectation that the assignment was contemplated or was about to be executed. That she had several times spoken to Mrs. Mixer, and told her she wanted security for the money loaned; and it appears that Mrs. Mixer had communicated her request to Mr.

Mixer, and he had promised that security should be given. Mr. Mixer says that he was willing to give her security, and Mr. Scranton says he objected, because the giving of security would injure their credit. It also appears that Mr. Mixer, before he delivered the chattel mortgage to his wife, told her of their embarrassment, but did not tell her that they had talked of or intended to make an assignment. The mortgage was executed in the corporate name by Scranton as vice-president and secretary, and Mixer as treasurer. Watson was not consulted, and of course gave no consent. There was no meeting of the board of directors, and no corporate action taken by resolution or otherwise. But by resolution adopted by the board the above-named officers were given general authority to manage and conduct the business.

The statute forbids because it prohibits any debtor who makes a common-law assignment from preferring one creditor over another. It forbids any such assignment unless it be of all the debtor's property, except such as is exempt from execution. As we have before said, the main object of the statute is to prevent a failing debtor from preferring one creditor over another, and to insure an equal distribution of the debtor's property among all his creditors. It is, however, neither an insolvent nor a bankrupt law. It affords no discharge to the debtor who has surrendered all his property to satisfy the claims of his creditors. It does not declare preferences, by way of payment or security before making the assignment, void. It provides no means by which the assignee can recover from a creditor so preferred payments made or property pledged. The greatest extent to which the law goes is to authorize the assignee to recover all property, or right or equities in property, which might be reached or recovered by any of the creditors of such assignor. This does not authorize the assignee to recover a payment made by way of preference to a *bona fide* creditor before the assignment, nor to attack the validity of a mortgage given to secure the payment of a *bona fide* indebtedness. No creditor could successfully attack such mortgage if the assignment had not been made, and, unless prohibited by law, a debtor has a right to secure a *bona fide* indebtedness to his creditor, although such act may operate to prefer him over other of his creditors. The law does not declare such preferences fraudulent; they are not fraudulent in fact. Preferences are void only in common-law assignments because forbidden by statute. The statute inhibits the debtor from preferring a creditor in the instrument. If it is done by another and separate instrument contemporaneous with the assignment it can only be held void as an evasion of the law by the parties to the instrument. The purpose must be mutual by the mortgagor and mortgagee, for, no matter what the intent of the mortgagor is with reference to evading the law or committing a fraud upon it, such intent cannot affect the validity of a security otherwise valid given to a person who is innocent of such intent, and who does not knowingly participate therein. *Heineman* v. *Hart*, 55 Mich. 76, 20 N. W. Rep. 792; *Root* v. *Potter*, 59 Mich. ——, 26 N. W. Rep. 682; *Sweetser* v. *Camp*, 29 N. W. Rep. 506; *Field* v. *Fisher*, 32 N. W. Rep. 838.

The total absence of enactments necessary in order to effectuate the intention of the law to secure an equal distribution of all the debtor's property among all of his creditors, and to recover preference made with intent to evade its provisions, renders the law but little better than a dead letter upon the statute book. We are satisfied that the debt to Miss Whipple was one that the corporation had assumed, and was obligated to pay; that it was a *bona fide* liability of the corporation which it had a right to secure. The chattel mortgage appears to us to be a valid instrument, and was received by the petitioner without notice or knowledge that the corporation or its officers intended to make a general assignment for the benefit of their creditors. It was therefore a valid security in her hands, and under the stipulation made in the cause whereby she consented to the sale of the property by the receiver, and that he

should hold the fund subject to her lien if established, she is entitled to payment of her mortgage debt out of such fund, and the decree of the court below is affirmed. The costs will be paid by the receiver out of the general fund in his hands as receiver.

MORSE and SHERWOOD, JJ., concurred.

PENDLETON v. ELLIOTT and another.

(Supreme Court of Michigan. November 10, 1887.)

MORTGAGES—INSURANCE BY MORTGAGEE—PROCEEDS APPLIED ON MORTGAGE DEBT.

In a proceeding to foreclose a mortgage for $6,529.12, on a hotel property, the evidence showed that the mortgage contained no stipulation requiring the mortgagor to insure for the mortgagee's benefit; that an insurance company issued to the mortgagee a policy for $2,000 on his mortgage interest in the building; that the hotel burned, and the insurance company paid the $2,000 to the mortgagee; that the policy contained no provision that, in case of payment, the company would be entitled to subrogation. The evidence also showed that the whole course of the dealings of the parties was consistent with a memorandum indorsed on the application, that the assessments were to be paid by the mortgagor, and was inconsistent with the theory that the insurance was obtained by the mortgagee solely and exclusively for his benefit. *Held*, that the mortgagor was entitled to have the insurance money applied in reduction of the mortgage debt.

Appeal from circuit court, St. Joseph county, in chancery; RUSSEL R. PEALER, Judge.

D. E. Thomas and *H. H. Riley*, for complainant and appellant. *J. W. Flanders*, for appellees.

CHAMPLIN, J. This is a proceeding in chancery to foreclose a mortgage executed by defendants, Edwin W. Elliott and Amanda H. Elliott, of date July 16, 1873, to secure the payment of $6,529.12, in five equal annual installments of $1,305.82, evidenced by five notes bearing that date payable in one, two, three, four, and five years. The premises covered by the mortgage were situated in the village of Sturgis, St. Joseph county, Michigan, upon which was a hotel. The mortgage contained no stipulation or agreement requiring the mortgagor to insure for the mortgagee's benefit. On the twenty-seventh day of September, 1873, the St. Joseph County Village Fire Insurance Company issued and delivered to E. W. Pendleton, mortgagee, a policy of insurance on the mortgage interest of the mortgagee in the hotel building for $2,000. The hotel was totally consumed by fire on the nineteenth day of March, 1876, and the insurance company paid the $2,000 to the mortgagee. The policy contained no provision that, in case of loss and payment of the insurance, the company should be entitled to subrogation. The question in dispute is whether the mortgagor is entitled to have the insurance money applied in reduction of the mortgage debt. The right of the insurance company to be subrogated to the rights of the mortgagee does not arise in this suit, except so far as the question may be involved in the dispute between the parties to the mortgage. It was conceded upon the argument that the insurance company has as yet made no claim to be subrogated.

The law is well settled that if the mortgagee obtain insurance on his own account, and the premium is not paid by or charged to the mortgagor, he cannot claim the benefit of a payment of the insurance. *Insurance Co.* v. *Woodbury*, 45 Mo. 447; *White* v. *Brown*, 2 Cush. 412; *Stinchfield* v. *Milliken*, 71 Me. 567. If, however, the policy contains no stipulation for subrogation in case of payment to the mortgagee, and there is any arrangement between the mortgagor and mortgagee, either verbal or written, by which the mortgagor becomes liable to pay for the insurance, he is entitled to the benefit thereof, and to have it applied in liquidation of the mortgage debt *pro tanto*, and his

right in this respect does not depend upon the fact that he has paid for the insurance, nor whether the mortgagee procured the insurance, intending to look to the mortgagor for reimbursement of the premium; but it depends upon whether he is liable to the mortgagee therefor under any agreement, express or implied. And in such case, if the insurer receives the premium knowing it is paid by the mortgagor, or for him, he will not, in the absence of a stipulation therefor in the policy, be entitled to be substituted to the rights of the mortgagee against the mortgagor. *Kernochan* v. *Insurance Co.*, 17 N. Y. 428–441; *Cone* v. *Insurance Co.*, 60 N. Y. 619, 624.

The mortgagor Elliott claims that he procured the insurance upon the mortgagee's interest, and paid the premiums thereon. On the contrary, the complainant claims that he procured such insurance for his own benefit, and without any agreement whatever between himself and Elliott that it should be obtained. Both of these parties were examined as witnesses, and their testimony is as conflicting as it well could be, and both are more or less corroborated by facts and circumstances, which makes it extremely difficult to arrive at a very satisfactory solution of the case. Mr. Elliott testifies positively that he obtained the insurance in question, or applied for it, for Mr. Pendleton's benefit, and paid assessments upon it; that he transacted the business with J. Eastman Johnson, who was an officer of the company. Mr. Johnson, however, denies that he made application to or procured the insurance from him; and Mr. Charles Cooper, who was at the time agent of the insurance company for St. Joseph county, testified that Elliott applied to him for insurance upon the hotel, and he declined to take the risk,—did not want to carry any risk on it. Mr. Pendleton testifies that he made the application and procured the insurance for his own benefit without Mr. Elliott's knowledge, and the original application was produced in evidence from the office of the insurance company, and it appears to be and is in Mr. Pendleton's handwriting, and signed by him; that Charles Cooper acted for the company in taking the application; that it was done at the Exchange Hotel, and no one was present but Cooper and himself. Mr. Cooper, however, testifies that he has no recollection of having received the application from Mr. Pendleton. At the time this application was made John C. Joss was secretary of the company. He died in 1879, two years before this suit was commenced. The office filing indorsed upon the application is in the handwriting of Mr. Joss, and is as follows: "St. Joseph County Village Fire Insurance Company. Application. E. W. Pendleton; P. O. Sturgis. September 27, 1873. Class 9, $2,000. Hotel burned in February, 1876. Assessments to be paid by E. W. Elliott. Sturgis. Premium, $\{^{\$2.00.}_{3.50.}$ CHAS. COOPER, Agent."

The only fact of significance in the indorsement is that the assessments were to be paid by E. W. Elliott. Mr. Pendleton testifies that he gave no such instruction to the officers or agents of the insurance company, and that the indorsement was placed upon his application without his knowledge or consent. Mr. Cooper testifies that he has no knowledge and does not know how or by whose direction the indorsement, "Assessments to be paid by E. W. Elliott," came upon the application. Its existence there is an important fact; for if placed there by direction either of the mortgagee or mortgagor, and assented to by the company, it not only precluded the company from insisting on subrogation, but it was evidence that the insurance was intended for the mortgagee's benefit, and of an agreement that the mortgagor should pay the assessments, and, under the law, the insurance in case of loss would have to be applied by the mortgagee in reduction of the mortgage debt. Now, if Mr. Pendleton, although he made and presented the application to the agent, gave no such information to the agent or officers of the company, it follows that Mr. Elliott must have done so. If he did not, it is very singular and unaccountable how such indorsement came to be made. A strong inference arises from this fact that some agreement must have been entered into by

which Elliott was to pay the assessments. The books of the company show and the parties have stipulated that assessments were paid upon the policy as follows:

March assessment, 1874, paid by E. W. Pendleton,	$ 7 95
October assessment, 1874, paid by E. W. Elliott,	24 06
April assessment, 1875, paid by E. W. Elliott,	7 68
November assessment, 1875, paid by E. W. Pendleton,	3 00
March assessment, 1876, paid by E. W. Pendleton,	21 53

Thus it appears that, of the total assessments paid, Elliott paid $31.74, and Pendleton $32.48. Mr. Pendleton explains the payments of assessments by Mr. Elliott as follows: "When the first note became due, that would be about July 16, 1874, Mr. Elliott said that he was unable to meet the note, and asked for an extension. The note was partly paid. He said that owing to some old matters coming up from La Grange that Mr. Ellison had, that he was unable to pay it, and wanted further time. I told him that as money was worth 10 per cent., and that these notes were only drawing 7, and no interest due until the notes became due, that I could not afford to give him further time; and also that I had been to the expense of getting my mortgage interest insured. He asked me, 'Have you got your mortgage insured?' and I told him I had. He asked me in what company. I told him, in the St. Joseph County Village Fire Insurance Co. He said that was strange; the company had refused to give him a policy upon the building; and he then asked me how much it cost. I told him I did not know; it depended upon the losses the company sustained, and they made their assessments accordingly. He said that 'if you will not crowd me, and give me more time, I will pay your assessments for you until I can pay you.' I said, 'Very well, but you must pay it as soon as you can.' I think he paid the two next assessments,—the ones of the fall of '74, in October and April, '75. When the next note became due, which was about July 16, '75, he was considerably behind; I think somewhere about the amount of the second note. He said he had not got the money, but he would not pay any more assessments; that one of them was a heavy assessment. I asked him what he would do I could not afford to let it stand in that shape at that rate of interest. He said he would pay 10 per cent. on all payments, and the interest of the same after they became due. I said then we might as well put it upon the papers, and he said, 'Well,' and I wrote out the statement on the back of the mortgage, and he signed it, and he paid no assessments after that." He also testified that he received the notices of assessments directed to himself through the mail. Mr. Elliott was afterwards recalled, and further examined, but his attention was not called to the above testimony of Mr. Pendleton; neither did he deny it in express terms. He testified, however, that he paid all the assessments except the last; but is uncertain to whom he paid them, but thinks to Mr. Cummins, the collecting agent of the company. Mr. Cummins was dead at the time he gave his testimony. The next testimony in order of time bearing upon the question is that of J. Eastman Johnson, who went to Sturgis to investigate the loss immediately after the fire. He swore both Mr. Elliott and Mr. Pendleton, and made written *memoranda* of their statements. His *memoranda*, which were introduced in evidence, show that Mr. Elliott at that time stated to Mr. Johnson that he had $2,000 insurance in the Home Insurance Company of New York, and $1,000 on the furniture, and that all his policies were for his own benefit, and that he held none for Mr. Pendleton's benefit. It is claimed that this statement shows that Elliott at that time did not make any claim to the insurance held by Pendleton, but I do not think any such inference follows. Pendleton was present and was sworn at the same time, and the examination was being made for the purpose of adjusting the loss under Pendleton's policy. The statement of Mr. Elliott was directed to the policies which he held, and these he stated he held for his own benefit.

Mr. Johnson testifies that afterwards, and during the settlement of the loss, he had a conversation with Mr. Pendleton, in which he told Mr. Pendleton that the money should be applied as he thought upon the Elliott mortgage, the payment of which was partly secured by that policy. Mr. Johnson says that was the substance of his part of the conversation; that he might not have used those identical words; that Mr Pendleton replied he thought he should so apply it. This was the substance of the conversation. That Mr. Pendleton also stated that he had other claims against Mr. Elliott. This item of testimony has a bearing upon the right of the company to be subrogated to the mortgagee's interest. Mr. Johnson was president of the company when the application was made, and it already appears that the company understood that the insurance was for Mr. Elliott's benefit. Mr. Johnson was secretary of the company when adjusting this loss, and his testimony shows how the company understood the matter; that the mortgage was partly secured by that policy. Mr. Pendleton asserted no claim that it was not so secured, but said he thought he should so apply it. The money was paid by the insurance company in installments, and when the company had raised between twelve and fifteen hundred dollars it desired to hand it over to Mr. Pendleton as partial payment. Mr. Elliott testifies that Mr. Cummins came with the money, and he and witness went and hunted Mr. Pendleton up. Cummins asked him to receive the money, and indorse it on the mortgage; that Pendleton said that he could not use that amount then, as he had no place to use it until he got the whole of it; that he said when we got the whole of it he would indorse it on; that the money was then paid into the bank for Mr. Pendleton's credit. This statement is denied by Mr. Pendleton. It appears without dispute that Mr. Elliott desired to rebuild the hotel. He says he called on Mr. Pendleton, and requested him to loan him the money to rebuild with, and he told him that he could not let him have it. Mr. Pendleton testifies that Mr. Elliott asked him if he would not let him have the $2,000 insurance money to assist him in rebuilding, and he told him he could not; that he told him if he would reduce the mortgage to $3,000 he would extend the time of payment of that amount for five years, or a portion of it; that is, it was all to be paid in the course of five years; and upon that they made such an agreement, which was put in writing, and, as he understood it, was recorded; that Mr. Elliott at that time paid him $862.69, being the balance due upon the second note, which had matured the July previous. The agreement entered into at that time was as follows:

"Whereas, the Exchange Hotel, in the village of Sturgis, having been destroyed by fire, and there being due and to become due to Edward W. Pendleton, upon his mortgage upon said property from Edwin W. Elliott, and the said property being insufficient to secure said sum of $5,526.61, the amount now remaining unpaid upon said mortgage, the said Elliott agrees to pay this day the balance due upon the third installment of said mortgage, viz., $862.69, and to rebuild said hotel with brick. In consideration thereof said Pendleton agrees to loan upon said property to said Elliott the sum of $3,000 of the unpaid installment of said mortgage, and, if said mortgage should be less than $3,000, then the same to be made up to that amount in money; said loan to be for the term of five years, with annual interest at ten per cent; said installments that shall not be due when this agreement shall be consummated to be discounted so as to make them worth ten per cent. at the time of such loan. Said Elliott agrees to proceed to build said hotel within six months from this date. E. W. ELLIOTT.

"*Dated April* 7, '76. E. W. PENDLETON.

"*State of Michigan, St. Joseph County—ss.:* I, Nicholas Hill, register of deeds in and for said county, do hereby certify that I have compared the copy of 'Copy of Contract' to which this is attached with the record of the original instrument, which said original is now of record in my office, and find

the same to be a *true copy* of such record, and of the whole thereof. Said copy of contract was received for record on the nineteenth day of February, A. D. 1878, at 2 o'clock P. M., and was recorded in Volume 2 of Miscellaneous Records, on page 226.

"Witness my hand at Centreville, in said county, this eleventh day of July, A. D. 1885. [Seal.] NICHOLAS HILL, Register."

At the time this agreement was made the insurance money had not been received by Mr. Pendleton. He afterwards received and gave receipt therefor to the company as follows: "April 25, 1876, $1,435; June 2, 1876, $165; July 11, 1876, $160; August 25, 1876, $100; February 10, 1877, $160; total, $2,020,—the twenty dollars being interest on the deferred payments."

The testimony of Mr. Elliott and of Mr. Pendleton conflicts with reference to the manner in which the mortgage debt was to be reduced to $3,000, as specified in the above agreement of April 7, 1876. Mr. Elliott says that the insurance money when received was to be applied upon the mortgage, and that, if by such application the mortgage should be reduced below $3,000, he was to have sufficient money from Mr. Pendleton to make the mortgage up to $3,000. Mr. Pendleton says that the insurance money was not to be applied, and says that Elliott was to reduce the mortgage by payment, which he has never done. Both agree that the $862.69 was paid on that day, and it appears that Mr. Elliott went on and rebuilt the hotel with brick as specified in the agreement. I think Mr. Elliott's statement concerning the way the mortgage was to be reduced to $3,000 is the correct version of the affair. It is supported by the peculiar language of the instrument. The mortgage was to be continued on the premises, "and if said mortgage should be less than three thousand dollars, then the same to be made up to that amount in money." The words would be meaningless unless there was some amount to be applied on the mortgage which in the contemplation of the parties might reduce it below $3,000. If Elliott was to pay so as to reduce it to $3,000, such language would have been unnecessary. Pendleton makes no satisfactory explanation of this clause of the contract, and my conclusion is that it referred to the insurance money, and if it did it also follows that the parties understood from the beginning, taken in connection with the fact of the indorsement upon the application, and the payment by Elliott of part at least of the assessments, and the manifest understanding of the insurance company, that the insurance was for Mr. Elliott's benefit.

After the hotel was rebuilt, and on the thirteenth of April, 1878, Elliott conveyed the premises in question to Charles B. Buck, one of the defendants. Mr. Buck testifies that, previous to his purchase, Mr. Pendleton, Mr. Elliott, Benjamin Buck, and himself met in the office of Mr. Flanders, to see what was going to Mr. Pendleton,—to see what there was going to him,—so they could tell how much the balance was that Mr. Elliott owed him. Mr. Pendleton had his papers there, and Mr. Flanders and Mr. Pendleton both figured the mortgage, and made the balance coming to Mr. Pendleton, as near as he could remember, about $3,200. He states there was no controversy at that time between the parties as to the amount due on the mortgage. The deed he received from Elliott contained the usual covenants of warranty, and it covenants against incumbrances, except mortgages of $8,000. These he says were the mortgage to Pendleton for $3,000, one to Buck of $4,000, and one to Wait of $1,000. Benjamin Buck corroborates C. B. Buck as to the meeting in Flanders' office; says he can't recollect the exact amount they found due on the mortgage, but it was about $3,000. He is also corroborated by Mr. Elliott. Charles B. Buck purchased the property subject to Mr. Pendleton's mortgage, and afterwards made payments to Mr. Pendleton thereon as follows: November 4, 1878, $300; April 26, 1879, $700; September 20, 1879, the amount of a board bill, $90; and on December 14, 1881, he tendered to Mr. Pendleton $2,778, which he claims was the balance due Mr. Pendleton upon

the mortgage. Mr. Pendleton received the money tendered, but insisted that it did not pay the mortgage in full, and afterwards filed this bill to foreclose the mortgage for the balance which he claims to be due him thereon. It is conceded by the parties that if the insurance money was applied towards the payment of the mortgage debt the money tendered was sufficient to extinguish the mortgage.

The conclusion at which I have arrived is, after duly considering all the testimony, that the insurance of Mr. Pendleton's mortgage interest was for the benefit of the mortgagor, and was effected with the understanding that the mortgagor should pay the assessments therefor, and was liable to the mortgagee for the assessments he has paid therefor. Starting from the memorandum indorsed upon the application, and following down through the whole course of the dealings between these parties, their actions are consistent with this fact, and inconsistent with the fact that the insurance was obtained by Mr. Pendleton for his sole and exclusive benefit. This conclusion reached, the question whether the tender was properly made or not is of no consequence. The payment made discharged the lien of the mortgage, and it only remains for Mr. Pendleton to execute the formal discharge.

The decree of the circuit court is affirmed, with costs.

MORSE and SHERWOOD, JJ., concurred.

HART *v.* FIRZLAFF.

(*Supreme Court of Michigan.* November 10, 1887.)

1. CONTRACTS—CONSTRUCTION.

In an action to recover for expenses, and for money paid upon a joint contract for the purchase of land, it appeared that plaintiff, who was a real-estate dealer, first negotiated the sale to defendant alone, and, after the first payment, took a one-half interest, but the evidence was conflicting as to the exact nature of the contract. Plaintiff claimed to have been to considerable expense in negotiating the sale, and looking after the land, and testified: "I was to pay one-half, and he was to pay one-half. The condition of my making one-half of these payments was that he should reimburse me for one-half of my expenses." The court, in stating to the jury the plaintiff's version of the contract, said: "Mr. Firzlaff was to buy the lands, and pay $3,000 down upon them, and afterwards, if it became necessary, Mr. Hart and Mr. Firzlaff would pay the balance of the purchase money equally, and if they sold at an advance they would divide the profits; and, if the land was afterwards sold at a profit, then Mr. Firzlaff was to have the $3,000 he had paid, with interest at seven per cent. taken out, and the balance divided between the parties." Plaintiff excepted to the charge on the ground that the *condition* upon which plaintiff was to furnish any money at all, as he stated the contract, was not given to the jury. *Held*, that the exception was well taken.

2. SAME—BREACH—ABANDONMENT.

In an action to recover for expenses, and for money paid on a joint contract for the purchase of land, the claim for expenses was submitted to three arbitrators, who awarded the plaintiff $203.21. In charging the jury the court, referring to this award, said. "If then Mr. Firzlaff refused to pay those expenses, that would be a breach of the contract, and Mr. Hart would have a right to abandon the contract, and recover his money back. If, upon the other hand, notwithstanding the fact that there was an award made, if he refused to carry out the contract, there could be no recovery in this suit at all. *Defendant's Counsel.* He could abandon the award as well as the contract? *The Court.* Yes, sir." *Held*, that the instruction was misleading and erroneous.

Error to circuit court, Manistee county; J. BYRON JUDKINS, Judge.

Ramsdell & Benedict, for plaintiff and appellant. *A. J. Dovell*, for appellee.

SHERWOOD, J. The plaintiff in this case is a dealer in real estate, and resides at Manistee, and has a set of abstract books showing the titles to lands in Manistee county. He is a dealer in pine lands, and for several years has

been accustomed to procure examination of pine timber, and in 1877 and since then has had men in the woods to make such examinations. The defendant is a hotel keeper, and lives in Manistee, where he has resided many years. In the spring of 1882, the plaintiff claims, after he had looked up the land and estimated the timber thereon, he negotiated a contract with the Jackson, Lansing & Saginaw Railroad Company in behalf of the defendant, for the purchase of 1,956.24 acres of land, lying in the counties of Ogemaw and Roscommon, and secured the execution of a written contract to the defendant therefor. The terms of the contract were that the defendant agreed to pay for the land $39,000; $3,000 at the date of the contract, and the balance in five installments, extending through a period of four years. The plaintiff further claims that he looked up said lands, and estimated the timber thereon, and negotiated the contract in behalf of the defendant, for their purchase, under the following agreement with the defendant: That in consideration of these things, and the plaintiff's efforts to sell said lands, the defendant agreed to furnish the money to make the payment of the lands which were to be sold as soon as purchasers could be found; and when the sales were made the defendant was to receive back the money he had paid on the contract, with interest, and the profits made in the transaction were to be equally divided between them. Under this arrangement the defendant paid the first $3,000, and, when the next payment became due, the agreement was modified between the parties, as follows: It was then agreed that they should jointly own the land, and jointly raise the money at the bank to make the payments upon the contract; that defendant should pay the plaintiff one-half his expenses incurred in the enterprise, and, after such expenses were paid, the profits on sales of the land were to be equally divided as before.

Plaintiff further claims that he invested large sums of money in expenses both before and after the modification of his agreement with defendant, and paid large sums upon the modified agreement; but that defendant made default, and on or about August 13, 1884, refused to allow or pay one-half the plaintiff's expenses; and that about December 6, 1885, he notified the plaintiff that he would not recognize him as having any interest or right in the contract, and refused to give him a one-half interest therein. The plaintiff, after such notification, brought this suit against the defendant in the Manistee circuit, claiming for the expenses he had paid in the premises, and the moneys he had advanced upon the contract, under the agreement with the defendant. The defendant pleaded the general issue. A trial of the cause was had, and the defendant prevailed. The plaintiff brings error.

The defendant, upon the trial, did not concede the agreement made between the parties, as stated by the plaintiff, but testified that he was induced by the plaintiff to make the investment he did in the lands upon the former's representations that the purchase was a good one for speculation; that the land would sell within 30 or 60 days at a large profit; that, in the arrangement he made with the plaintiff, he guarantied that the land would sell at a large profit before it became necessary to make the second payment; and that, if it became necessary to make more payments than the first, he would furnish half the money; and that they were to share equally in the profits made.

It appears from the testimony that the second payment became due in August, 1882, and, anticipating the third payment, the parties obtained a loan at the bank on their joint note of $6,907.50; that on December 26, 1882, the plaintiff made sale of one section of the land for the sum of $12,000; that each received from this sale, after paying for the land sold and a few expenses, a profit of $547.84. The testimony further shows that the efforts of the parties to sell the remaining lands were unavailing, and that on the twenty-eighth of April, 1883, they paid the interest on the contract, to the amount of $1,871.29, each party paying his half of the same; and that this was the last payment made by either party upon the contract. At this time it would appear

each party had invested equally in the property, except that Hart had not been reimbursed for his costs incurred. At this time the parties still owed at the bank on their note $7,911.21.

The plaintiff presented to the defendant a bill of his expenses, under the agreement between them, as he claimed it, of $557.21, of which he requested the defendant to pay half. Over this claim a difficulty arose between the parties, which they submitted to three arbitrators, who found that the defendant should pay the plaintiff $203.21. The plaintiff then paid to the bank his half of the note, less the sum awarded for the defendant to be paid to him. The defendant paid his half of the note, but refused to pay the amount of the award, which, with interest, the plaintiff afterwards, on the sixteenth day of October, paid, and at the same time told the cashier of the bank to tell the defendant "that I wash my hands of it; that he could run the thing after this; that I had run it for three years, and put in all expenses, and that he might put in the expenses hereafter as long as he would not pay what the board of arbitrators decided he should pay." After this the plaintiff told several parties he had dropped out of the contract. The defendant then offered the property for sale to several parties, but did not sell to them, and gave testimony tending to prove that he went to Hart, and protested against his giving up the agreement; but that Hart insisted he would have nothing more to do with it, but said he would assist the defendant what he could in making sale of the property. In November some parties applied to Hart for the purchase of the land, and asked a refusal of it for 30 days. Hart carried the proposal to the defendant, who directed him to give the refusal. The defendant's terms were finally accepted, and the defendant transferred the contract he held for the lands to the purchaser for $30,000, on the first day of December, 1885. The defendant received upon this sale, after deducting the amount due the railroad company, from the purchase money, $3,799.18. The testimony further shows that the plaintiff paid for expenses, and on the parties' note at the bank $5,299.07, and received in profits $547.84.

The plaintiff claims that when the defendant refused to pay the expenses found by the arbitrators due him he became released from his agreement with the defendant, and was entitled to recover back the money he had expended; or, if his subsequent negotiation of the sale of the property should be considered a waiver of the default made by the defendant, then the plaintiff should recover the amount of his award, and one-half of what was paid to Hansen on the last sale, both sums amounting to $2,103.50. The defendant claims that under the agreement he made with Hart, notwithstanding Hart may have put more money in the venture than himself, upon the sale of the property the defendant is entitled to take out all of his investment before any division, and is to give Hart half the profits, and, there being no profits, he owes the plaintiff nothing. He also testifies that his loss is $2,714.42. It was under these several claims the cause was tried and submitted to the jury.

On the trial the defendant's counsel was allowed to show that the defendant, after he claims the plaintiff gave up his agreement with defendant, went to Mr. Barnes, the railroad company's agent, and offered to give up the contract, and pay something in addition to what he had paid if the company would cancel his contract. This was objected to as irrelevant and immaterial. In view of the claims submitted to the jury, I think the evidence was proper. It did no more than show the efforts made by the defendant to dispose of the property. The plaintiff makes claim for a portion of its proceeds on final disposition. Under the theory of the defendant, and the claims made by the plaintiff, the other testimony objected to and admitted was properly received in evidence. Counsel for plaintiff assigns error on the statement by the court to the jury of the plaintiff's version of the contract between the parties as given by the plaintiff when upon the stand. In the charge the court said: "Mr. Firzlaff was to buy the lands, and pay $3,000 down upon them, and after-

wards, if it became necessary, Mr. Hart and Mr. Firzlaff would pay the balance of the purchase money equally, and if they sold at an advance they would divide the profits; and if the land was afterwards sold at a profit, then Mr. Firzlaff was to have the $3,000 he had paid, with interest at seven per cent. taken out, and the balance divided between the parties." In relation to the plaintiff's advancing any money upon the contract the plaintiff testified: "I was to pay one-half and he was to pay one-half. The condition of my making one-half of these payments, and taking an interest with him, was that he should reimburse me for one-half my expenses."

It will be noticed that the condition upon which the plaintiff was to furnish any money at all, as he states the contract, was not given to the jury. This was a hurtful omission in stating the contract as the plaintiff claimed it. If the defendant refused to pay one-half the expenses, the plaintiff, was, under the plaintiff's statement of the agreement, under no obligation to make any advances upon the contract. The error upon this subject is well assigned.

Counsel for plaintiff excepted to that portion of the charge reading as follows: Referring to the expenses that had been awarded to the plaintiff by the arbitrators, the court said: "If, then, Mr. Firzlaff refused to pay those expenses, that would be a breach of the contract, and Mr Hart would have a right to abandon the contract, and recover his money back. *Mr. Dovel.* If he did it on that account? *The Court.* Yes, sir. If, upon the other hand, notwithstanding the fact that there was an award made, if he refused to carry out the contract, and abandoned the whole contract, there could be no recovery in this suit at all. *Mr. Dovel.* He could abandon the award as well as the contract? *The Court.* Yes, sir." While from this passage it may be a little difficult to say just what the court intended the jury should understand, still I think the language is misleading, and must be regarded as prejudicial to the rights of the plaintiff, and erroneous.

I find nothing in the record in the testimony of the defendant warranting the following statement made by the court in the charge to the jury, viz.: "Mr. Firzlaff, on the other hand, claimed that he never broke his engagement at all. He admits making the contract very much as claimed by plaintiff, but claims that Mr. Hart refused to carry it out, refused to make payments, although he was urged by Firzlaff to do so." The exception to this charge was well taken. It appears from the record that neither party made payments upon the contract after August 26, 1883, nor does it appear that the plaintiff was asked by the defendant to make any.

For the error stated the judgment should be reversed, and a new trial granted.

CHAMPLIN, J. I agree in a reversal of the judgment.

MORSE, J. I do not think this case was presented to the jury upon the right basis as to the respective rights or claims of the parties, and therefore concur in a reversal of the judgment. If the plaintiff's testimony was to be believed, the last and final arrangement was that each should pay for one-half of the land, and share equally in the profits, if any. The defendant was to pay him one-half of the expenses already incurred in and about the looking up and purchase of the land, and in trying to sell it. The defendant was to receive out of the proceeds of the sale of the land the $3,000, with interest, that he had paid when the contract for the lands was executed. There is no doubt but, after the refusal of the defendant to pay the award of the arbitrators, the plaintiff announced his intention of throwing up and abandoning the contract, and refused for a time to do anything more about it. If, as he claims, he afterwards waived this abandonment, and with the consent or acquiescence of the defendant, entered into negotiations, and helped sell the land, he would be en-

titled to one-half of the proceeds of the sale, and one-half of the expenses incurred by him. If there was a loss upon the venture, he would be entitled to what he had paid in upon the contract, and the expenses as above stated, less one-half of the loss, which he must share with defendant. I can find no law from the facts of the case, as stated by himself, that would authorize him to recover back from the defendant what he had paid upon the contract, without regard to the question of losses upon the same. According to his own statement after the sale to Salling and Hansen, and before they had settled for the purchase, he only asked to be paid one-half of the amount received over and above the amount going to the railroad company. This is all he was entitled to under his own evidence. In regard to the statement of facts made by the court to the jury, I think it was the duty of the plaintiff's attorneys to correct the court, at the time, if he made any mistake in the statement of the plaintiff's claim as to the terms of the agreement between the parties. If this had been done, and the court had not made the correction when suggested, it would have been error. But when the court made the statement that the defendant claimed that Mr. Hart "refused to make payments, although he was urged by Firzlaff to do so," plaintiff's counsel were not called upon to interfere. I also find, with my Brother SHERWOOD, no warrant in the record for this statement. I also think that portion of the charge wherein the court instructed the jury that plaintiff could abandon the award, as well as the contract, as misleading and prejudicial to the plaintiff's case. There was no evidence anywhere tending to show that the plaintiff ever abandoned the award. If the agreement was as he claimed, he had the right to abandon the contract when Firzlaff refused to pay his share of the expenses. And the whole testimony shows that his sole reason for stating that he would have nothing more to do with the contract was on account of the refusal of Firzlaff to pay the amount of the award. Firzlaff admits that he refused to pay the award after he had agreed to submit the matter to the arbitrators. But he claims that he never agreed at any time to pay these expenses, but refused to do so, and that such payment upon his part was no part of the first or any subsequent agreement as to the purchase of the lands, and that he told the arbitrators as soon as they announced their decision that he would not pay it, as they had not done right. If Firzlaff never agreed as a part of his contract to pay one-half of Hart's expenses, his refusal afterwards to abide by the award would not justify Hart in abandoning the contract. The case then should have been submitted to the jury upon the plaintiff's theory, as legitimately drawn from his own testimony, that, if his story of the transaction was true, he was entitled to recover such sum as would give him one-half of the profits of the venture, if any, or, if there were no profits, such sum as would leave him loser of only half of the entire loss upon the contract, and reimburse him for one-half of his expenses. Upon the defendant's theory, if the jury believed that Firzlaff never agreed to pay these expenses, and that Hart abandoned the contract, the plaintiff could not recover anything.

SLATER *v.* CHAPMAN.

(*Supreme Court of Michigan.* November 10, 1887.)

1. MASTER AND SERVANT—NEGLIGENCE OF SUPERIOR—KNOWLEDGE OF MASTER.

Plaintiff, a carpenter employed on a building by defendant, was sent by one S., who had been placed in full control of the building by defendant upon some stairs from which S. had removed the cleat which kept them from slipping. There was evidence that defendant knew S. was careless, and that he had been careless in other work about the building. *Held*, that an instruction, that if the accident was caused by the negligence of S., and defendant knew S. was a careless workman in the place where he put him, and S. was in fact careless, then defendant was liable if plaintiff was in exercise of due care and in ignorance that S. was careless, and had removed the cleat, was not erroneous.

2. SAME—ALTER EGO—WORKMAN IN CHARGE OF BUILDING.
Where defendant gave an employe full control of a building and the men employed thereon, *held*, that he stood in the shoes of his principal, the defendant, and his negligence was that of the defendant.[1]

3. APPEAL—PLEADING AND PROOF—VARIANCE WAIVED.
In a suit for damages for injuries from a fall, plaintiff alleged in his declaration that the neglect which caused the injury was with the knowledge and in the presence of defendant, while the testimony showed he was absent, and knew nothing about it. *Held* that, as there was no claim of a variance at the trial, nor in the assignment of errors, it cannot be raised on appeal.

Error to circuit court, Charlevoix county; J. G. RAMSDELL, Judge.
Cruickshank & Grier, for plaintiff. *Pailthorp & George* and *Taggart, Walcott & Ganson*, for defendant.

MORSE, J. This action was brought by the plaintiff to recover damages for an injury resulting from a fall while he was employed as a carpenter about the construction of a hotel, which the defendant was building at Bay Springs, in Charlevoix county. The theory of the plaintiff upon the trial was that the injury was occasioned, without fault on his part, through the negligence of one Charles Sizer, who had the whole charge and management of the work and the workmen employed in the building of the hotel, and that the defendant was liable for the result of Sizer's negligence, because he knew that Sizer was careless and negligent, and kept him in his employ and in charge of the work after such knowledge of his incompetency by reason of such carelessness and negligence; and also because Sizer being employed by the defendant to take the whole charge of the erection of the building, and exercising full control over it in the place and stead of defendant, his negligence was the negligence of the defendant, even if the defendant had no knowledge that Sizer was incompetent or careless.

There seems to be no dispute about the reason of the accident. A temporary staircase had been erected connecting the second and third stories of the hotel. This stairway was kept from sliding or slipping by a cleat at the bottom. In putting in the permanent stairway it became necessary to remove this cleat. Sizer removed it without the knowledge of the plaintiff. After its removal he ordered plaintiff to go up the temporary stairs to work about the permanent stairway. When near the top the stairs gave way on account of the removal of the supporting cleat, and the plaintiff was precipitated into the basement below, severely injuring him. He recovered a judgment for $1,000. It is claimed by the counsel for the defendant that the proofs in the case were at variance with the declaration. That the declaration avers that the removal of this cleat was with the knowledge and consent of the defendant, who was present, while the evidence shows that Chapman was absent and knew nothing about it. It appears however from the record that no claim of this kind was made upon the trial, nor is there any assignment of errors that covers it. It cannot now be raised here for the first time. The other errors assigned relate to the charge of the court.

We think that the court very fairly and properly instructed the jury as to the law of the case. Every request of the defendant's counsel was given in the exact language of the counsel, and without modification. The court instructed the jury in substance that if Sizer was employed by the defendant to take the whole charge of the erection and construction of the hotel, and exercised full control over it, in the place of the defendant, then the negligence of

[1]To constitute one vice-principal or superior servant, the master must have committed to him the virtual and substantial control of the business, and the power to do all acts necessary to its conduct. Willis v. Railroad & Nav. Co., (Or.) 4 Pac. Rep. 121. Where a master delegates duties, which the law imposes upon him, to an agent, the agent, whatever his rank, acts as the master in performing these duties. Copper v. Railroad Co., (Ind.) 2 N. E. Rep. 749. See note to Id.

Sizer would be the negligence of the defendant, who would be liable for such negligence, no matter whether he knew Sizer was incompetent or careless or not; and also, that if the injury was occasioned by the negligence of Sizer, the defendant would be liable for the same if he knew Sizer to be incompetent and careless, and Sizer was in fact a careless and negligent workman in the place where the defendant had put him: provided, however, in either case, that the plaintiff himself was not in fault, for the plaintiff must also show that he was ignorant of these faults in Sizer, and ignorant of the removal of the cleat, and that he exercised all the care and caution that a competent workman in his calling would have exercised under like circumstances, and that if the plaintiff, in going upon the stairs to work, when he was ordered to do so by Sizer, without first examining them to determine their safety, did not thereby exercise the care and caution which common prudence would require of one in his calling, he could not recover, notwithstanding the negligence of Sizer.

It is contended here that there was no evidence tending to show that Chapman had any knowledge that Sizer was careless or negligent in his work as foreman, or that in fact Sizer was so careless or negligent. There was evidence tending to show not only that Sizer was careless in removing this cleat, and then sending the plaintiff upon the stairway, but that he was careless in other respects as to the fastenings of braces and other supports upon which the workmen must rest in the process of the work upon this building. There was also testimony that Chapman said after the accident that he knew Sizer was careless and "expected he would kill somebody," and that he "was the man who built the grand-stand at Adrian." This testimony was not denied by the defendant, as appears from the record. It is also insisted that because the foreman, Sizer, worked himself about the buildimg, the same as the other carpenters, and at times with them, he was a fellow-servant of the plaintiff, in law, and therefore the direction of the court below was erroneous in instructing the jury that his negligence might be considered the negligence of Chapman. There was testimony tending to show that Sizer was something more than a mere foreman or boss workman. If he had the full charge and control of this building and the men employed thereon delegated to him by the defendant, and his agency covered the entire building, and his capacity and discretion dominated over it, in respect to his legal accountability, he stood in the shoes of his principal, Chapman, and his negligence was the negligence of the defendant without question. *Mining Co.* v. *Kitts*, 42 Mich. 34, 3 N. W. Rep. 240; *Ryan* v. *Bagaley*, 50 Mich. 179, 180, 15 N. W. Rep. 72; *Willis* v. *Navigation Co.*, 4 Pac. Rep. 121; *Rodman* v. *Railroad Co.*, 55 Mich. 62, 20 N. W. Rep. 788, and 26 N. W. Rep. 651.

We find no error in the proceedings upon the trial, and the judgment of the court below will be affirmed, with costs.

SHERWOOD and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

FRAIN *v.* METROPOLITAN LIFE INS. CO.

(*Supreme Court of Michigan.* November 10, 1887.)

INSURANCE—LIFE—RETURN OF POLICY—QUESTION FOR JURY.

Plaintiff procured from defendant a policy on the life of her father. Her father was never examined by a physician. Plaintiff paid the premiums. An inspector sent out by the company to examine and take up improper policies, called upon plaintiff, learned her father had not been examined, and took the policy to send to the company, promising the company would return the policy or the premiums. Plaintiff afterwards demanded the policy or the premiums of the local agent, but received neither. Defendant claimed to have returned the policy to plaintiff's husband through the local agent. He denied having received it. There was no claim of fraud on the part of plaintiff. *Held*, that an instruction directing a verdict for defendant was erroneous. The case should have been left to the jury.

Appeal from circuit court, Wayne county; WM. JENNISON, Judge.
Griffin & Warner and *Ormond F. Hunt*, for plaintiff. *Edmund Haug*, for defendant.

MORSE, J. The plaintiff brought suit in the Wayne circuit court, and filed a bill of particulars, the action being in *assumpsit*, to recover moneys paid to the defendant for premiums and assessments on an insurance policy issued to her by the defendant company upon the life of her father. The defendant pleaded the general issue, and gave notice under said plea that the policy was procured by means of certain false and fraudulent representations. This defense under the notice, however, was not sustained, and cuts no figure in the case. The circuit judge directed a verdict for the defendant. The Metropolitan Life Insurance Company, as appears from the record, had at the time a superintendent of agencies, one Alexander Adams, over the district which consisted of the city of Detroit, where plaintiff resided, when she received her policy. It appears from the testimony of the plaintiff that she took out the policy in December, 1883, and paid all the premiums and assessments upon it up to the time it was taken away from her, $59 in all. This is the amount she sues for. In February, 1885, one Southworth, an inspector of the company, came to her house. He came from New York, and said he was inspecting all the agent's business. He asked to see plaintiff's policy, and she produced it. He asked her if the physician of the company had ever seen her father, and she told him, "No." Southworth then said that was not right, and he would take the policy, and that the company would either return the policy or the premiums paid thereon. He took the policy, and afterwards she went to the office of Adams, and asked him if the policy had come back. He replied that Southworth had taken it to head-quarters, and that it had not been returned. She went to Adams at another time, and offered to pay the premiums then due, as she did not wish the policy to lapse. Adams refused to take the money, for the reason, as assigned by him, that the policy had lapsed when Southworth took it away. She had never seen the policy since, and the premiums have not been refunded to her. At the time the policy was issued her husband was an agent of the company, and one Branch, who was assistant superintendent at Detroit, came to her, and asked her about having some of her friends insured. She said perhaps she would get her father's life insured, and finally she did so. Mr. Branch filled out the application. Her father at the time lived at Brussells, Ontario, and was 70 years of age. He was never examined by a physician, and for this reason the policy was taken up.

It appeared from the testimony of Adams that he and Southworth came to Detroit together to examine into the condition of the agency there, and to take up and cancel policies taken, as this one was, without any examination of the insured person by a physician. He claims that Southworth sent the policy in question here to the company, who returned it to Adams, who delivered it to Frain, the husband of the plaintiff. Frain denies that it was ever delivered to him. There is nothing in the record before us to show that Mrs. Frain made any false or fraudulent representations to the company, or that she was in any way responsible for her father's not being examined by a physician, as required by the rules of the company. The circuit judge held that there was no evidence tending to show that Southworth had any authority to promise on behalf of the company to return the policy or pay back the premiums. But, if the testimony of the plaintiffs is to be taken as true, she was innocent of any fraud upon the defendant. She paid in good faith $59 in premiums. She delivered up the policy to one professing to act for the defendant. The evidence upon the part of the defendant shows that Southworth was sent by the company to Detroit for the express purpose of taking up and canceling just such policies as this; that he sent this policy to

the company, and presumedly the defendant was acquainted by him why it was so sent. If the plaintiff's evidence is true, she has never had the policy returned to her, or to any one for her; and her testimony and that of Adams, taken together, shows that the company refuse to recognize the validity of the policy, yet has in its hands $59 that in equity and good conscience belongs to plaintiff, if she committed no fraud upon them in procuring the insurance.

The case should have been submitted to the jury. Judgment is reversed, and a new trial granted, with costs of this court.

SHERWOOD and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

STEERE and others *v.* VANDERBERG.

(*Supreme Court of Michigan.* November 10, 1887.)

ATTACHMENT—PERSONAL SERVICE ON DEFENDANT—AFFIDAVIT—FILING DECLARATION.

By How. St. Mich. § 8005, in a proceeding against a debtor by attachment in a circuit court, if a copy of the attachment writ has not been served personally on the defendant, and he does not enter an appearance in the suit, the plaintiff may, on filing an affidavit of the publication of a certain notice, file the declaration and proceed to judgment as if personal service had been obtained. Plaintiff sued out an attachment writ, and it was returned without such service. Plaintiff then filed his declaration, and several days afterwards filed the required affidavit, and thereupon proceeded to judgment by default. *Held*, that the failure to comply with the statute was not a mere irregularity, and that the judgment was void.

Error to circuit court, Montcalm county.

Wm. O. Webster, (*S. G. Millard*, of counsel,) for plaintiffs, appellants. *Mitchel & McGarry*, for defendant.

CHAMPLIN, J. In this case the writ of replevin issued by the plaintiffs was quashed, and the cause came on to be heard in the court below for the purpose of assessing the value of the property taken upon the writ. Testimony was taken therein, and upon request of plaintiff the circuit court filed special findings of fact and law as follows:

"*First.* In September, 1884, one George C. W. Richards was engaged in the drug business at Sheridan, Michigan, and had in his possession, and owned the same, a stock of drugs and medicines.

"*Second.* September 5, 1884, Hazelton, Perkins & Co., in the names of the different members of the firm, commenced suit against said Richards by attachment, alleging in the affidavit that Richards had absconded from the state with intent to defraud his creditors, and that he had assigned his property with the like intent, and a writ of attachment was duly issued on the same day, returnable September 12, 1884. The writ was returned not served on the return-day, but showing a seizure of the property in question in this suit —the drugs and medicines. Notice of attachment was duly and regularly published for six successive weeks, and on the twenty-ninth day of November affidavit of publication was filed. The declaration was filed in the case November 21, 1884. On the same day that affidavit of publication was filed, being November 29, 1884, the defendant's default was entered and the same made absolute December 2, 1884. On the third of December, 1884, judgment was rendered against defendant Richards for $544.18. Dec. 5, 1884, costs taxed at $39.50, and execution was issued Dec. 5, 1884, returnable December 20th, on which the following return appears:

"'By virtue of the annexed execution, to me directed, I levied on the goods and chattels of the defendant therein named as described to me in the notice annexed to said writ, and after advertising the same for sale as required by law, I did, at the time and place appointed in the notice of sale, expose said goods and chattels for sale at public auction or vendue, and at said sale several persons were in attendance, and several different persons bid therefor;

that the same was sold and duly struck off to M. J. Summers for the sum of thirteen hundred and fifty dollars. I further certify and return that I have paid the attorney for the within named plaintiffs the full amount of the damages and costs herein, and taken his receipt therefor.

"'*Dated December* 20, 1884. J. A. SUMMERS, Under-Sheriff.'

"*Third.* On the eighteenth of September, 1884, suit was commenced against said Richards by attachment for the sum of $———, in favor of Hinchman *et al.*, as plaintiffs, and the writ issued and made returnable October 7, 1884, on which day it was returned showing that the defendant's property was attached, but no personal service had because the defendant could not be found. The affidavit, notice of attachment, proof of publication, filing of declaration, entry of default, default absolute, rendition of judgment, issuance and return of execution, were substantially the same as in the case of Hazeltine, Perkins & Co. against Richards.

"*Fourth.* On the twelfth of September, 1884, another suit was commenced by attachment in favor of Barnes *et al.*, and against said Richards, in which like proceedings in the case last above mentioned were had and taken.

"*Fifth.* On the thirteenth of September another suit was commenced by attachment in favor of Courtlander *et al.* against said Richards for the sum of over one hundred dollars, in which the subsequent proceedings were the same as in the case of *Hinchman et al.* v. *Geo. C. W. Richards.*

"*Sixth.* Each suit was commenced by affidavit against Richards as an absconding debtor and were substantially the same.

"*Seventh.* The executions issued in the several attachment suits having been levied on the said stock of goods, and the judgments therein amounting to $1,350, the property, after being duly advertised, was offered for sale by said under-sheriff, and bids made thereon. The sale was held open until afternoon, and during this time an agreement was entered into between Mr. Griswold, representing the attachment creditors, the agent of Hinchman & Sons, one of said creditors, whose execution was the last one levied, and Mr. M. J. Summers; that Summers should bid on the goods $1,350, and if no person bid more they should be struck off to him; that Hinchman & Sons would pay the amount due the prior attaching creditors in cash, and give Summers time to pay for the goods, taking his notes indorsed by his father and also secured by chattel mortgage on the goods for the full amount of $1,350. When the sale was again opened in the afternoon, Mr. Griswold, at the request of Summers, made the bid of $1,350, and, there being no higher bid made, the goods were struck off on that bid. Subsequently the notes and mortgage were executed by Summers to Hinchman & Sons for the price bid, $1,350, and Mr. Griswold took them to Detroit to close the matter up with Hinchman & Sons, but owing to some misunderstanding they declined to accept the same and pay the other attaching creditors. When notified of this fact, Summers not being in a situation to pay the money, and by an agreement between Griswold acting for the attaching creditors, Mr. M. J. Summers and the defendant in the case, the goods were delivered to the defendant, the notes and mortgage delivered up to Summers, and the defendant paid in cash to Griswold $900 for the same, and Mr. Griswold, as attorney for the plaintiffs in the attachment suits, receipted the judgments and executions to the sum and amount of $1,350, the amount at which they were struck off to Summers.

"*Eighth.* Immediately after Jacob Vanderberg purchased the stock of goods, he put an agent in charge and commenced selling the same at retail. He also purchased some goods which he added to the stock. The amounts so sold and purchased were about equal. In this manner he was carrying on the business when the writ of replevin in the present case was served, and the property in question seized upon the writ and delivered to the plaintiffs.

"*Ninth.* On the thirtieth day of January, 1885, the plaintiffs instituted this suit. Mr. Vanderberg was made sole defendant. The stock of goods, as

above stated, was seized and delivered to the plaintiffs, who subsequently sold and disposed of it. No personal service was ever had, though several *alias* writs were issued. Upon motion of defendant's attorneys the writ was dismissed, and the suit ordered to stand on the assessment of value. Upon this issue testimony was taken on the part of the defendant.

"*Tenth.* The plaintiffs, who are attorneys at law, claim title to the property in question by virtue of the following instrument, which they claim had been executed by Geo. C. W. Richards, and was in their possession before suit was brought, viz.:

"'POWER OF ATTORNEY.

"'Know all men by these presents that I, Geo. C. W. Richards, of the village of Sheridan, Montcalm county, Michigan, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Steere & Brown my true and lawful attorneys, for me, in my name, place, and stead, to collect my exemption rights, and receive the money for the same from certain parties who have seized my business and household goods by virtue of certain writs, the nature of which I do not accurately know; *and also selling and conveying unto them all of my goods in said county*, giving and granting to my attorneys full power to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present; with full power of substitution and revocation, hereby ratifying and confirming all that my said attorneys or their substitutes shall lawfully do or cause to be done by virtue hereof.

"'In witness whereof I have hereunto set my hand and seal the ——— day of ———, 1885. GEO. C. W. RICHARDS. [Seal.]'

"*Eleventh.* The plaintiffs are a law firm doing business at Stanton, and one of the firm, Mr. Brown, was present at Sheridan at the sale when the property in question was sold on the execution by the sheriff. After said sale and prior to the replevin suit the instrument under which the plaintiffs claim title was drawn in the office of said plaintiffs by one of their clerks, and at their request sent to said Geo. C. W. Richards, in the state of California, who executed the same and sent it by mail to the plaintiffs. The plaintiffs paid no consideration for the property in question. The said Geo. C. W. Richards is a non-resident of this state, and has been ever since and prior to the issuing of said writs of attachment. Such goods were worth at the time of the seizure, January 30, 1885, $900, and defendant is entitled to judgment for that amount and interest thereon at seven per cent. to date, which is $1,024.95. Said defendant having waived a return of the property, let judgment be entered for defendant in that amount.

"(1) That the judgments rendered in the several attachment cases against Geo. C. W. Richards are voidable only and not void, and that a sale upon an execution issued thereon, while unreversed, would confer a valid title upon the purchaser at such sale. The judgments are not open to attack collaterally.

"(2) That the sale on such execution divested said Geo. C. W. Richards of his title to the goods in question, and conferred said title in the purchaser at said sale.

"(3) That the plaintiffs, having no right nor title to the goods in question, cannot contest the validity of Vanderberg's title thereto."

There are only two questions presented by this record. (1) Was Richards divested of his title to the goods in question by the attachment proceedings? (2) If not, did the instrument under which the plaintiffs claim transfer the title to them? The proceedings in the attachment suit are conceded to be defective, but counsel for the defendant claims that the defects went merely to the regularity of the proceedings, and hence were not such as to render the judgment a nullity. The defects appear in the second finding of facts. The writ

was issued September 5, 1884, returnable September 12, 1884. It was returned on that day, from which it appeared that property had been attached, and that defendant could not be found. On the twenty-first day of November, 1884, the plaintiff filed his declaration. This was premature, as affidavit of publication was not filed until the twenty-ninth day of November. Notice of attachment was duly and regularly published for six weeks. On the same day the affidavit was filed the defendant's default was entered. On December 2d the default was made absolute, and on December 3d judgment was rendered against Richards for $544.18. Neither the statutes nor rules of court were regarded by the plaintiff in the attachment suit. Section 8005, How. St., enacts that "if a copy of the attachment has not been served upon any of the defendants, and none of them shall appear in the suit, the plaintiff, on filing an affidavit of publication of the notice hereinbefore required for six successive weeks, may file his declaration in the suit, and proceed therein as if a copy of such attachment had been served upon defendants."

The jurisdiction conferred upon circuit courts in proceedings by attachment is special, and a strict compliance with statutory requirements is essential to the validity of judgments rendered where there has been no personal service of the writ. That irregularities in the proceedings may be corrected upon writ of error no one disputes. It is a settled rule of law that all exceptional methods of obtaining jurisdiction over persons not found within the state must be confined to the cases and exercised in the way precisely indicated by the statute, and it may also be regarded as settled law that a failure to comply with the statutory requirements when the jurisdiction conferred is special and no personal service is obtained renders the judgments null and void. *Thompson* v. *Thomas*, 11 Mich. 274; *King* v. *Harrington*, 14 Mich. 532; *Miller* v. *Babcock*, 29 Mich. 526; *Johnson* v. *Delbridge*, 35 Mich. 436; *Woolkins* v. *Haid*, 49 Mich. 299, 13 N. W. Rep. 598; *Rolfe* v. *Dudley*, 58 Mich. 208, 24 N. W. Rep. 657.

In *Woolkins* v. *Haid*, *supra*, it was said that "in suits by attachment, when no actual service has been obtained nor any real appearance made, a scrupulous adherence to the settled course of practice has always been required, and the plaintiff has uniformly been held to a strict compliance with all the conditions precedent to a judgment by default. The default here entered was wholly unauthorized, and had no force. The proceedings derive no support from it. But as there was no actual service, and no appearance in fact, a valid default was a needful preliminary to a final judgment. It could not be dispensed with." The defect in that case was the same as in this. The declaration was filed four days before the affidavit was filed. It is unnecessary to pursue the subject further. The judgment rendered was a nullity, and not a mere irregularity. *Granger* v. *Judge Superior Court of Detroit*, 44 Mich. 384, 386, 6 N. W. Rep. 848. In this case the distinction between cases where there has been a personal service and where there has not is clearly pointed out. In the former case the irregularity must be taken advantage of upon writ of error. In the latter, proceedings not conforming to the statutes are void. It follows also that such proceedings can be attacked collaterally, as was done in *Miller* v. *Babcock*, 29 Mich. 526, and in *King* v. *Harrington*, 14 Mich. 532.

The title of defendant having failed for want of a valid judgment to support it, the court below was in error in awarding to him the value of the property upon the assessment of damages. The judgment is reversed, and a new trial on the assessment of damages ordered.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

GALLOWAY *v.* ESTATE OF MCPHERSON.

(*Supreme Court of Michigan.* November 10, 1887.)

EXECUTORS AND ADMINISTRATORS — EXPENSES OF LAST SICKNESS OF WIFE PAYABLE BY HUSBAND.

A decedent who had prior to her death always lived with her husband, left an estate of between $2,000 and $3,000. *Held*, that the expenses of her last sickness and funeral were a charge upon the husband, and not upon the estate.

Appeal from circuit court, Wayne county; JOHN J. SPEED, Judge.

Jay Fuller, for appellant. *Alex. D. Fowler*, for Mrs. Mary Ross, Guardian, appellee.

SHERWOOD, J. Mrs. McPherson, at the time of her death, lived with her husband, James McPherson. She died, leaving an estate of between two and three thousand dollars, and John Galloway, the appellant, was appointed executor of her will. The funeral expenses and doctor bills of Mrs. McPherson during her last sickness amounted to the sum of $163, and the executor asked her husband to pay them, which he did. The executor, on rendering his final account, included this sum among his disbursements, it standing in the account as an item for money "paid James McPherson for money advanced by him by my direction to the undertakers and doctors for services and funeral expenses." On appeal of the executor from the disallowance of the circuit court for the county of Wayne, where a trial was had, Judge SPEED directed the verdict of the jury in favor of the estate.

It does not appear but that the husband was able to pay his wife's funeral expenses, and it was his duty to do so. *Sears* v. *Gidday*, 41 Mich. 590, 2 N. W. Rep. 917; *Jenkins* v. *Tucker*, 1 H. Bl. 90; *Ambrose* v. *Kerrison*, 10 C. B. 776; Macq. Husb. & W. 191; *Bradshaw* v. *Beard*, 12 C. B. (N. S.) 344; *Bertie* v. *Chesterfield*, 9 Mod. 31; *Methodist Church* v. *Jaques*, 1 Johns. Ch. 450; *Durell* v. *Hayward*, 9 Gray, 248.

The judgment at the circuit will be affirmed, with costs.

MORSE and CHAMPLIN, JJ., concurred.

STATE *v.* MYERS.

(*Supreme Court of Iowa.* December 2, 1886.)

HOMICIDE—ASSAULT WITH INTENT TO KILL — INSTRUCTIONS—APPEAL—BILL OF EXCEPTIONS.

Appeal from district court, Butler county.

A. J. Baker, Atty. Gen., for the State.

SEEVERS, J. The defendant was indicted for an assault with intent to commit murder, and was found guilty on a trial before a jury. Judgment was pronounced on the verdict, and he appeals. In the record before us we find the indictment, instructions, verdict, and judgment of the court, and motion for a new trial, which was overruled. A new trial was asked on eight grounds, but we are able to consider only one of such grounds, for the reason that the evidence is not before us, and, as there is no bill of exceptions, we are unable to say whether the seven grounds upon which the motion is based are true or not. The remaining ground of the motion is that the court erred in the charge to the jury, and in relation thereto we have to say that the charge seems to us to be correct. Abstractly considered, it certainly is, and whether it is applicable to the evidence we are of course unable to say. Affirmed.

STATE v. FULLAR.

(*Supreme Court of Iowa.* December 2, 1886.)

CRIMINAL PRACTICE—REVIEW ON APPEAL—RECORD.

Appeal from district court, Buena Vista county.

A. J. Baker, Atty. Gen., for the State.

SEEVERS, J. This cause was submitted upon transcript, and the indictment, evidence, charge, and all of the proceedings of the district court, are now before us. We have carefully examined the record, and deem it sufficient to say that we have failed to discover any error therein. Affirmed.

BRANTZ v. MARCUS.

(*Supreme Court of Iowa.* October 21, 1887.)

1. ASSAULT AND BATTERY—CIVIL ACTION—INSTRUCTIONS.
In an action for assault and battery the court instructed the jury that, in order to entitle the plaintiff to recover, they must find that he was "unlawfully, wantonly, and willfully assaulted." It was insisted that the word "wanton" means malicious, and that there was no evidence of malice. *Held*, that no such meaning should be given the word as used by the court, and the jury were only required under the instruction to determine whether the assault was willful and intentional, or justifiable or excusable.

2. TRIAL—AMENDMENT OF PLEADING—OBJECTION RAISED AFTER VERDICT.
In an action for assault and battery, after all the evidence had been introduced, plaintiff asked leave to file an amendment to his petition to conform the allegations to the proof. It did not appear that the amendment was actually filed, but it was in the hands of the court, and the court gave instructions in conformity thereto. Defendant knew the purport of the amendment, but made no objection to it until after the verdict. *Held*, that it was then too late to object to the amendment.

3. APPEAL—EXCEPTIONS TO INSTRUCTIONS MUST BE SPECIFIC.
Under Code Iowa, § 2789, exceptions to the instructions of the trial court must state specifically the grounds upon which they are based.

Appeal from superior court, city of Council Bluffs.

The petition states that the defendant, at Grand Island, Nebraska, unlawfully, negligently, and with force assaulted the plaintiff, and did then and there shoot him, whereby one of his eyes was put out and destroyed. The defendant denied the allegations of the petition, and pleaded he was justified in shooting the plaintiff, because the latter, at the time he was shot, was attempting to enter a building at a late hour of night, which was occupied by the defendant as a store. Trial before a jury, verdict and judgment for the plaintiff, and defendant appeals.

Wright, Baldwin & Haldane, for appellant. *Scott & Gilbert* and *Smith & Harle*, for appellee.

SEEVERS, J. 1. After the evidence had been introduced, and counsel concluded their arguments to the jury, the plaintiff asked leave of the court to file an amendment to his petition to "conform the allegations to the proof, and for such amendment strikes out of said petition * * * the word 'negligently,' and substitutes therefor the words 'wantonly and willfully.'" It is doubtful whether the amendment was marked "Filed," and it will be conceded that it was not; but it is certain it was in the hands of the judge, and counsel for the defendant had knowledge of this fact, and of its purport prior to the time the instructions were given. The court regarded it as filed, and gave the instructions in conformity thereto. When counsel for the defendant obtained knowledge of the amendment, they made no objections thereto; but, as we think the court was justified in believing, acquiesced therein, or,

in substance, agreed that the same might be regarded as being filed. The supposition cannot be indulged that counsel did not have ample opportunity to object to the filing of the amendment, and their failure to do so precludes them from now, after verdict, making such objection. If the amendment was deemed material, and counsel were taken by surprise thereby, they should have applied for a continuance. They knew, when the instructions were made, the court regarded the amendment as filed. Objections could have been made; none were made, except in a motion for a new trial. This was too late.

2. No exceptions were taken to the instructions except in the motion for a new trial, and such exceptions must be regarded as not sufficiently specific, because the ground of the exception is not stated. Code, § 2789. This is true also as to the instructions asked and refused. The court instructed the jury, in substance, as the defendant claims, that in order to entitle the plaintiff to recover they must find he was unlawfully, wantonly, and willfully assaulted; and it is insisted the evidence does not justify the verdict. The evidence clearly shows that the shooting was willful, as distinguished from accidental. The defendant purposely fired the pistol. He so testifies; and if such act was not excusable it was unlawful. But it is said the word "wanton" means "malicious," and that there is no evidence of malice. No such meaning can or should be given to the word "wanton" as used by the court. At most, the jury were required to determine whether the assault was willful and intentional, or justifiable or excusable. In fact, the only question under the evidence was whether the assault was excusable, and this was fairly submitted to the jury, and with their finding we cannot interfere.

Affirmed.

HAUGH, Adm'r, *v.* CHICAGO, R. I. & P. RY. CO.

(*Supreme Court of Iowa.* October 21, 1887.)

1. RAILROAD COMPANIES—INJURIES TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.
Plaintiff's intestate, a yardman in defendant's employ, was ordered to couple to the train a car of lumber. The car had been improperly loaded, the lumber projecting too far forward, and in coupling the car plaintiff's intestate was caught between the projecting lumber and the tender of the locomotive, and killed. The evidence showed that the order to deceased to couple the car was unqualified, and given at the last minute. The car was to be put immediately into the train for transportation. It was night, and the projecting lumber was seen by deceased only as he approached it by the light of his lantern. *Held*, that deceased had a right to presume that the car was properly loaded, and he was not guilty of contributory negligence in not closely examining the car as to its readiness for shipment.

2. SAME—DUTY OF COMPANY TO HAVE CARS PROPERLY LOADED.
The evidence showed that it was the custom for defendant railroad company to send its cars to the yard of certain lumber merchants to be loaded with lumber, and to put them into the train when loaded. In an action by plaintiff against the railroad company to recover damages for the death of her intestate, caused by the improper loading of a car of lumber by the owners of the lumber in their yard, *held*, that it made no difference whether the car was in fact loaded by men in the employ of defendant or not; the loading was essentially the act of defendant, and it was its duty to see that the car was properly loaded.

Appeal from district court, Scott county.

Action for a personal injury to the plaintiff's intestate, Dennis Haugh, while engaged as the employe of the defendant in coupling cars. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Cook & Dodge, for appellant. *Gannon & McGuirk*, for appellee.

ADAMS, C. J. On the thirtieth of August, 1884, the plaintiff's intestate, Dennis Haugh, was killed while attempting to couple to the defendant's train a car loaded with lumber. The accident occurred by reason of the fact that

the lumber was so loaded as to project too far forward. Haugh approached the loaded car riding upon the foot board fixed across the rear end of the tender, and was caught between the projecting lumber and the tender. He was himself controlling the movement of the engine, through signals to the engineer, and no fault is chargeable to the latter. The plaintiff contends that the company was responsible for the improper way in which the lumber was loaded; and the company contends that the deceased was negligent in not discovering that the lumber was improperly loaded, and in attempting to make the coupling in the position in which he was. The loaded car stood upon a side track in the city of Davenport. It had been loaded by the owners of the lumber, Keator & Son, a firm of lumber merchants. They had given the company the usual notice that the car was ready. On the night of the accident the deceased and one Stapleton, both engaged as yardmen, were directed to bring the car from the side track, and the accident occurred in the attempted execution of this order.

Several questions are discussed, but if a certain instruction given by the court is correct, it appears to us that there is no error in the other matters complained of. That instruction is in these words: "No question is made under the evidence but that the car in question was loaded by Keator & Son at their own yard, said car being sent there for that purpose in accordance with a common custom, which custom also required the defendant to send for the car and put it into the train when it was loaded. From the standpoint of the law it makes no difference under the circumstances whether it was in fact loaded by men in the employ or pay of the defendant or not; it was essentially the act of the defendant, and stands in precisely the same situation as if actually loaded by men in the pay of the defendant." The giving of this instruction is assigned as error. The instruction proceeds upon the theory that the company owed the deceased the duty of seeing that the car was properly loaded, so far as the safety of the deceased was concerned, and that it must be deemed to have adopted the acts of Keator & Son in the loading of the car. The company denies that it owed the deceased such duty, and denies that it was responsible for the manner in which the car was loaded. It admits that no car loaded as this was should be taken into the train, but its position is that it can act only through employes, and that the deceased was the sole employe charged with the duty of discovering whether the car was properly loaded or not.

A large amount of evidence was introduced tending to show that the deceased was by virtue of his employment and mode of doing business charged with some duty in respect to the examination of the car and the manner in which it was loaded. It was also shown that the company did not have an inspection made of the cars, loaded under similar circumstances, until the yardmen were sent to bring them from the side track. But, in our opinion, the instruction given is not inconsistent with such evidence. Every employe must keep his eyes open, and exercise reasonable care to guard against danger to himself. Some examination of all that he has to do with may without question be required of him, if it is practicable for him to make it, and this is so notwithstanding the company may have owed him the duty of making a prior examination. We do not therefore attach much importance to the evidence as to the duty of the deceased to examine the car, and the way it was loaded, before attempting to couple to it. The company might have set up this claim without evidence, because this duty would be imposed by law from the very nature of his employment. He was bound to exercise reasonable care. But what would be reasonable care would be greater or less according to circumstances. He of course saw the car and saw the lumber, but he did not go quite to the car before mounting the foot board of the tender, and he saw the car only as he approached it, and by the light of his lantern which he held in his hand. If he had appreciated his danger, he could by a signal have stopped

the engine which was moving very slowly. It may be that a man of ordinary prudence would have been more watchful, but this was a question for the jury. In determining it they might, we think, properly consider that he had a right to assume that the company through some one had examined the car, and the way it was loaded.

We arrive at this conclusion partly from the character of the order itself. It was an unqualified order to bring out the car. It carried upon its face the implication that the company considered the car ready to be brought out. Its unqualified character is not consistent with the idea that the deceased was charged with the primary and sole duty of determining whether it was ready to be brought out. Besides, it was given at the last minute. The car was to be put immediately into the train for transportation. We do not understand it to be claimed that the car could have been reloaded and put into that train. The commonest business principles would suggest that the car should have been examined in time to enable it to go in the train, and with the dispatch which the shippers desired. We think that the deceased, in the absence of any express information to the contrary, had a right to take this view of the situation, and that the care and diligence which could be required of him should be measured by such fact. While he was bound to look at the car and lumber, he was not bound to make the strict examination that he would have been if he had been told that he was to make the primary and sole examination. Under this view it appears to us that the instruction set out is correct, and that there is no error in the other rulings complained of.

Affirmed.

STATE *ex rel.* BOARD OF TRANSPORTATION *v.* FREMONT, E. & M. V. R. CO.

(*Supreme Court of Nebraska.* November 10, 1887.)

1. ATTORNEY GENERAL—POWERS—MANAGEMENT OF CASE.
The attorney general is the law officer of the state and is required to prosecute or defend any case in the supreme court in which the state is a party or interested; therefore, where a majority of the board of transportation of the state adopted a resolution asking the supreme court to continue a case pending therein against a railroad company to compel such company to conform its rates and charges to an order previously made by said board, *held*, that the board has no authority to control the action of the attorney general in the management of the case.

2. RAILROAD COMPANIES—RATES—POWER OF BOARD OF TRANSPORTATION TO REDUCE.
Where a railroad company demurred to an alternative writ requiring it to reduce its rates and charges to conform to an order of the board of transportation, and denied the power of the board to reduce such rates and charges, *held*, that the court would determine the question of the power of the board to make the order in question before entering upon an examination of the facts, and therefore would not permit the demurrer to be withdrawn.

3. SAME.
The act to regulate railroads and prevent unjust discriminations, approved March 31, 1887, provides that all the charges made for service rendered, or to be rendered, by any railway company in the state, in the transportation of passengers or property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful; and requires such railway company to print and keep for public inspection, schedules showing the rates and fares and charges which have been established and are in force at the time upon such railroad. *Held*, that the board of transportation has authority to determine in the first instance what are just and reasonable charges for the services rendered, or to be rendered, on such railway.

4. SAME—DISCRIMINATION—COMPLAINT.
The act in question prohibits any preference or advantage to any particular person, company, corporation, or locality, or any particular description of traffic in any respect, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any prejudice or disadvantage in any respect, and places the general supervision of all railroads within the state in the board of transportation, and requires it carefully to investigate any complaint

made in writing, and under oath, concerning any unjust discrimination against any person, firm, corporation, or locality, either in rates or facilities furnished, in order to prevent unjust discriminations against either persons or places.

5. SAME—"LOCALITY" DEFINED.
The word "locality" mentioned in the statute means the territory unjustly discriminated against, and may be a village, city, county, or portion of the state.

6. SAME—POWER OF BOARD TO FIX REASONABLE RATES.
The power to determine what is an unjust rate and charge, and the extent of the same, and to prevent unjust discrimination, carries with it the power to decide what is a just rate and charge, and authorizes the board to fix just and reasonable rates and charges.

7. SAME—FINDINGS OF FACT BY BOARD—CONCLUSIVENESS.
The finding of facts by the board of transportation in any matter submitted to it under the above statute for determination, is *prima facie* evidence of the existence of such facts and of the reasonableness of an order made by said board in pursuance thereof.

8. SAME—CONSTRUCTION OF ACT.
The act to regulate railroads and prevent unjust discriminations, approved March 31, 1887, being a remedial statute, is to receive a liberal construction to carry into effect the purpose for which it was enacted.

9. SAME—MANDAMUS TO COMPEL REDUCTION OF RATES.
Where the board of transportation has investigated charges of unjust discrimination against a railroad company, and has found such unjust discrimination to exist, and ordered such railroad company to reduce its rates to conform to a schedule presented by such board, which order the railroad company neglected to comply with, *mandamus* is a proper remedy to enforce such order, and the mention of the district court in the statute will not preclude bringing the action in the supreme court, where the latter court has original jurisdiction.

(*Syllabus by the Court.*)

Mandamus.

O. P. Mason and *William Leese*, Atty. Gen., for relator. *John B. Hawley*, (*T. M. Marquett*, with him,) for respondent.

MAXWELL, C. J. 1. On the twenty-fourth day of September, 1887, the board of transportation of this state served notice upon the respondent, requiring it to reduce its freight charges 33 1-3 per cent. on all its lines within the state of Nebraska, on or before October 1, 1887, a schedule of charges to be made, as reduced, for freight on the said line of road within the state being furnished to the respondent. The respondent neglected to comply with the order of the board of transportation, and on the fourth day of October, 1887, the board, through the attorney general of the state, applied for an alternative writ of *mandamus* to compel the respondent to comply with said order. The writ was returnable on the fifth of that month, when the respondent, by its attorney, appeared and prayed for additional time in which to plead to the writ, which was granted. The respondent demurred to the complaint, and also to the alternative writ, and the case was set for hearing on the eleventh day of October, 1887. On that date the attorney for the respondent appeared, and the attorney general being absent at Washington on business pertaining to his office, the case was passed until his return. On his return the case was set for hearing on the thirty-first day of October, 1887. At that date the attorney for the respondent appeared and filed a statement of an alleged compromise with the board of transportation of the state, except the attorney general, and also a resolution of said board, except said attorney general, asking the court to continue the case until the January term. This the attorney general resists, and insists that the case shall proceed, in order that the authority of the board over the subject-matter may be determined. The first question presented, therefore, is the authority of the attorney general to proceed with the prosecution of the case against the protest of a majority of the board of transportation.

Section 1*a*, art. 5, *c.* 83, Comp. St. 1887, provides that "the attorney general shall appear for the state, and prosecute and defend all actions and pro-

ceedings, civil or criminal, in the supreme court in which the state shall be interested or a party, and shall also, when requested by the governor, or either branch of the legislature, appear for the state and prosecute and defend in any court, or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested." The attorney general is thus the law officer of the state, and intrusted by law with the management and control of all cases in which the state is a party or interested. The majority of the state board of transportation, therefore, cannot control his actions in the premises, and the motion to continue the cause must be overruled.

2. Upon the overruling of the motion for continuance, the attorney for the respondent asked leave to withdraw the demurrer, and for time in which to prepare and file an answer. This, however, cannot be permitted. The respondent denies the authority of the state board to regulate and control the rates of freight upon its lines of railway. The question of power is fully raised by the demurrer, and should be decided before entering upon the consideration of questions of fact. It is important, too, that if such power should be found to exist, that the question be determined, so that parties aggrieved may apply to the board for relief. The motion for leave to withdraw the demurrer and file an answer is therefore overruled. If, however, the court should decide that the board of transportation has the power to regulate rates, as contended for in the petition and alternative writ, the demurrer will be overruled, and upon proper application the defendant will have leave to answer.

3. It is a matter of the public history of the state that for a number of years prior to the thirty-first day of March, 1887, it was generally claimed some or all of the railroads of the state had granted secret rebates to favorite shippers over their lines; that the effect of such rebates was to charge a party not thus favored a larger sum for the same service than was charged to the favorite shipper; that equal facilities, in many cases, were not furnished to all who desired to ship, either goods, grain, or stock, and business, as far as possible, was thrown into the hands of favorite parties. It was also claimed that certain prominent competing points in the state which had paid large sums as donations to secure competing lines, had actually been discriminated against by the increase in rates, and that charges generally throughout the state were much higher than those of other states having the same amount of business. Other wrongs were claimed which need not be noticed here. To correct these wrongs, the legislature, at its last session, passed "An act to regulate railroads, prevent unjust discriminations, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled 'Railroads,' of the Revised Statutes, and all other acts and parts of acts in conflict therewith." Comp. St. 1887, pp. 563–570. The first section of the act provides that it shall apply to any common carrier, or carriers, engaged in the transportation of passengers or property by railroad under a common control, management, or arrangement, for continuous carriage or shipment from any point in the state of Nebraska to any other point in said state, and requires that all charges made for any service rendered, or to be rendered, in the transportation of passengers or property, shall be reasonable and just; and prohibits unjust and unreasonable charges, and declares them to be unlawful. The second section declares that no common carrier, subject to the provisions of the act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater compensation for any service rendered, or to be rendered, in the transportation of passengers or property than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The third section declares it to be unlawful for any such common carrier to

give any preference or advantage to any particular person, company, firm, corporation, or locality, or (on) any particular description of traffic in any respect whatever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever, and also declares that a railway connecting with other lines shall not discriminate in their rates and charges between such connecting lines. The fifth section prohibits the pooling of earnings of railways. The sixth section requires such railways to print and keep for public inspection schedules showing the *rates and fares and charges* "for the transportation of passengers and property which any common carrier *has established*, and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part of its aggregate of such aforesaid rates and fares and charges. Such schedules shall be printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places, and in such form that they may be conveniently inspected. No advance shall be made in the rates, fares, and charges *which have been* established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules then in force at the time, and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice; but whenever any such reduction is made, notice of the same shall be publicly posted, and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedule at the time in force and kept for public inspection. And when any such common carrier shall have established and published its rates, fares, and *charges* in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons, a greater compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges, as may at the time be in force."

It is contended by the attorney for the respondent that without a charge actually made in reference to some specific freight, and against some particular person, the statute is not and cannot be violated; and it is said on page 6 of the respondent's brief: "A charge cannot be made when there is no property transported, and when there is no person for whom such property has been or is to be transported. There must be both a specific person and specified property, and the charge must be made for such specific property, and against such specific person: and it must be for such service rendered or to be rendered." The respondent's attorneys seem to ignore the remedy given by the statute, and place the claim for relief entirely upon the ground that there must be a charge actually made for services rendered, before the question of the unlawful charges can be determined. The statute, however, requires the railway company to establish and publish its rates, fares, and charges, before rendering the service. Suppose A., residing at Columbus, or other point in the state, wishes to ship goods to Omaha or Lincoln, but deems the charges excessive; the statute gives him the right to complain of such charges

as being excessive, and ask that they shall be fixed at such sum as shall be reasonable and just, as provided in the first and sixth sections of the act. The first section declares that every unjust and unreasonable charge is prohibited and declared to be unlawful. The board of transportation, therefore, is clothed with power to determine what is a just and reasonable charge on all the lines of railway within the state, and this may be done in advance of the rendition of the service.

4. The seventh section requires such railway company to file with the board copies of its schedules, of its rates, fares, and charges which have been established and published in compliance with the statute, and promptly to notify said board of all changes made in the same, and also to file with said board copies of all contracts, agreements, or arrangement with other common carriers, in relation to any traffic affected by the provisions of this act, to which it may be a party, and in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs or rates or fares or charges, for such continuous lines or routes, copies of such joint tariff shall also in like manner be filed with said board. Such continuous lines shall publish the joint rates, fares, and charges thereon when so directed by the board, and may be compelled to publish the same if on such request they neglect or refuse to do so.

The eighth section makes it unlawful for such common carrier to enter into any combination, contract, or agreement, express or implied, to prevent by change of time, schedule, carriage in different cars, or by other means or devices, the carriage of freight being continuous from the place of shipment to the place of destination. The ninth section authorizes a recovery against any such carrier as shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done. The tenth section provides the procedure by any person claiming to be damaged. The twelfth section authorizes the board to inquire into the management of the business of all common carriers, subject to the provisions of this act, and it shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the board to perform the duties and carry out the object for which it was created, and it is clothed with power to require the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and it may invoke the aid of either the district or supreme courts to require the production of the required witnesses or documents. The thirteenth section provides that "any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any politic or municipal organization, complaining of anything done or omitted to be done by any common carrier subject to the provisions of the act in contravention of the provisions thereof, may apply to said board by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the board to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time, to be specified by the board. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the board to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of absence of direct damage to the complain-

ant,"—that is, railroads being public ways, and subject to legislative control, any violation of the statute by them is a matter of public right to procure the enforcement of a public duty, and it is sufficient for the complainant to show that he is a citizen, and as such is interested in the execution of the laws. *State* v. *Shropshire*, 4 Neb. 413, 414; *Hall* v. *People*, 57 Ill. 313: *State* v. *Judge*, 7 Iowa, 202; *Hamilton* v. *State*, 3 Ind. 458; *People* v. *Halsey*, 37 N. Y. 348; *State* v. *Stearns*, 11 Neb. 106, 7 N. W. Rep. 743. The fourteenth section requires the board to make a report, in writing, in respect to any investigation which they shall have made, which shall include the findings of fact, together with a recommendation as to what reparation, if any, can be made by the common carrier to the party injured, and such findings shall be deemed *prima facie* evidence of every such fact found. The fifteenth section declares that if it be made to appear to the satisfaction of the board, either by the testimony of witnesses or other evidence, that anything has been done, or permitted to be done, in violation of the provisions of this act, or any law cognizable by said board, by any common carrier, or that injury or damage has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation, it shall be the duty of the board to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to such common carrier to cease and desist from such violation, or to make reparation for its injury so found to have been done, or both, within a reasonable time, to be specified by the board. The sixteenth section declares that "if such railroad companies shall violate, or refuse, or neglect, to obey any lawful order or requirement of the board in this act named, it shall be the duty of the board, and lawful for any company or person interested in such order or requirement, to apply in a summary way, by petition filed in the judicial district, in which the common carrier complained of has its principal office, or in the district in which the violation or disobedience of such order or requirements shall happen, alleging such violation or disobedience, as the case may be, and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable, and said court shall proceed to hear and determine the matter speedily as a court of equity, but in such manner as to do justice in the premises; and to this end the court shall have, if it think fit, power to direct and prosecute in such mode and by such persons as it shall appoint, and such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition, and on such hearing the report of such board shall be *prima facie* evidence of the matters therein stated, and if it be made to appear to such court on such hearing, or on report of any such person or persons, that the lawful order or requirement of said board drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said board, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction, or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction, or other proper process, mandatory or otherwise, against such common carrier; and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or any other person failing to obey any such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier, or other person, so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order,

that such carrier or other person shall fail to obey such injunction, or other proper process, mandatory or otherwise."

The mention of the district court in the above section does not exclude the supreme court from hearing any case in which it has original jurisdiction.

Section 17 provides that "said board shall have the general supervision of all railroads operated by steam in the state, and shall inquire into any neglect of duty, or violation of any of the laws of this state by railroad corporations, doing business in this state, or by any officer, agent, or employe of any railroad corporation, doing business in this state; and shall from time to time carefully examine and inspect the condition of each railroad in this state, and its equipments, and manner of the conduct and management of the same, with reference to the public safety, interest, and convenience. It shall carefully investigate any complaint made in writing, and under oath, concerning any lack of facilities or accommodations furnished by any railroad corporation, doing business in this state, for the comfort, convenience, and accommodation of individuals and the public; or any unjust discrimination against either any person, firm or corporation, or locality, either in rates, facilities furnished, or otherwise; and whenever, in the judgment of said board, any repairs are necessary upon any portion of the road, or upon any stations, depots, station-houses, or warehouses, or upon any of the rolling stock of any railroad, doing business in this state, or additions to, or any changes in, its rolling stock, stations, depots, station-houses, or warehouses, are necessary in order to secure the safety, comfort, accommodation, and convenience of the public and individuals, or any change in the mode of conducting its business, or operating its road, is reasonable and expedient, in order to promote the security and accommodation of the public, or in order to prevent unjust discriminations against either persons or places, it shall make a finding of the facts and an order requiring said railroad corporation to make such repairs, improvements, or addition to its rolling stock, road, stations, depots, or warehouses, or to make such changes, either in the manner of conducting its business, or in the manner of operating its road, as such board shall deem proper, reasonable, and expedient."

It will thus be seen that the board is clothed with the "general supervision of all railroads operated by steam in the state, * * *" and it is made its duty to "carefully investigate any complaint in writing, and under oath, concerning * * * any unjust discrimination against either any person, firm or corporation, or locality, either in *rates*, facilities furnished, or otherwise. * * * In order to *prevent* unjust *discriminations* against either persons or places, it shall make a finding of the facts and an order requiring said railroad corporation * * * to make such changes * * * in the manner of conducting its business, as such board shall deem proper, reasonable, and expedient."

Webster defines the word "supervision" to be, "the act of overseeing; inspection; superintendence." The board, therefore, is clothed with the power of overseeing, inspecting, and superintending the railways within the state, for the purposes of carrying into effect the provisions of this act, and they are clothed with power to prevent unjust discriminations against either persons or places. The attorneys for the respondent contend that the act is to receive a strict construction. No satisfactory reason, however, was given for the adoption of such rule. The act is remedial in its nature, and is designed to prevent and punish abuses, in the management of some or all of the railways of the state; and in construing remedial statutes there are three points to be considered, viz.: the old law, the mischief, and the remedy; that is, how the law stood at the making of the act, what the mischief was for which the former law did not provide, and what remedy the legislature has provided to cure the mischief; and it is the business of courts so to construe the act as to suppress the mischief and advance the remedy. 1 Bl. Comm. 87; *Rogers* v. *Ho-*

tel Co., 4 Neb. 58. Here is an act which declares that all charges shall be just and reasonable, prohibits and declares unlawful all unjust and unreasonable charges; which requires schedules of such just and reasonable charges to be posted for the use of the public, and prohibits an advance in rates, except upon certain conditions; which prohibits any preference in favor of, or against, any person or place; which requires the board to investigate all complaints against any railway corporation doing business within the state, and gives such board power to call for persons and papers in order that their investigations may be thorough, and the report thereof based upon facts; and also makes their finding of facts *prima facie* evidence thereof, and requires said board to investigate and prevent any unjust discrimination against either any person, firm, corporation, or locality. These are broad powers. They are not to be restricted. Such powers were conferred for the express and declared purpose of fixing charges which shall be reasonable and just, and prohibiting unjust and unreasonable charges, and unjust discrimination. The court has no authority to limit the board in any respect in that regard. Such board is to determine, in the first instance at least, what are reasonable and just charges, what unreasonable and unjust, and when any person, firm, corporation, or locality is unjustly discriminated against. There can be no restriction of the word "locality." It may refer to a village, city, county, or portion of the state, the meaning in each case to be determined by the territory which the board shall find to be unjustly discriminated against. And if there is discrimination against any person, firm, or corporation, it is the duty of the board so to find, and to require the railway company to cease its discrimination. To do so such board has the authority to require such railway company to reduce its rates to a reasonable and just standard. The power to fix a reasonable and just rate is clearly conferred on the board, as also the power to determine what rates are unjust and unreasonable. It is the duty of the board to prevent unjust discrimination in all the forms mentioned in the statute, and to do so it may determine what is a proper charge to and from any points within the state, and its order in that regard, based on its finding of facts, will be *prima facie* evidence of the correctness of the order.

In the case under consideration the board found that the rates and charges of the respondent were excessive; in other words, that there was unjust discrimination against that part of the state; and having so found, the board is clothed with ample power to require such railway company to reduce its rates and charges. The power of the board, therefore, to establish and regulate rates and charges upon railways within the state of Nebraska, is full, ample, and complete.

5. Some objection is made to the remedy by *mandamus*, and it is said by the attorneys for the respondent that the writ may not issue where there is a plain and adequate remedy in the ordinary course of the law, (Code, § 646;) that, therefore, "it may not issue in this case, because there is a plain and adequate remedy in the law for enforcing the order of the board of transportation, if its order is a lawful one, by application to the district court in the mode pointed out in the sixteenth section of the act of 1887; that the proceeding under the sixteenth section is both plain and adequate. That the legislature did not intend to authorize or permit the enforcing of all orders of the board by *mandamus* is clear from the fact that as to the particular matters mentioned in the seventeenth section it gave authority to proceed by *mandamus* as the only and exclusive remedy for enforcing such orders; and as to all other orders in reference to all other matters mentioned in the act the legislature provided, as the only and exclusive remedy, an application in the first instance to the district court, as provided in section 16. The fact that the legislature specifically gave the right to proceed by *mandamus* in the cases mentioned in the seventeenth section only, and provided other specific and adequate remedy for all other cases, leaves no doubt that it was the intention

of that body that *mandamus* should only be resorted to in the cases provided for in the seventeenth section." These objections are untenable. They are that the district court alone has jurisdiction, and not that the relator has another remedy besides *mandamus*. But even if the objections were to the form of the remedy, they could not be sustained. The fact that an action will lie does not supersede the remedy by *mandamus*. If the remedy by an action is not a plain and adequate remedy, a *mandamus* may be issued, notwithstanding an action would lie. *State* v. *Stearns*, 11 Neb. 107, 7 N. W. Rep. 743. Thus, while a party aggrieved by some violation of the statute by the respondents might maintain an action against such respondents, yet, if such remedy was not adequate, it would not prevent him from enforcing his rights by *mandamus*. The test to be applied in determining the right to relief by *mandamus* is to inquire whether the relator has a clear, legal right to such writ, and whether he has any other *adequate* legal remedy. *People* v. *Head*, 25 Ill. 325; *People* v *Hilliard*, 29 Ill. 418.

In the case at bar the relators show a clear legal right to have the order made by them complied with. *People* v. *Mayor*, 51 Ill. 28; *People* v. *Brooklyn*, 1 Wend. 318. And this writ may be applied for in a proper case in the supreme court under any section of the act which authorizes the filing of an application in the district court for such writ. In many cases the district court is unable to grant adequate relief, its jurisdiction being limited to a particular county. Thus, suppose the board of transportation, as in the case under consideration, should order a railway company to reduce its rates and charges on all its lines within the state; a question might perhaps arise as to the power of the district court to act on rates without the county in which the action was brought. So in cases of like character. But where the action is instituted in the supreme court, no question of that kind can arise, nor can the party be debarred by any statute of a constitutional right. The supreme court, therefore, has jurisdiction in the case, and *mandamus* is the proper remedy.

The demurrer, therefore, is overruled, and a peremptory writ will issue within 10 days from this date, unless the respondent, within that time, shall present to the court an answer showing compliance with the alternative writ, or a defense upon the facts to the action. Judgment accordingly.

(The other judges concur.)

ROTTMAN and others v. BARTLING and others.

(*Supreme Court of Nebraska.* November 10, 1887.)

1. RELIGIOUS SOCIETIES—SCHISM—INTERFERENCE BY EQUITY.
   Where there is a schism in a religious society, a court of equity does not attempt to enforce the decree, faith, or doctrines of either party, though their existence and nature may incidentally be involved in an inquiry relative to the rights of such society. All that it does is to enforce the observance and execution of an ascertained trust.

2. SAME—SEPARATION—SUCCESSION.
   Where a separation has taken place, a court, in determining the question of legitimate succession, will adopt the rule of such society, and enforce its policy in the spirit and to the effect for which it was designed.

3. SAME—CHANGE OF CONSTITUTION—NOTICE.
   Where a church has been organized, and a constitution adopted and signed by its members, under which the church has existed for a series of years, such constitution can be changed only in the manner provided therein, or by the rules or by-laws of such society; and, where the constitution provides for a three-months notice of any proposed change in the constitution, a change effected without giving such notice is invalid, and of no effect.

4. SAME—SEPARATION—POSSESSION OF CHURCH PROPERTY.
   Where certain members and officers of the Evangelical Lutheran Church, without giving the notice required by the constitution and complying with its terms,

join "Die Erste Deutsche Evangelische Zions Gemeinde," *held* that, having ceased to be members of the Lutheran Church, they were not entitled to the possession of the property of such church.

(*Syllabus by the Court.*)

Appeal from district court, Otoe county; POUND, Judge.

S. H. Calhoun, for plaintiffs. *F. T. Ransom* and *John C. Watson*, for defendants.

MAXWELL, C. J. The plaintiffs allege in their petition—

"That they are residents of Nebraska City, in Otoe county, state of Nebraska; that on the twentieth day of January, 1867, at said Nebraska City, the said First Evangelical Lutheran Church in Nebraska City, Nebraska, was duly organized under the laws and regulations of the general synod of the Evangelical Lutheran Church of the United States, and was then duly incorporated under the general incorporation law of the then territory, now state, of Nebraska, by the election of a board of trustees, consisting of Eli Huber, Charles C. Walbaum, F. Templin, H. H. Petring, A. F. Mollring, Frederick W. Rottman, and John Stromer, and adopted a constitution in accordance with the rules and regulations of the general synod; that under said constitution, two of said trustees are called 'deacons,' and two of them are called 'elders,' and two of them are called 'trustees,' and that said officers, together with the pastor, constitute the council of said congregation, and have charge of its affairs, and control and custody of its property and hold all the same in trust for said congregation, subject to and in accordance with the rules and regulations of said general synod; that, shortly after said organization, the said congregation purchased lots one (1) and two, (2,) in block eight, (8,) as designated on the recorded plat of South Nebraska City, now a part of Nebraska City, in Otoe county, Nebraska, and during said year of 1867 erected thereon a commodious building for public worship to be therein held according to the doctrines, beliefs, and discipline of the said Evangelical Lutheran Church, and for such other purposes as said congregation might properly see fit to use said building, in connection with ordinary church work of said Evangelical Lutheran Society; that said property was so purchased, and said church edifice so erected thereon, by members of said Evangelical Lutheran Church at that time, and with the further aid of certain funds furnished by the Church Extension Society of the Evangelical Lutheran Church of the General Synod of the United States,—the same being an organization of the said Evangelical Lutheran Church, for the purpose of aiding in the erection of church edifices in the United States for the use and benefit of congregations and organizations of said particular sect or denomination, and that the same has been so used until about the happening of the events hereinafter mentioned; that Die Erste Evangelische Zions Gemeinde, to-wit, the First German Evangelical Zions Congregation, is a religious organization different and distinct from the Evangelical Lutheran Church aforesaid, is not in affiliation with the general synod of said Lutheran Church, nor with those who purchased said property and contributed to the price thereof, and to the erection of said church edifice, nor with the said church extension society, which aided in said purchase and erection, and is not subject to the said general synod, or in any way controlled thereby; that on or about the eighteenth of December, 1884, the above-named defendants, combining and confederating with other persons to these plaintiffs unknown, but whose names, when discovered, plaintiffs ask may be added hereto as defendants, with apt and suitable words to charge them herein, did wrongfully and fraudulently, and in violation of the rights of those plaintiffs and other members of said Evangelical Lutheran Church, undertake to unite said Evangelical Lutheran Church with said First German Evangelical Zions Congregation, and to take posses-

sion of said property, and to transfer the same to the possession and control of said Zions Congregation, and did at said meeting agree among themselves to change said organization to and to become a part of said Zions Congregation, and to deprive these plaintiffs and the said Evangelical Lutheran Church in Nebraska City, Nebraska, of said property, and of all right, title, and interest therein, and to prevent them from worshiping therein, or otherwise using said property as and for the use of the said Evangelical Lutheran Church; that on the evening of the thirteenth of February, 1885, at about eight o'clock P. M. of said day, after these plaintiffs and certain other members of said Lutheran Church had quietly and peaceably entered said church edifice, and were engaged in religious services, and also in holding a business meeting, and before said religious services were concluded, under the direction and temporary charge of Rev. Joseph W Kimmel, a regularly ordained minister of the said Evangelical Lutheran Church, the said Rev. J. W. Kimmel having been in writing duly instructed and authorized by the president of the Nebraska synod of said Evangelical Lutheran Church to look after the interests of said church, and its property in said Nebraska City, the said defendants and their said confederates did enter said church building violently, tumultuously, and, as these plaintiffs verily believe, some of them armed, and did interrupt said meeting, and did with violence eject him, the said Rev. J. W. Kimmel, from the room, and did then and there, by their violent and outrageous conduct, and by blowing out the lights with and by which said church was then lighted, stop and end said meeting, and did refuse to allow and did actually prevent said business meeting or said religious services from being completed, although the said Rev. J. W. Kimmel read aloud his said written authority; that said defendants and their said confederates seized the possession of said property and still retain the same; that said defendants and their said confederates have seized the custody and control of all the records and books of said Evangelical Lutheran Church, and the keys to the said church edifice, and still retain the same, and refuse to give them up to the regular officers of said church, who are the only proper legal custodians thereof, and they threaten to retain possession of all said property, and to prevent the said Evangelical Lutheran Church from holding divine services in said building to-morrow, the fifteenth of February, 1885, and at all times thereafter, and claim to hold said property for the use and benefit of the said Zions Congregation, and refuse to allow these plaintiffs, and the said Evangelical Lutheran Church, any possession of or control in any of said church property, and to prevent them from ever hereafter holding services or public worship as such Evangelical Lutheran Church therein; that the mode of worship and the religious belief in accordance with the tenets of the said Zions Church is not the mode of worship nor the religious belief nor the discipline which these plaintiffs, nor the said Evangelical Lutheran Church for which they are trustees, profess, nor prefer and desire, nor the one for which said property was purchased, and said church edifice erected, and that they have no other place of worship in said Nebraska City, nor is there any other place in said Nebraska City solemnly dedicated to public worship, as these plaintiffs and said church believe that said edifice should be dedicated, nor is there another regularly ordained minister of said church now here to conduct divine worship, except the said Rev. J. W. Kimmel, so far as these plaintiffs know; and that their rights in the premises demand prompt and immediate protection.

"Plaintiffs ask that said defendants, and all persons acting by, through, under, or in connection with them in any way, may be restrained forever from keeping these plaintiffs, and the said Evangelical Lutheran Church, out of the possession of said property, or of the key or keys whereby access may be obtained thereto, and of the records, books, papers, and documents of said Lutheran Church, and from any longer retaining any of the property of any description which they have taken from the said organization known as the First

Evangelical Lutheran Church in Nebraska City, Nebraska, and from any interference with or interrupting the meetings or the worship of said church, or setting up any claim or claims, as such Zions Congregation, to the property of said Lutheran Church, or from preventing these plaintiffs, and the said Lutheran Church, from having, holding, and enjoying the sole and uninterrupted use and possession of said property, and all that pertains thereto; and for such further and other relief in the premises as shall seem agreeable to equity and good conscience."

In their answer the defendants admit—

"That on the twentieth day of January, 1867, the First Evangelical Lutheran Church in Nebraska City, Nebraska, was duly organized as in the petition stated; and admit the election of the persons therein named as a board of trustees; and that a constitution was adopted as in the petition alleged; and that under said constitution two of said trustees are called 'deacons,' and two are called 'elders,' and two are called 'trustees;' and that said officers, together with the pastor, constitute the council of said congregation, and have charge of the affairs and control and custody of its property, and hold the same in trust for said congregation; but deny they hold the same for said congregation subject to and in accordance with any rules and regulations of the General Synod of the Evangelical Lutheran Church of the United States, and allege that the said general synod has no right, authority, or jurisdiction over the said property of said congregation; nor can said general synod dispose of the property of said congregation, nor can it prevent the said congregation from disposing of the same in any manner the said congregation see fit; admit the purchase by the said First Evangelical Lutheran Church of the property described in the petition, and that a church edifice was erected upon said property, but deny that said property was purchased or said church edifice erected through any means furnished by the general synod, or by any aid received from any church extension society; and deny that said property was purchased through any aid received from said synod or said society. They allege that said synod or said society loaned to said First Evangelical Lutheran Church money, and, to secure the repayment of the same and interest, took a mortgage from said church concerning the said real estate, and the church edifice thereon, and they allege the said debt was paid, with interest, by the said First Evangelical Lutheran Church, and the said synod, and the said Church Extension Society have no longer any claim thereon. They deny that the said synod, or the said church extension society, furnished any money, or any means, to aid the said First Evangelical Lutheran Church in purchasing said property, or in erecting the church edifice thereon, other than as above set forth; and deny that the said synod, or the said church extension society, have any right, title, claim, or interest of any kind in or to said property. They admit the said church edifice was erected as a building of public worship to be therein held according to the doctrines, beliefs, and discipline of said Evangelical Lutheran Church, and for such other purpose as said congregation might see fit to use the said building in connection with ordinary church work of said Evangelical Lutheran Church; that the said First German Evangelical Zions Congregation is a religious organization, as hereinafter set forth more fully; but deny that it is different or distinct from the Evangelical Lutheran Church, and that it is not in affiliation with the General Synod of the Evangelical Lutheran Church, or with those who purchased said property, and contributed to the price thereof, and to the erection of said edifice.

"They deny that on the thirteenth of December, 1884, or at any other time, they wrongfully and fraudulently, and in violation of the rights of said plaintiffs, and other members of said First Evangelical Lutheran Church, undertook to unite said Evangelical Lutheran Church with said First German Evangelical Zions Church; that they undertook to take possession of said property, and to transfer the same to the possession and control of said Zions

Church or Congregation; that they agreed among themselves to change said congregation to and become a part of said Zions Congregation or Church, and to deprive the plaintiffs and the said Evangelical Lutheran Church of the said property, and of all or any right, title, or interest therein, or to prevent them from worshiping therein, or otherwise using said property as and for the use of said Evangelical Church; deny that they on the thirteenth of February, 1885, or at any other time, entered the said church building violently or tumultuously and armed, and thus interrupted the plaintiffs and others when lawfully worshiping therein; deny that they prevented, or attempted to prevent, the plaintiffs worshiping in said church building, but admit that they prevented them from transacting any business therein; deny that they seized possession of said property, but allege that defendants were actually and lawfully in the possession of said building, and that they still lawfully retain possession of said building; deny that they seized the records, books, papers, and other property of said First Evangelical Lutheran Church, and allege that defendants were in the lawful possession and custody of said properties, and still retain such lawful possession, and deny that they refuse to give up the said properties to the legal custodians, and allege that they are the legal custodians of all the property of the said First Evangelical Lutheran Church of Nebraska City, and that, as such, they are and have had uninterrupted possession of the said church building, and all other properties of said church.

"They deny that they threatened to prevent the said First Evangelical Lutheran Church from holding divine worship in said building, but allege that on the eighteenth day of December, 1884, they were the duly elected and acting trustees of the said First Evangelical Lutheran Church in Nebraska City; that on that day a meeting had been called pursuant to notice for the purpose of amending the constitution of the said last-named church in the matter of the name of the church and the congregation only; that defendants William Luecke, Albert Schnitker, and Frederick W. Rodenbrock were duly elected trustees of said Evangelical Lutheran Church, and were duly installed and entered upon the duties of said offices and trust on October 28, 1883, and, under the constitution of said last-named church, their terms of office expire on November 1, 1885; that the defendants Adam Schafer, Herman H. Bartling, and Henry Fastenan were duly elected trustees of and for said church for the term of two years, and on the twenty-eighth day of October, 1883, were duly installed as such, and entered upon the duties of said offices, and that, under the constitution and laws of said church, their terms of office expire on November 1, 1886; and that said election was duly and regularly held by said church association, at the time and in the manner required by the constitution, rules, and customs of said church association, and said plaintiffs, or a majority of them, participated therein, and have acquiesced therein since the date thereof, until the date of the disturbances mentioned in the petition; that two of said defendants are trustees, two of them are deacons, and two are elders, duly installed and in charge of the affairs and property of said church, and are in possession of said church building, and the pews and furniture therein, and of the service owned by said church, and of all books and other property belonging to the said church, and have been so in charge and possession thereof ever since the twenty-eighth day of October, 1883, at which date their predecessors in office turned the same over to them, at which time, nor ever since, has there been any question raised by any one in or out of said church as to the right of defendants to administer said offices until the same was raised in this proceeding; that defendants and their predecessors in office have been in the peaceable possession of said church and its property since the date of its organization, to-wit, in the year 1867, until the present time, and the said plaintiffs have at no time been in the lawful possession of said church, or any of its property; said plaintiffs are not the trustees of said First Evangelical Lutheran Church, nor are they or either of them trustees

thereof, nor do they or either of them hold an office in said church, and there has been no election of them, or either of them, to the office of trustees, or to any other office in said church; and no meeting of said society has ever been called at which the said plaintiffs, or any of them, were elected to any office in said church.

"Defendants are the legal and lawfully elected trustees, and are in the lawful possession of the said First Evangelical Lutheran Church, and of all its affairs and property, and hold the same in trust for said society; that on the eighteenth day of December, at the said meeting called as required by the constitution and regulations governing said Lutheran Church, it was unanimously resolved by the said congregation to change the name of the said church from that of the First Evangelical Lutheran Church of Nebraska City, to the First German Evangelical Zions Lutheran Congregation, and the said constitution was changed and altered in that particular, but in writing up the proceedings had in thus changing the name of said church for the purpose of filing a certificate thereof in the county clerk's office of Otoe county, Nebraska, and in writing up the minutes of said meeting, the word 'Lutheran' was unintentionally left out by the secretary, and proceedings have been taken by said society to have the said minutes and the said certificate amended, and the said word 'Lutheran' will, as soon as the rules and regulations governing the meetings of said society permit, be inserted in the name of said church: that it was the understanding and intention of said society, and of all the members present at said meeting, that the word 'Lutheran' was to be a part of the said name of said church association, and there was no intention to change the doctrines, modes of worship, or disciplines in said church, but it was and is now the desire of defendants that the doctrines, modes of worship, and church discipline in said congregation shall be and remain the same as it has been heretofore, from the date of the organization of said First Evangelical Lutheran Church, and defendants and those acting with them do not intend to change the doctrines, mode of worship, or church discipline in any particular from that which has already been practiced in said First Evangelical Lutheran Church, and the said church constitution as so amended does not assume or pretend to change the doctrines to be preached to said congregation, nor to transfer the said church congregation to any faith other than the faith of the said Lutheran Church.

"That at said meeting on the eighteenth of December there were present all the members of said First Evangelical Lutheran Church who were in good standing, and there was none who dissented from the changes sought by said meeting to be made in its constitution; that the said congregation of said Evangelical Lutheran Church is composed exclusively of Germans, all of whom speak and understand the German language, and the persons who contributed to the purchase of said church-site, and the church building thereon, were Germans, and the said church has always been one in which the German language has been spoken exclusively, and it was the desire of the said congregation that the word 'German' should appear in the name of said church, which was also inserted in the name of the church at said meeting; that the plaintiffs have conspired among themselves to have the English language spoken in said church, at least during a portion of the time of service, and to have the church exercises and ceremonies conducted and administered in the English language, which language is not spoken or understood at all by a portion of said congregation, and by a portion thereof is not readily understood; that to this end, and with the intent to so introduce the said English language into said church, the said plaintiffs have attempted to take forcible possession of said church, and have at times broken the doors of said church building open, and, without any authority, the said plaintiffs have called to take the said church one J. W. Kimmel, and the said J. W. Kimmel has en-

tered into the conspiracy with the said plaintiffs, with the intent to aid and assist them in their said plot; and in pursuance of their said conspiracy, the said plaintiffs, in company with the said J. W. Kimmel, proceeded to said church edifice on the thirteenth day of February, 1885, and with force and violence did unlawfully enter said church in the absence of defendants, the officers and trustees, of said church, and in the absence of the said congregation, and that said entry and breaking were made and done in the night-time, and defendants and other members of the said church association learning that such unlawful breaking and entry had been made, and that it had been made with the intent to take forcible possession of said church building and the properties of said church, went to said church building while plaintiffs and the said Kimmel were in the said church, and entered the same in a peaceable manner, and did not interfere or interrupt the said plaintiffs or the said Kimmel while engaged in worship, though plaintiffs and said Kimmel had no right or authority to hold services therein; that after the services were concluded the said Kimmel claimed to be the pastor of said First Evangelical Lutheran Church, and he and said plaintiffs attempted and commenced to exercise the rights, duties, and functions of said church congregation and church officers; and thereupon defendants and other members of said congregation of the said First Evangelical Lutheran Church ejected and removed said plaintiffs and said Kimmel from said church building, having first requested them to withdraw from the same, and, upon their refusal, ejected them, using only sufficient force for that purpose; defendants deny that they or any of them were armed, nor was any one with them armed, and allege that the allegations in the petition stating any of them, or any of the congregation who accompanied them, were armed, are wholly and absolutely false in every particular; that the said Geo. F. Kregel, as they verily believe, was armed for the purpose of terrifying defendants and the said other members of said congregation, and was about to draw the said weapon from his pocket at the time defendants requested the said Kimmel and said plaintiffs to withdraw, when defendant Bartling cautioned him not to do so, or have any trouble, whereupon said Kregel desisted, and refrained from drawing said weapon; that said Kimmel has not been chosen, called, elected, or appointed by the said First Evangelical Lutheran Church to act as the pastor thereof, and he and the said plaintiffs are seeking to place him, the said Kimmel, in charge of said church, and said congregation unlawfully, and contrary to the rules and regulations of said church, and against the wishes of said congregation.

"That under the rules, practice, and under the constitution or governing law of the said congregation, whether it is called by the old or the new name, pastors for said congregation are chosen by said congregation, and no synod, whether the General Synod of the United States or the General Synod of North America, has any authority to place any pastor over or in charge of said congregation, but the said congregation is an independent body, with the right, power, and authority to choose its own pastor, preaching, practicing, and owning the faith of the Lutheran Church; that under the said constitution of the First Evangelical Lutheran Church, and under the constitution of the congregation thereof under the new name given to said congregation, that said F. W. Rottman, said Kregel, John Teten, and Frederick W. Petring are not in good standing in said church, because and for the reason that none of them have, for more than two years, contributed to the support of said church, though they and each of them are amply able to contribute to the support thereof, and said Meyers and said Noelting are not considered members of said congregation, whether under the old or new name, and they are not members thereof, as they have never been received into said congregation, and have not signed the constitution of said church; that not one of said plaintiffs is entitled to vote for church officers of said congregation, by reason of the facts

aforesaid, and are by the provisions of the said constitution, as it was then and now is as amended, disqualified from holding office or voting at any election for church officers, and they and each of them have been so disqualified for more than two years from voting or holding office in said church.

"Article 7 of the constitution, as it was and as it exists now, is the same.

"Sections 1 and 2 are as follows: '(1) All congregational elections must be published by the church council to the congregation at least two weeks before the election. (2) At these elections only such persons shall be entitled to vote who are in full communion with the church, and have signed the constitution, who submit to its government and discipline regularly administered, who have within the year previous communed, unless providentially prevented, and who have contributed according to their ability and engagements to all its necessary expenditures.'

"That said plaintiffs are all and each is disqualified from voting or holding office in said congregation for the reason that none of the plaintiffs have within a year communed in said church, and they were so disqualified at the last election for officers, though they were not refused the right to vote, nor debarred from voting, by any of the defendants or said congregation, but they refrained from voting or absenting themselves from such election; that on November 26, 1882, said Rottman was a deacon in said congregation, and had been for some time such officer therein, and on that day he tendered his resignation to the congregation, and withdrew from the council of said church, and his said resignation was accepted by the said congregation; that on February 6, 1883, the said Geo. F. Kregel asked for leave to withdraw from the membership of said congregation, and asked for a certificate of dismissal from the said church, and the same was allowed and issued to him, and he has never been reinstated to membership in said congregation since that time; that the said Henry Noelting, on October 24, 1880, was, at an election held by said church, elected to the office of deacon in said congregation, and thereupon he was installed into said office, when it was learned that he was not a member of said congregation, nor a member of any Lutheran church, which fact he admitted, and a new election was ordered and held to fill the vacancy; that he has not been received into said church as a member by the said congregation since then; that said plaintiffs are alone in their efforts to seize the said property, and are not supported by even a respectable portion of said congregation, and are not supported by any member of said congregation in good standing in said church, so far as defendants have been able to learn; that said congregation is in charge of said church through their said trustees, the defendants, and the plaintiffs have no right therein, either as officers or members, because of the facts aforesaid; that on the said eighteenth of December, 1884, the following provisions were in the church constitution, to-wit:

"'Article 1. *Of the Name.* The name of this church shall be the First Evangelical Lutheran Church of Nebraska City.

"'Art. 2. *Doctrinal Position.* This church, in accordance with the doctrinal basis of the General Synod of the Evangelical Lutheran Church in the United States, and in the words thereof, receives the word of God as contained in the canonical scriptures of the Old and New Testament, as the only infallible rule of faith and practice, and the Augsburg Confession as a correct exhibition of the fundamental doctrines of the Divine Word, and of the faith of our church founded upon that Word.'

"'Art. 4. *Of the Pastor.* The pastor of this church shall be a member of some synod in connection with the General Synod of the Evangelical Lutheran Church in the United States.'

"That on said eighteenth day of December it was unanimously resolved at said meeting to change and amend said articles 1, 2, and 4, so that they should read as follows, and a resolution so amending them was unanimously framed by said congregation, to-wit:

" 'Article 1. *Name.* The undersigned have associated themselves together as a religious society, under the name of the First German Evangelical Zions Congregation in Nebraska City, in Otoe county, Nebraska.

" 'Art. 2. We profess to be a Christian society, believing with the Apostle Paul, 1st Cor. 3:11, that no other foundation can be laid than that as laid in Jesus Christ; we profess to be an evangelical society, considering ourselves members of the evangelical church of Christ, which takes the Holy Scriptures as the Word of God, as the only true doctrine of faith, and the reposition of the Holy Scriptures as laid down in the Lutheran and Reformed Church, namely: The Catechism of Luther and the Heidelberg Catechism, as near as they correspond. In their difference, we hold to the Holy Scriptures relating thereto.'

" 'Art. 4. The pastor of this congregation shall be a member of the German Evangelical Synod of North America.'

"Defendants allege that said two names designated but one and the same body of people, to-wit, the congregation worshiping in the church building described in the petition, of which body defendants are the trustees, and hold and own said property to the use and benefit of said congregation, to be used and disposed of as the said congregation shall direct, whether it order the same as the first named society or the second."

The plaintiffs, in their reply, say that they do not claim that the General Synod of the Lutheran Church has authority over the property, or can dispose of the same, but allege that the property was purchased by the original organization for the purpose of worshiping in accordance with the tenets of the church of which the synod is the representative; that the Church Extension Society of said Lutheran Church did aid in the erection of said building, and, while the money advanced to said organization has been refunded, yet the Church Extension Society donated the use thereof without interest, and the General Synod of the Lutheran Church supported the pastor of the church in question for a long time; that on the eighteenth of December, 1884, the defendants, and those acting with them, did unite with said Zions Congregation, and did ordain that said congregation "shall adhere to the faith of the Evangelical Christian Church;" that plaintiffs do not desire to unite with said Evangelical Christian Church, or with said Zions Congregation, and do not desire to have settled over them a pastor who is a member of the Evangelical Synod of North America, but desire still to adhere strictly and faithfully to the doctrines, discipline, and tenets of the Lutheran Church.

There are a number of other allegations in the reply in which the plaintiffs claim the right to said church property, and deny the right of the defendants to the possession of the same.

On the trial of the cause the court found "that the defendants Herman H. Bartling, Frederick W. Rodenbrock, Henry Fastenan, Albert Schnitker, Adam Schafer, and William Luecke, and Louis Hobine were at the commencement of this action, and now are, the legal trustees and council of the First Evangelical Lutheran church of Nebraska City, and as such trustees and council are entitled to the possession, care, custody, and control of the property of said church, consisting of the real estate and other property described and referred to in the pleadings herein, as provided by the constitution of said church. And the court doth further find that the new amended constitution purporting to have been adopted on the eighteenth day of December, 1884, was not framed and adopted in accordance with the provisions of the constitution of said church, but in violation thereof, and is invalid, and of no effect, and that the defendants should be restrained from observing or conducting the affairs of said church under said new or amended constitution; wherefore it is considered, ordered, adjudged, and decreed by the court that the defendants Herman H. Bartling, Frederick W. Roderbrock, Henry Fastenan, Albert Schnitker, Adam Schafer, and William Luecke, and Louis Hobine are the legal

trustees and council of the First Evangelical Lutheran Church of Nebraska City, and, as such trustees and church council, are lawfully in the possession of the property belonging to said church, to-wit, lots one (1) and two, (2,) in block eight, (8,) in South Nebraska City, a part of Nebraska City, in Otoe county, Nebraska, together with the church edifice and other buildings and improvements thereon, and all property in the said church edifice, and the church communion service, and are lawfully entitled to remain and continue in the possession thereof, and to direct and manage the affairs of said church. And it is further ordered and decreed by the court, that said defendants, as trustees and church council aforesaid be, and they hereby are, restrained from observing or conducting the affairs of said church under the said new or amended constitution purporting to have been adopted December 18, 1884. To so much of this finding and decree as finds the defendants are the legal trustees of said church, and that they are entitled to the possession of the church property, the plaintiffs except, and to the finding that the new or amended constitution purporting to have been adopted December 18, 1884, is invalid, and that portion of the decree restraining defendants from managing the affairs of said church under said new or amended constitution, defendants except. It is further ordered by the court that the plaintiffs and defendants each pay half the costs of this action, the whole costs being taxed at the sum of $156.13." The plaintiffs appeal.

On the trial the plaintiffs introduced a deed from C. F. Holly and wife to the trustees of the First Evangelical Lutheran Church of Nebraska City, dated January 20, 1867. The plaintiffs then introduced the constitution of said church, as follows:

"Article 1. *Its Name.* This congregation shall be known by the name of the First Evangelical Lutheran Church in Nebraska City, Nebraska.

"Art. 2. *Its Doctrinal Basis.* This congregation, in harmony with the doctrinal stand-point of the Evangelical Lutheran General Synod of the United States, accepts the word of God as contained in the canonical books of the Old and New Testament as the only infallible rule of faith and practice, and the Augsburg Confession as a correct exhibition of the fundamental doctrines contained in the word of God.

"Art. 3. *Membership.* All such persons who in their infancy have been baptized, and after previous instruction in the doctrines and duties of the Word of God, and upon their confession of faith, have been confirmed, shall be considered as regular members of this congregation. Also such persons, though not baptized in their infancy, but afterwards, after previous instruction and upon their confession of faith and baptism, shall be received as members. Furthermore such persons who have been members of another Lutheran Congregation or Evangelical Church may be received as members, upon presentation of a certificate of honorable dismission from the congregation to which they belonged, or upon a repeated public confession of their Christian faith. Persons, whether from this or another congregation, who have been excommunicated, shall have no rights until they have repented, and have again been received as regular members. (2) The principal duties of the members are the following: They shall live a humble, holy, and useful life; attend divine services faithfully; partake of the Lord's Supper regularly; hold devotional and family worship. They shall endeavor, by an exemplary life and godly conversation, to lead the unconverted to Christ; to care for the instruction of the youth; to contribute, according to their means, to the maintenance of public worship, to the support of the pastor, to help the poor, etc., and shall heartily participate in all orderly and scriptural ways which the congregation devises, in order to ameliorate human suffering and extend the kingdom of Christ upon the earth. It shall be the duty of parents to bring up their children in the fear and admonition of the Lord, to instruct them in the doctrines of the church, and to submit to its regular appointed

means. And when young members have reached the proper age, and are possessed of the natural abilities, it is their duty to appear as worthy communicants at the Lord's table.

"Art. 4. *The Pastor.* (1) The pastor of this congregation shall be a member of some synod which stands in connection with the General Synod of the Lutheran Church in the United States. (2) The principal duties of the pastor are the following: To preach the gospel; to administer the sacrament; to instruct youth in the congregation in the doctrines and duties of the scriptures, in the catechism, and in other ways according to Lutheran usage; to visit the sick, and all that are in need; to warn the sinners; in short, to keep the vow of his ordination or licensure faithfully, and give himself wholly to winning and leading souls to Christ. (3) Should the pastor at any time be accused of teaching unbiblical doctrines, or leading an immoral life, then shall the church council (if there be trustworthy evidences) bring the accusation before synod, and inform president of synod of the facts, and at the same time give notice to the accused one. (4) Of all the official duties, as baptisms, confirmations, weddings, funerals, receptions, and admission of new members, cases of church discipline, etc., the pastor shall keep a record in a book which the congregation is to provide, which shall remain her property, and at all times be open for inspection. In case of a vacancy, the secretary of the council shall keep the church book until the congregation is again supplied with a pastor.

"Art. 5. *Of the Church Officers.* (1) This consists, at present, of two elders, two deacons, and two trustees. At the first election, one elder, one deacon, and one trustee shall be elected for one year, the rest for two years. But after this first election all of the officers shall be chosen for two years, so that one elder, one deacon, and one trustee may step out of office yearly, whose vacancies are to be filled at the annual election, which is to be held on ———. These newly-elected officers shall, as soon as possible, be installed according to the formula of the synod to which the congregation belongs. Those who, according to article 7, § 2, are not entitled to vote, cannot be elected. (2) The duties of the elders consist, among others, in the following: To live an exemplary life; faithfully to participate in all the inner and outer affairs of the congregation; to visit the Sunday and week schools; to assist the pastor in visiting the sick, in holding devotional meetings, and in his endeavors to maintain peace and harmony in the congregation. (3) The duties of the deacons consist, among others, in the following: To live an exemplary life; to participate in all the inner and outer affairs of the congregation, especially to take up the collection at public worship; to distribute gifts which the poor are to receive; to see to it that the pastor receives sufficient support; to assist at communion and baptisms in securing the necessary things, as bread, wine, and water; and in general see to it that all the necessaries belonging to the outer affairs of public worship are cared for. (4) The duties of the trustees consist, among others, in the following: To live an exemplary life; to participate in all the affairs of the congregation faithfully; to see to it that the property of the congregation, which belongs to it now or which may belong to it in the future, be kept in good condition, in so far as their duties correspond with article 6, § 6, and therewith be construed."

"Art. 7. *Of the Church Council.* (1) The church council consists of the pastor or pastors, elders, deacons, and trustees. (2) The church council has the general oversight of all the secular and spiritual affairs of the congregation, and shall endeavor conscientiously and faithfully, according to Biblical principles, to promote the interests of the same. (3) It shall exercise church discipline over all such members who live an immoral life, and foster false doctrines. To this end it is empowered to call up any member to give an account, and to cite others before it as witnesses, as the case may be. It shall be authorized, in case any member has given offense, first privately to give ad-

monition, or, if necessary, to call him to account; and, when these measures prove ineffectual, to suspend or excommunicate such member, viz., to deny him all rights of membership according to apostolic injunctions. The council shall further be empowered to restore all church privileges to such as have been suspended or excommunicated, after they have acknowledged their sins and sincerely repented. Every act of excommunication or restoration shall publicly be made known to the congregation. Should a church member in reference to his rights not be satisfied with the decision of the council, he may then appeal to synod with which the congregation is in connection; but in every such case the accuser must, within two weeks from the time the decision took place, inform the church council of the fact. He must also state the cause of his dissatisfaction, and the grounds for his appeal. (4) The church council elects its own secretary and treasurer. The pastor, in virtue of his office, acts as chairman. (5) The church council may at any time, when important questions, which the constitution states, arise, call a congregational meeting. The council shall have the right to decide as to the legality of such meeting; and, when two-thirds of all voting members insist on the holding of such meeting, it shall in all cases take place. (6) The church council shall have full possession of the church property, and shall endeavor to preserve the same for the use of the congregation; but it shall not be empowered to burden the same with mortgage, or heavy debts, to sell it, to make alterations to any great extent, unless a majority of votes of the members be cast at a regular meeting, which has been held according to previous announcement. (7) The council shall annually elect one of its members, who enjoys the confidence of the congregation, to represent the same at synod, whose expenses, as also those of the pastor, shall be paid out of the treasury of the church. (8) The council shall from time to time receive such persons as members who, after previous examination, or upon the recommendation of the pastor, are found to be worthy to participate in the rights and privileges of a Christian congregation. (9) The council shall keep a correct list of all persons who are considered regular members, which list is to be carefully examined and corrected at the annual meeting of the council, which is to take place on the first Monday in January. At this meeting the treasurer shall lay before the council a detailed report of all the receipts and expenditures, and this report is to be given into the hands of a committee for examination of all the moneys in the hands of the treasurer. The council may at any time decide as to its disposal. The pastor, together with half the number of the other members of the council, or, in the necessary or voluntary absence of the pastor, two-thirds of the other members, constitute a quorum. (10) The council shall hold regularly quarterly meetings on the first Monday in January, April, July, and October. But it may also hold special meetings at any time, either by the pastor called together, or when two-thirds of the members of the council, or one-fourth of all the voting members of the congregation, demand it.

"Art. 8. *Of Elections and Congregational Meetings.* (1) Every congregational meeting must be made known to the congregation two weeks before. In case of vacancy in church council, a meeting shall be called at once to fill the same. (2) At these meetings only such persons shall be entitled to vote who are in full communion membership, who have signed the constitution, and who submit to regular church discipline, who have partaken of the holy communion during the year, unless providentially prevented, and who contribute according to their means to all necessary expenditures of the congregation. (3) All elections, whether for the pastor or members of the church council, must be held by ballot, and a majority of all votes cast shall be sufficient, except in the election of a pastor two-thirds vote must be cast. (4) At the election for members of the church council the council shall nominate as many persons as are to be elected, and the congregation may, if it chooses, nominate a like number. (5) In case of resignation or death of a pastor, the

secretary of the council shall inform the president of synod of the fact, and ask him for advice. The council shall then invite an Evangelical Lutheran pastor or pastors to preach for the congregation, whereupon an election shall take place, at which, for one person only, votes shall be cast. Should this person not receive two-thirds votes, then the name of another may be taken up.

"Art. 9. (1) This constitution shall be signed by all who stand in regular communion membership according to article 3. (2) This constitution cannot be altered or improved unless it be at a meeting of the congregation legally called together by the council, and made known three months before, at which meeting two-thirds votes of all the members present shall be sufficient for any alterations or improvements."

Frederick W Rottman testifies, in substance, that he is one of the original trustees; that defendants have all the original papers and documents of the church; that he and the other gentlemen named as trustees contributed to the purchasing the property. Church was built in 1868. We got help from the general synod. That is the same synod a part of whose constitution has been offered. Eli Huber was the first pastor. We obtained assistance, and the money was used for purchasing the property, and erecting building for First Evangelical Lutheran Church of Nebraska City, and that particular church occupied the same to about January, 1885. The Church Extension Society of this denomination loaned us, in all, $600, without interest. The church had no affiliation with any other church organization, up to about January, 1885. On the evening of February 13, 1885, myself and several other male and female members of the original church went into the building, using the key that for many years had been in Mr. Petring's possession, and accompanied by Rev. Mr. Kimmel, a regular Lutheran pastor, and were holding a religious and business meeting, when the defendants and several others entered, and ordered us out, and finally ejected us, and put out the lights, and stopped our meeting. Kimmel had authority from the president of synod, and read it to them before they ejected him. The services were broken up by defendants. Since then the Evangelical Lutheran Church of Nebraska City has had no possession or control of the property. Went to church on a Sunday afternoon after this, but defendants would not permit me to enter. There is no other church of this denomination in Nebraska City, and no other place for us to worship, except private houses. The denomination known as Evangelical Lutheran Church has held possession of this property from the time it was built up to the time we were ejected as aforesaid, and all the preachers settled over the congregation were connected with the general synod.

George H. Meyers testified that he acted as clerk of meeting of the Evangelical Lutheran Church, held at Nebraska City, January 31, 1885. Minutes show that Rev. J W Kimmel was chairman, and G. H. Meyers clerk, and that Noelting, Rottman, Teten, Petring, and Meyers were elected trustees of said congregation to fill the vacancy caused by the withdrawal of the former officers, they having united with the First German Evangelical Zions Congregation. Witness then detailed the proceedings on the night of the thirteenth of February, 1885, substantially as testified to by Rottman, and that Bartling, Rodenbrock, and others have had possession ever since. Petring, son of one of the original trustees, was away at school when church was organized in 1867; was elected trustee in January, 1885. The property, both real and personal, including books, papers, church records, communion service, etc., have been in possession of Bartling and party since that night. Rev. Kimmel is attached to the Nebraska Synod that is in connection with the General Synod of the Lutheran Church of the United States. Noelting was a member of the church. Teten was a member. At the time of the differences, in 1880, when they all united again, witness acted as clerk of the meeting, and voted. Rottman was a member; had been trustee and elder. Plaintiffs and the people in general had noticed by the records that defendants had placed themselves

on record as having ceased to be Lutherans, and had become Evangelicals, and consequently that property ceased to have proper officers. Therefore plaintiffs, as deacons and trustees, were authorized to take possession by their election at the hands of the members of the church. Defendants had been in possession as trustees of the old church, but they had withdrawn and ceased to be Lutherans, and were acting under authority of Evangelicals, and were unlawfully in possession, and plaintiffs acted by authority of Lutheran Church. The plaintiffs had put a lock on that church prior to February 13th, by authority of the Lutheran Church. Rev. Kimmel had not been "called" by the congregation, but was sent here by the president of synod of which that church is a member. A part of the congregation withdrew in 1880, but afterwards reunited with the church, and always afterwards acted with the Lutheran Church. There was no objection to defendants, nor interference with them prior to the time they changed the constitution and united with the Zions Congregation, and no attempt to take possession of the property so long as they acted under the state and general synod. When a part withdrew, in 1880, there was no controversy as to the trustees or doctrines; it was only a question about preaching English or German; and they afterwards reunited, and called Rosenstengel as pastor. There are perhaps Evangelicals in the original congregation, but they always acted with the Lutherans.

John Teten testified: Was chosen trustee in the Lutheran Church on January 21, 1885. Rev. Kimmel is a Lutheran preacher connected with the synod of this state, and is an officer of the synod, and is settled over a Lutheran congregation at Auburn. Witness then detailed the proceedings on the night of February 13, 1885. There was on that night no lock but the old lock which had been there since the church was built. Witness was a member, the old church record shows, when he united. Parties went there, among other things, for an election. Knew that Bartling and Rodenbrock had been trustees, and had gone into another church. The new lock was put on to keep out parties who did not belong there,—such parties as went off to another church. Only one officer was elected that night of February 13, 1885. On that night some of the other party were armed with sticks, broom-handles, axe-handles, and clubs.

Plaintiffs then offered in evidence a duly certified copy of the proceedings of the Zions Congregation, dated December 18, 1884, and filed for record December 19, 1884, showing that, at a meeting of First Evangelical Lutheran Church of Nebraska City, Bartling was made chairman, and Schafer secretary; and it was resolved by a unanimous vote of those present to change the name from First Evangelical Lutheran Church to First German Evangelical Zions Congregation of Nebraska City, and that the by-laws, articles of association, rules, and regulations of said Lutheran Church, as amended and revised, be spread on the records of Zions Congregation, and be adopted.

Rev. Kimmel testified that he is a Lutheran preacher; that he and the First Lutheran Church of Nebraska City are attached to the State Synod, and that to the General Synod of the United States; was present at meeting of State Synod in September, 1884. Witness stated difference between Lutheran and Reformed Church or Evangelicals to be particularly on the subject of the Lord's Supper, the Evangelicals believing Christ present spiritually, and the Lutherans believing in actual presence. A further difference is that the Lutherans accept the Augsburg Confession as correct in itself, and the others accept it only so far as it squares with their interpretation of the scriptures; that is, they decline to receive that confession as an absolute interpretation. None of these denominations are admitted as members of any Lutheran synod, and their pastors are in no way whatever connected with or under control of any Lutheran synod. Witness then gave, in detail, the proceedings of the night of February 13, 1885. None of these parties acting with Bartling at that time are members of the First Lutheran Church of Nebraska

City. Was authorized to act by letter from president of synod, and under seal of synod, dated January 14, 1885, which letter has since been mislaid, and cannot be found; and showed that letter to Bartling. Bartling pushed him out after he showed him the letter. The Church Extension Society is a corporate body made up of members of the general synod to help needy churches and to build churches. It has no connection with the Evangelical Church. It furnishes no help outside of the general synod of the Lutheran Church, and it is so stated in all applications. At the first meeting, but five trustees had been elected, and we were going to elect the sixth that night; that was what the meeting was called for. Meyers was secretary of board of trustees. That letter was all the authority witness needed. The president of synod has authority to appoint a man to act where there is no pastor. Defendants were not asked to that meeting, because they were not members of the Lutheran Church.

The testimony of Rev Eli Huber was taken by deposition as follows: Reside in Philadelphia, and have been a Lutheran minister. Connected with the general synod since 1858. Pastor of First Evangelical Lutheran Church of Nebraska City from 1866 to 1876. Since then the pastors have been connected with the same synod. Synod adopts the Augsburg Confession and Luther's Catechism; do not use the Heidelberg Catechism, nor do any Lutheran churches. It is the standard of the Reformed Church. It differs from Luther's Catechism mainly on the subject of predestination and the Lord's Supper. The latter was the cause of separation of the Protestant Church into Lutheran and Reformed. The General Synod and the German Evangelical Synod of North America are two entirely distinct bodies, having no connection with each other, and no church or minister can be connected with both. No minister or church would be received into Lutheran Synod without accepting the Augsburg Confession in its unaltered form; that is, the confession of A. D. 1530. The Evangelical Synod of North America is not connected in any way with the general synod, or with any other Lutheran body. This field was, in 1866, assigned to the Alleghany Synod, and I was sent as missionary to establish the First Evangelical Lutheran Church of Nebraska City. During the first four years of my pastorate in Nebraska City I received from the Alleghany Synod in all $2,300. I also collected from the church, belonging to general synod, $350, for the erection of this building, and the Church Extension Society of General Synod loaned $500 on three years' time, without interest, for the erection of this church.

Rev. Conrad Huber testified: Reside in Saunders county, Nebraska. Am president Lutheran Synod of Nebraska. Same is subject to General Synod of the United States. The membership of the First Evangelical Lutheran Church of Nebraska City, as per last official report, was 116. The Evangelical Synod of North America is an entirely different organization from General Synod of Lutheran Church. There is and can be no connection between these two bodies, and still retain their identity. There is no such body existing as the Evangelical *Lutheran* Synod of North America. There has never been any application made to me relative to the vacancy in the Nebraska City church. When I heard of the condition of affairs there, I instructed Rev. Kimmel to go to Nebraska City, and look after the interests of the church and its property. He is a regular member of our synod.

Rev. W. F. Eyster testified: Have been a Lutheran pastor or professor in Lutheran instructions for 44 years. Am acquainted with its doctrines, discipline, and organization. Have some acquaintance with tenets and doctrines of Zions Congregation of Nebraska City. The basis of that belief is as follows: We profess to be a Christian society, believing with Apostle Paul, 1 Cor. 3:11, that no other foundation can be laid than is laid on Jesus Christ. We profess to be an Evangelical society, considering ourselves members of the Evangelical Church of Christ, which takes the Holy Scriptures as the word of God, as

the only true doctrine of faith, and the exposition of the Holy Scriptures as laid down in the Lutheran and Reformed Church named, the Catechism of Luther, and the Heidelberg Catechism, as near as they correspond. In their difference, we hold the Holy Scripture in relation thereto. The doctrinal basis of Evangelical Synod of North America, as laid down in their constitution, is as follows: The German Evangelical Synod of North America, as a part of the Evangelical Church, is that community which believes that the Holy Scriptures of the Old and New Testament is the Word of God, and the only infallible rule of faith and life, following the interpretation of the Holy Scriptures as laid down in the symbolical books of the Lutheran and Reformed Churches, which principally are the Augsburg Confession, the Lutheran Catechism, and the Heidelberg Catechism, as far as the symbolical books agree with one another. In their variances the Evangelical Synod of North America adheres to the Holy Scriptures, and reserves for itself the freedom of conscience which prevails in the Evangelical Church on these important points. The Lutheran Church makes subscription to the Augsburg Confession as a correct exhibition of the fundamental doctrines of the Divine Word an express test of admission to her ministry and synodical connections. The Evangelical Church ignores it as such exposition. The Evangelical Church further differs from the Lutheran Church in that they make the Catechism of Luther co-ordinate with the Heidelberg Catechism as authority in matters of faith, and may accept or reject its teachings on the important points on which the two catechisms differ. It further differs in allowing her ministers or members to hold doctrinal views accordant or discordant with the Lutheran Confession, according to individual judgment. The Heidelberg Catechism was drawn up in 1562, to set forth the distinctive doctrines of Zwingli and Calvin, as against the Roman Catholic Church, and certain points of Luther's views. The variances between the two catechisms respect mainly the presence of Christ, the nature and efficacy of the sacraments, baptism, and especially the real presence of Christ at the Lord's Supper. The Evangelicals believe that Christ is present on earth only with respect to his divine nature. The Lutherans believe that his human and divine nature are inseparably united in one person with regard to the sacraments. The Heidelberg Catechism teaches that there are visible signs and seals appointed by God. The Lutheran Catechism teaches that there are efficacious signs and effective means of grace. These are the points of difference between the doctrinal teachings and symbolical books, and which originally led to the separation of the Protestant Church into Lutheran and Reformed, and has kept them in existence as separate ecclesiastical organizations. Am a member of Nebraska Synod. That synod claims and exercises over its individual churches and congregations the authority given by the formula of government and discipline prescribed by general synod. District synods combine mandatory and advisory powers. It is the duty of district synods to see that the government and discipline prescribed are observed by all the congregations and ministers within their bounds; to receive appeals from decisions of church council, and affirm or reverse them; to form and change ministerial districts; to attend to any business relating to the churches which may be brought before them, and to provide supplies for vacant pulpits. Chapter 8, § 6, of the formula, provides that when a congregation shall refuse to observe the resolutions of synod, or provisions of formula, it shall be excluded from connection, and no other synod or Lutheran minister or licentiate shall take charge thereof without permission of the president. The Zions Congregation of Nebraska City is not on the official roll of the synod, nor could it be so received under its doctrinal basis. The Evangelical Synod of North America has no connection with Nebraska Synod, or the General Synod of Lutheran Church; that synod has its own organization, institutions, and publications, distinct from all other denominations. No person can be a member of both

organizations at the same time. No pastor who subscribes to article 11 of constitution of Zions Congregation could belong to any Evangelical Lutheran Synod. I understand the church at Nebraska City to have been originally organized as a constituent part of the Evangelical Lutheran Synod, and that a portion of the congregation still adhere to the doctrinal basis and government of the Evangelical Lutheran Church, and is now a member of the synod under which that church was originally organized.

The following are the articles of incorporation of the First German Evangelical Zions Congregation, introduced in evidence by the plaintiffs:

"NEBRASKA CITY, NEB., December 18, 1884.

"Be it remembered that, in pursuance of notice given by the proper authorities for this purpose, a majority of the members of the First Evangelical Lutheran Church of Nebraska City, Neb., have this day met in convention, and transacted the following business: The house having been called to order, Mr. H. H. Bartling was chosen chairman, and Mr. A. Schafer as secretary, of this meeting. Thereupon it was resolved by a unanimous vote of members present to change the name of the society from First Evangelical Lutheran Church of Nebraska City to that of Die Erste Deutsche Evangelische Zions Gemeinde of Nebraska City, by which last name this society shall henceforth be known, and shall do all its business. And thereupon it was further resolved by a unanimous vote that the by-laws and articles of association, rules, and regulations of the said First Evangelical Lutheran Church of Nebraska City, as amended and revised, and as so amended, are spread upon the records of this society, be adopted as the articles of association, by-laws, rules, and regulations of this Die Erste Deutsche Evangelische Zions Gemeinde of Nebraska City, and the same are hereby so adopted, ratified, and confirmed. And thereupon it was further resolved that a substantial embodiment of the provisions of such articles be attached hereto and made a part hereof. The provisions of said articles are, in substance, as follows: Article 1 provides that the name of this congregation shall be Die Erste Deutsche Evangelische Zions Gemeinde von Nebraska City. Art. 2 provides that this congregation shall adhere to the faith of the Evangelical Christian Church, (that is, Ev. and Lutheran, United and Reformed.) Art. 3 provides that all persons who have been baptized, confirmed, and who declare themselves adherents of the faith of said Ev. Church and otherwise lead a moral and Christian life, may become members of this congregation. Art. 4 provides that the pastor shall be a Christian, law-abiding person, and a member of the Evangelical Synod of North America. The pastor, by virtue of his position, shall be president of the church council. Art. 5 provides that the directors or officers of this church shall consist of two elders, two deacons, and two trustees, all of whom shall be elected every two years by a majority vote of the members present at the election. Art. 6 provides that the church council shall consist of the pastor, elders, deacons, and trustees. Art. 7 provides that all notices of election shall be given two weeks prior to such election by the church council. Art. 8 provides for amending the constitution and by-laws, and for making additions thereto. And, after having so adopted said articles as aforesaid, it was resolved that a copy of these proceedings be recorded in the recorder's office of Otoe county, in the state of Nebraska, and thenceforth this society shall be and is a body corporate under the laws of the state of Nebraska, and shall be known and do business and hold property for religious purposes only, under the name and style of Die Erste Deutsche Evangelische Zions Gemeinde of Nebraska City, all in the county of Otoe and state of Nebraska; and thereupon the meeting adjourned.

"ALBERT SCHNITKER, H. H. BARTLING, Chairman.
"H. FASTENAN, A. S. SCHAFER, Secretary of Meeting."
"Trustees.

The plaintiff below also introduced the following in evidence:

"At a meeting of the First Evangelical Lutheran Church held at Nebraska City, January 21, 1885, the following business was transacted: Presiding officers of this meeting were Rev. J. W. Kimmel, chairman; G. H. Meyer, clerk. The following officers were then duly elected as a board of trustees of the above-named congregation, to fill vacancy caused by the withdrawal of the former officers, they having united with Die Erste Deutsche Evangelische Zions Gemeinde, as recorded in the county clerk's office of Otoe county, Nebraska, December 20, 1884, for the unexpired term of office.

"Trustees: B. H. NOELTING.
F. W. ROTTMAN.
JOHN TETEN.
F. W. PETRING.
G. H. MEYER.

"Rev. J. W. KIMMEL, Chairman.
"G. H. MEYER, Clerk."

The testimony on behalf of the defendants fails to deny that on behalf of the plaintiffs, except upon two material points: *First*, that there is any material change in the doctrines of government of the church; *second*, that Rev. Kimmel and the plaintiffs were ejected by force from the church on the night of February 13, 1885.

It will be observed that section 2, art. 8, of the constitution of the Evangelical Lutheran Church, provides that "this constitution cannot be altered or improved, unless it be at a meeting of the congregation legally called together by the council, and made known three months before, at which meeting two-thirds of all the members present shall be sufficient for any alterations or improvements;" yet, in open defiance of this provision, a meeting was called without such notice having been given, and an attempt made to change the constitution of the church, and transfer the church to another denomination. The points of difference in the two churches are sufficiently set out in the testimony, and need not be further referred to, except to say that it is apparent that material differences do exist, both in matters of belief and in the form of government.

The controlling question in this case is whether the plaintiffs and their associates, or the defendants and their associates, constitute the true and legitimate First Evangelical Lutheran Church of Nebraska City. In our view, the testimony clearly shows that the plaintiffs and their associates constitute the First Evangelical Lutheran Church at Nebraska City. In determining the question of legitimate succession of a religious society, where a separation has taken place, a court will adopt the rules of such society, and enforce its polity in the spirit and to the effect for which it was designed. *Harrison* v. *Hoyle*, 24 Ohio St. 254. If this were not so, it would be possible for a faction in any church, by concerted effort, to change its doctrines and form of government.

The leading case upon this subject is *Attorney General* v. *Pearson*, 3 Mer. 409, where it was held that if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant dissenters, promoting no doctrines contrary to law, it is then the duty of the court to carry such trust into execution, and to administer it according to the intent of the founders. In the same case, page 400, the chancellor says: "Where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the court. And to refer to any other criterion (as the sense of the existing majority) would be to make a new institution, which is altogether beyond the reach and inconsistent with the duties of the court. The cases of *Craigdallie* v. *Aikman*, 1 Dow. 1; *Foley* v. *Wontner*, 2 Jac. & W. 245; *Leslie* v. *Birnie*, 2 Russ. 114; *Davis* v. *Jenkins*, 3 Ves. & B.

156; and *Milligan* v. *Mitchell*, 3 Mylne & C. 72, and 1 Mylne & K. 446,—recognize the same principles."

In *Church* v. *Wood*, 5 Ohio, 283, where certain members of the Methodist Episcopal Church seceded therefrom, and brought an action to compel a division of the corporate property, their right to recover was denied. The court say, (page 288:) "The efforts of the dissatisfied members are not directed within the church to effect a reformation in its government and discipline, according to the usage of the society, to conform it to their wishes. They moved off in a body of several hundred, and associated themselves, not as *the* Methodist Episcopal Church, but, as is now claimed for them in argument, a persecuted body forced from the church by the intolerable tyranny of its government. The body of persons thus separated agreed upon articles of association, differing essentially from the rules governing the Methodist Episcopal Church. By these articles of association they have since conducted their affairs, and conducted worship as a distinct church, denying all accountability alike in the spiritual and corporate power of the Methodist Episcopal Church. In this state of facts it is difficult to perceive the ground on which the claim is now advanced, that they remain the Methodist Episcopal Church. Those remaining in that church have continued to exercise the corporate functions in conformity with the act of incorporation; and against a body who have acted openly upon other principles, and continued so to do until this time, they must be held in this action, the corporation."

The same principle applies in this case. The fact that these defendants did not move off in a body, but sought to retain possession of the church building, does not change the rule. All the testimony tends to show that they have seceded from the Lutheran church, and as such seceders have no right to the property of the church. *Kniskern* v. *Lutheran Churches*, 1 Sandf. Ch. 439; *Harrison* v. *Hoyle*, 24 Ohio St. 254; *Field* v. *Field*, 9 Wend. 401; *Gable* v. *Miller*, 10 Paige, 627, and 2 Denio, 492; *Church* v. *Wood*, 5 Ohio, 283.

The judgment of the district court is reversed, and judgment will be entered in this court ousting the defendants from the possession of such church property, and investing the plaintiffs and their associates in the Lutheran Church with the possession thereof, and enjoining the defendants, or any of them, from interrupting or interfering with such possession. Judgment accordingly.

(The other judges concur.)

BOYLE v. MARONEY and others.

(*Supreme Court of Iowa.* October 21, 1887.)

1. JUDGMENT—BAR TO SUBSEQUENT ACTION—DISCHARGE OF GARNISHEE—SUIT TO SET ASIDE FRAUDULENT CONVEYANCE.
An order discharging a person as garnishee of a judgment debtor is no bar to an action against the same person to set aside as fraudulent a conveyance to him by the judgment debtor, and to subject the property to a judgment against the grantor.

2. EXECUTION—ISSUANCE AFTER DEATH OF JUDGMENT DEBTOR—SALE INVALID.
The right to issue an execution against the property of a judgment debtor terminates with the death of the latter, and in the absence of any order or proceeding re-establishing the right of a judgment creditor as to such property, an execution sale of the property, and sheriff's deed thereto, after the death of the judgment debtor, are ineffective for the enforcement of the creditor's judgment.

3. CREDITORS' BILL—PRIORITIES OF JUDGMENTS.
Plaintiff and defendant were judgment creditors of the same party, and sought to enforce their judgments against a piece of land which had been fraudulently conveyed away by the judgment debtor. *Held*, that plaintiff having taken the first steps to uncover the property fraudulently conveyed, his rights were superior to those of defendant, though the latter was the senior judgment creditor.

4. SAME—EXPIRATION OF LIEN—REVIVAL—RIGHTS UNDER JUNIOR JUDGMENT.
A judgment lienor, whose lien had terminated by limitation before the rendering of judgment in favor of plaintiff against the same judgment debtor, had, at the time of plaintiff's judgment, taken no steps to preserve or revive his lien. *Held*, that such lien could not be revived as against plaintiff.

Appeal from circuit court, Buchanan county.

Action in equity to subject certain real estate to the satisfaction of two judgments obtained by plaintiff against the defendants, James and Mary E. Maroney. Judgment was entered by the circuit court in accordance with the prayer of the petition. The material facts are stated in the opinion. Defendants appealed.

Lake & Harmon, for appellants. *C. E. Bronson* and *Charles E. Ransier*, for appellee.

REED, J. On the eighth of November, 1876, plaintiff recovered a judgment against James and Mary E. Maroney for $500, and one against James Maroney alone, for $1,600. Those judgments were rendered in an action brought by plaintiff for the recovery of damages caused by the unlawful sale of intoxicating liquors to her husband. The petition in the action was filed on the tenth of February, 1876, and the original notice was served on James Maroney on the same day, and on Mary E. Maroney on the second of May following. On the first of March, 1876, the Maroneys conveyed the real estate in question to defendant Bridget Ryan. The title to the property at that time was in Mary E. Maroney. It had formerly been in James Maroney, but he had conveyed it, on the fourth of June, 1873, to Anthony McKerney, and Mary E. (who was his wife) joined in the conveyance. On the sixteenth of January, 1874, McKerney conveyed it to Mary E. Maroney, who, on the seventeenth of April, 1875, conveyed it to Patrick McKerney, and he, on the eighth of June following, reconveyed it to Mrs. Maroney. On the twenty-ninth of October, 1874, a judgment was rendered in the district court in favor of the defendant Wallace Francis against James and Mary E. Maroney, for $1,150, and the property was sold on execution issued on that judgment, Francis being the purchaser, and he subsequently obtained a sheriff's deed therefor. The sale was on the eighteenth of November, 1882, and the deed to Francis was executed on the twentieth of November, 1883. This suit was instituted on the ninth of April, 1877, but was not determined in the circuit court until December 6, 1886.

Mary E. Maroney died during the pendency of the action, and before the execution was issued on which the property was sold to Francis. After this

suit was commenced, plaintiff caused executions to be issued on these judgments, on which the defendant Bridget Ryan was garnished. She appeared and answered, denying that she was in any manner indebted to either of the Maroneys, or that she had in her possession, or under her control, any moneys, property, rights, or credits belonging to them. She was examined fully touching the conveyance of the property in question to her, and the consideration paid by her for it. But no pleading was filed controverting her answer, and the court entered an order disharging her as garnishee. The ground upon which relief is demanded against her in this action is that the property in fact belonged to James Maroney, and the conveyances by which the title to it was vested in Mrs. Maroney, as well as that by which it was conveyed to her, were without consideration, and were all made for the fraudulent purpose of covering the property from his creditors. In addition to her denial of the allegations of fraud she pleaded the garnishment proceedings in bar, alleging that the order of discharge was an adjudication of the questions involved.

Francis was made a party to the action by an amendment to the petition which was filed in January, 1885. That pleading alleged the rendition of the judgment in his favor, the sale of the property, and the execution of the sheriff's deed to him; also the death of Mrs. Maroney before the issuance of the execution, and that no order of court was made for the sale of her property in satisfaction of the judgment before the writ was issued; and the prayer was for the setting aside of the sheriff's deed, and for general relief. The decree of the circuit court adjudges that the deeds under which Mrs. Ryan holds the title to the property are fraudulent, directs their cancellation, and subjects the property to sale in satisfaction of plaintiff's judgments. It also sets aside the sheriff's sale and deed under which Francis claims, but restores the lien of his judgment upon the property.

1. As to the matter pleaded in bar by the defendant Ryan. The order of the court discharging her as garnishee is not an adjudication of the questions here involved. All that can be claimed for the order is that it determines that she was not indebted to the Maroneys, and that she did not have in her possession any property belonging to them, which could be reached by the process of garnishment. It is doubtful whether in any case real estate belonging to the debtor, the title to which is in the garnishee, can be reached by that process. The general rule is that it cannot. See Wade, Attachm § 407; Drake, Attachm. § 465. Clearly this is so where the property has been conveyed in fraud of the rights of the creditor. The garnishee can be charged only in case it is shown that he is indebted to the defendant, or that he holds property belonging to him. Code, § 2988. But in that case the real estate does not belong to the debtor. The fraudulent conveyance, although void as to the creditor, divests the grantor of all interest in the property. The grantee is charged with no trust with reference to it, and it can be reached in his hands and subjected to the judgment of the creditor's claim only in a proceeding in which the court can by proper judgment divest him of the title, and condemn the property to the satisfaction of the judgment against the debtor. That cannot ordinarily be done in a garnishment proceeding. The statute, Code, § 2988, defines the extent of the power of the court in the rendition of judgment against the garnishee. It may render judgment against him for the amount of his indebtedness to the defendant, or the value of the property held by him. But he has the right in every case to exonerate himself before judgment, by paying the money to the sheriff, or by placing the property at his disposal. Section 2986. He could not do the latter as to real estate the title to which is in him; for such property is at the disposal of the sheriff only when the one holding the title is divested of it, and that can be done only by conveyance, or the judgment of a competent court. He clearly cannot convey the property to the sheriff, and the provision is not capable of any interpretation under which he could be required to reconvey it to the grantor. It

clearly was not the intention of the legislature that real estate so held should be reached by that process, or that one holding the title to it should be charged in the proceeding with a money judgment for its value. The questions involved in this proceeding, then, could not have been adjudicated in that. Nor was there any attempt to litigate them.

2. We do not deem it necessary to set out the evidence as to the fraudulent character of the transfers. It is sufficient to say that it clearly sustains the finding of the district court on that question. The property belonged originally to James Maroney. The conveyances by which the title became vested in his wife were all without consideration, and were made, as we are satisfied, for the purpose of covering it from the liabilities he was incurring in the unlawful business in which he was engaged. The conveyance to Mrs. Ryan was made soon after plaintiff's original suit was instituted, which was against both James Maroney and his wife. We are satisfied that it was without consideration, and was made for the purpose of covering the property from any judgment which might be obtained in that action. This conclusion is reached, it is true, against the positive testimony of both the Maroneys and Mrs. Ryan. But the circumstances of the transaction satisfy us that that was the real character of the transaction. Their stories are unreasonable, inconsistent with each other, and self-contradictory, and the ultimate conclusion which they seek to establish cannot be accepted.

3. We come now to the questions arising on the appeal of defendant Francis. It will be borne in mind that his judgment is against both James and Mary E. Maroney, and that the title to the land was in Mary E. when that judgment was rendered. It, therefore, as against her, became a lien upon the property regardless of the character of the conveyances under which she held it; and when the conveyance was made to Mrs. Ryan she took the property subject to that lien. If Francis had proceeded to sell it during the life-time of Mary E. Maroney, the purchaser would probably have taken it discharged of any right or equity in the plaintiff. For as the judgment was a lien as against her, he had no occasion to institute any proceedings to subject it to his judgment as the property of James Maroney, but could have sold it as her property in satisfaction of the judgment. If he had taken that course, plaintiff's only remedy would probably have been to redeem from the sale. But he did not take that course. He waited until after her death, and then issued his execution, and sold the property. But his right to issue an execution against her property terminated at her death, (*Welch* v. *Battern*, 47 Iowa, 147;) and, in the absence of any order or proceeding re-establishing his right, the sale and deed are ineffective for the enforcement of any right which he held as against her. So far as his lien as against her is concerned, then, his condition was not changed by the sale and deed. But his right to enforce the judgment as against James Maroney continued. But treating the sale as a sale of the property of that defendant, it is as against plaintiff unavailing, for the reason that the title was not in him. Regarding the sale, then, as having been made for the enforcement of the judgment against James Maroney, which is the only light in which it can be regarded, the case comes within the settled rule that when a junior judgment creditor first institutes proceedings to uncover the property which the debtor has fraudulently conveyed away, he takes priority over the senior. *Bridgman* v. *McKissick*, 15 Iowa, 260; *Howland* v. *Knox*, 59 Iowa, 46, 12 N. W. Rep. 777. The judgment setting aside the sheriff's sale and deed to Francis is therefore correct.

4. Plaintiff appealed from the provision of the judgment which re-establishes the lien of the Francis judgment against the property. She does not object to the establishment of the lien as against the other defendants, but claims that it should be made subordinate to her lien. And we think the claim must be allowed. The lien of that judgment, by limitation of statute, terminated before the rendition of the judgment in this case, more than 10

years having elapsed since its rendition. As defendant had at that time taken no steps to preserve or revive his lien, it cannot now be revived as against plaintiff. The judgment will be modified in that respect. In all other respects it will be affirmed.

FORCHEIMER and others *v.* STEWART.

(*Supreme Court of Iowa.* October 26, 1887.)

1. EVIDENCE—OPINION—DAMAGE TO GOODS IN TRANSIT.
Plaintiff, living in Mobile, Alabama, bought a quantity of hams of defendant, living in Council Bluffs, Iowa. The hams were to be of a certain quality; but upon delivery, and after paying for them, plaintiff discovered that they were spoilt and "skippery," and he brings this action to recover damages for breach of contract. *Held*, that in order to prove that the hams were spoilt when shipped, witnesses who have knowledge of the business might testify on the question whether, supposing the hams were properly handled in transit, and were shipped by the ordinary route, and in ordinary time, they were in merchantable condition when shipped. REED, J., dissents.

2. SAME—COMPETENCY OF EXPERT.
Defendant introduced the foreman of his packing house, who testified that he had examined the hams before shipment, and they were all sound. *Held*, that defendant could not thereafter call another witness to prove that the foreman was a good judge of meat, and a competent inspector; affirming *Forcheimer* v. *Stewart*, 32 N. W. Rep. 665.

3. PRINCIPAL AND AGENT—CLERK—WARRANTY BY.
A clerk in defendant's employ sent a telegram warranting the hams, and signed defendant's name to it. The clerk was employed by defendant merely as a bookkeeper, and had no express authority to make such a warranty. *Held*, that no authority to make the warranty could be implied from his employment, and defendant was not bound.

4. SAME—WARRANTY BY TELEGRAM.
It is immaterial that the warranty was made by telegram. The ordinary rules of agency are applicable to telegrams as to other writings.

5. SAME—RATIFICATION—ACCEPTANCE OF PURCHASE MONEY.
The fact that defendant accepted payment of the purchase money from plaintiff does not bind him to the warranty contained in the telegram, or constitute a ratification of the agent's act in sending it. It appearing that the contract which defendant made with plaintiff was different from that made by the agent with plaintiff, defendant is to be considered as accepting and claiming the money under the contract which he had made.

Appeal from circuit court, Pottawattamie county.

Petition for rehearing. For former opinions, see 22 N. W. Rep. 886; 32 N. W. Rep. 665.

ADAMS, C. J. The defendant, in a petition for rehearing, cites *Couch* v. *Coal Co.*, 46 Iowa, 17, and *State* v. *Maynes*, 61 Iowa, 119, 15 N. W. Rep. 864, in support of his position that Fuller was properly allowed to testify that Hurlburt was a good judge of meats. But neither of those cases is like the present. In the first, the question was as to the competency of a certain employe. In the latter, the question was as to whether a certain person who had been allowed to testify as an expert had such character. In the case at bar, Hurlburt was confessedly an expert, and Fuller's testimony was not admitted to show that Hurlburt was competent to testify as an expert, but that, having testified as such, his skill and experience were such as to give his expert testimony great weight. We still think that Fuller's testimony was improperly admitted, for reasons stated in the original opinion, and the petition for a rehearing must be overruled.

PATTON v. CENTRAL IOWA RY. CO.

(*Supreme Court of Iowa.* October 28, 1887.)

1. RAILROAD COMPANIES — NOT REQUIRED TO FENCE TRACK — CONSTRUCTION OF GRADES AND CURVES — ASSUMPTION OF RISKS BY FIREMAN.
Railroad corporations have the right, in the absence of a duty imposed by statute or contract, to fence their roads or not, and to construct their road-beds in respect to curves and grades, as they see fit. And where a fireman on a railroad train has been over the road, and had opportunity to learn the character of the road as to curves, grades, and fences, and that of the country traversed, and its use for pasturage, but continues in his employment without objection, he assumes all risk arising from the unfenced condition of the road, and consequent danger of encountering cattle on the track, or from the peculiarities of the road-bed as to grades and curves. BECK, J., dissenting.[1]

2. SAME — DANGER OF CATTLE ON TRACK — DUTY TO WARN TRAIN-MEN.
Where an unfenced railroad runs through pasture land, cattle must be expected on the track at any point; and it is not the duty of the company to warn employes engaged in operating trains on the road of the danger of encountering cattle.

Appeal from district court, Cerro Gordo county; G. W. RUDDICK, Judge.

Action to recover for a personal injury. There was a trial to a jury, and verdict and judgment were rendered for the defendant. The plaintiff appeals.

Richard Wilber and *Card & Montague*, for appellant. *A. C. Daly, Blythe & Markley*, and *John Cliggett*, for appellee.

ADAMS, C. J. At the close of the plaintiff's evidence the defendant moved that the court direct the jury to render a verdict for the defendant. The court sustained the motion, and directed the jury accordingly, and the plaintiff assigns the ruling of the court as error. The plaintiff was employed as a fireman on one of the defendant's freight-trains. While so employed, upon one of his trips the engine struck two cattle standing on the track, and became derailed and capsized. The defendant's negligence is alleged to consist in constructing its road with an improper curve, and improper grade at the point in question, and in not fencing against cattle, and in not warning him of the liability of encountering cattle at that point. The country was broken and hilly, and used for pasturage. The curve in the track at the place of the accident was six degrees, and the grade was 52.8 in a mile. About 40 head of cattle were in the pasture, and they had frequently been encountered near the place of the accident, and eight had been killed. The grade and curve were less than half as great as have been used upon other roads, and do not appear to have been greater than was rendered necessary by the topography of the country. The plaintiff was not very familiar with the road, though he had been over it before. He had an opportunity to know the character of the ground, and the fact that it was used as a pasture, but does not appear to have known much about the number of cattle pastured there, nor the fact that they had frequently been encountered near the place in question. No information had been given him by the defendant in respect to the grade, curve, or cattle.

The foregoing are the essential facts upon which the defendant's negligence is predicated. We cannot say that they have any tendency to show

[1] If a servant enters upon and continues in the service of a railroad company with knowledge of the inadequacy of the instrumentalities furnished for the operation of the road, he assumes the risk of the service as he finds it. Fleming v. Railroad Co., (Minn.) 6 N. W. Rep. 448. If an employe knows, or by the exercise of ordinary diligence could know, of any defects in the things about which he is employed, and continues in the service without any objection, and without promise of change, he assumes the risk of all the consequences resulting from such defects. Perigo v. Railroad Co., (Iowa,) 3 N. W. Rep. 43. As to the risks which a servant assumes upon entering the employment of his master, see Anthony v. Leeret, (N. Y.) 12 N. E. Rep. 561, and note.

negligence. It may be that it would have been safer for the defendant's employes if the right of way had been fenced. But it has never been held, so far as we are aware, that a railroad company owes to its employes the duty of fencing its right of way. It is common, we believe, for railroad companies to omit, for a time at least, to fence their right of way in some places where it might fence. They must, we think, be allowed to determine for themselves whether they will fence in all places where they might. Employes who are employed to operate the road are supposed to contract to operate it in its unfenced condition so far as it is unfenced. Whatever additional exposure there may be is so common and patent they must be presumed to have taken it into consideration, and to have required that their compensation be graduated accordingly. The question as to the liability of a railroad company to an employe by reason of a want of a fence, where there is no statutory nor contract obligation to fence, and where the employe knew that there was no fence, is not a new one. The rule which we have expressed may be considered as settled. In *Sweeney* v. *Railroad Co.*, 57 Cal. 15, the plaintiff's husband, acting as conductor, was killed under circumstances similar to those under which the plaintiff in the case at bar was injured. An instruction was approved which was given by the court below in these words: "If I understand the position of the plaintiff's counsel, it is this: That the defendant failed in its duty to its employes by not fencing its railroad track; that it was negligent in this respect, and the death of Sweeney is due directly to this negligence, and that to an action of this kind it is no defense that Sweeney had full knowledge of this particular negligence, and equally with the defendant well knew the danger that might flow therefrom; in other words, that a risk cannot, under any circumstances, be naturally incident to the employment if it be incurred through the negligence or want of care on the part of the employer. This, as it seems to me, is stretching the principle beyond its legitimate limits. As I understand it, one may engage in and conduct a dangerous business, provided it be one not prohibited by law, and to assist him may employ another without incurring a responsibility to such employe for injuries sustained in such hazardous business, provided the danger or risk be equally known to both. In such case the servant voluntarily entering upon an employment, the dangers and hazards of which are well known to him, must be held to have assumed the consequences of such risks."

In *Fleming* v. *Railway Co.*, 27 Minn. 111, 6 N. W. Rep. 448, the plaintiff's intestate was acting as fireman in operating the defendant's road, and was killed under circumstances similar to those under which the plaintiff in the case at bar was injured. A recovery was sought under a statute which provides that "any company or corporation operating a line of railroad in this state, and which company or corporation has failed, or neglected to fence said road, * * * shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect." It was held that the plaintiff could not recover under the statute. The court said: "If the servant enters upon and continues in the service of the company with knowledge of the unsuitableness and inadequacy of the instrumentalities furnished for the operation of the road, it is his own negligence, and he assumes the risk of the service as he finds it. * * * The power of an employe to assume the known risks of his employment, and the consequent exemption of the master in such cases, is well settled in law."

In 1 Redf. R. R. 492, the author states the rule as follows: "Railways are not bound to maintain fences upon their road so as to make them liable to their own servants for injuries happening in consequence of the want of such fences; and where the statute makes them liable for all injuries done to cattle by their agents or instruments until they fence their road, the liability extends only to the owners of such cattle, and this liability is the only one incurred."

In *Wells* v. *Railroad Co.*, 56 Iowa, 524, 9 N. W. Rep. 364, the plaintiff's intestate was acting as brakeman on the defendant's road, and was killed by reason of the top of a bridge being too low, but of which bridge he had knowledge. It was held that he waived the company's negligence. BECK, J., in delivering the opinion of the court, said: "The defendant asked the court to instruct the jury to the effect that if they found the service of the intestate as brakeman upon the route where he was employed was hazardous on account of the bridge being of insufficient height, of which he had knowledge while employed upon this part of the road, and he continued in the defendant's service without objection, the law in such case is that he assumed the dangers incident to the service resulting from the bridge in question, and his administratrix, therefore, cannot recover on account of his death. The court refused to give this instruction. It should have been given. The rule of the instruction is announced in *Perigo* v. *Railway Co.*, 52 Iowa, 276, 3 N. W. Rep. 43; *Muldowney* v. *Railway Co.*, 39 Iowa, 615; *Kroy* v. *Railway Co.*, 32 Iowa, 357; *Way* v. *Railroad Co.*, 40 Iowa, 341; *Lumley* v. *Caswell*, 47 Iowa, 159." The principle involved in the case from the opinion in which we have made the foregoing quotation is precisely like that involved in the case at bar, and we are not aware that any court has ever held to the contrary.

We think that the same must be said in regard to the grades and curves. It is the right of every railroad company to construct its road as it shall see fit, in regard to grades and curves. It is a question of engineering to be decided in view of the cost of construction and business, etc. One alleged ground of negligence is that the plaintiff, though almost a stranger to the road, was not notified by the company that cattle had been frequently encountered near the place of the accident, and might be expected to be there. But where a railroad runs through a pasture, and the right of way is not fenced, cattle may be expected anywhere. Safety is to be secured by maintaining vigilance. Such outlook may doubtless be maintained as to prevent ordinarily running over cattle, to the destruction of human life, and the cattle, and other property. It seems to us that it would be a strange rule to hold that railroad companies owe their employes the duty of notifying them at what particular place in a pasture the cattle of the pasture may be expected to be encountered. In our opinion, the court did not err in directing a verdict for the defendant.

Affirmed.

BECK, J. (*dissenting.*) I cannot concur in the conclusion announced in the foregoing opinion, to the effect that defendant cannot be held in this action for negligence in failing to fence its railroad track. While there is no law absolutely requiring defendant to fence its road, it is nevertheless its duty to do so when life and property would be protected thereby. The law does not declare just what acts amount to negligence. They are nowhere enumerated. Those acts resulting in injury to persons or property which could have been avoided by due care for the property, rights, and persons of others are negligent, and a liability therefor arises.

Nor can I assent to the doctrine announced in the opinion that plaintiff contracted with defendant to serve in view of the fact that the road was not fenced, and therefore cannot recover for injuries resulting by reason of the absence of fences. We ought not to extend the doctrine that an employe of a railroad engaged in operating a train is presumed to assent to the condition of things connected with the operation of the road and the discharge of his duty, known to him to be defective, and thus to contract to take the risk of such defects, to cases not of like facts with those to which the court has applied it. The doctrine, to say the least of it, in its effects is cruel and oppressive towards the employes who are thus compelled to choose between employment with dangers known to them and idleness with safety. The neces-

sities of nature, bread, and raiment, will compel them to take even dangerous employment rather than idleness with want. Employers thus hold a whip over their employes, forcing them to perform services attended by dangers arising from the negligent acts of the employers themselves. I am not willing to extend this rule to any extent further than it is carried by the decisions of this court. If we apply it to the facts of this case, there can be no restrictions upon it, and an employe can have no claim for injuries resulting from negligence of the employer of any kind, if that negligence be constant and habitual, and be so known to the employe when he entered into the service.

JONES and others *v.* PASHBY and others.

(*Supreme Court of Michigan.* November 3, 1887.)

1. BOUNDARIES—DISPUTE—PAROL AGREEMENT—BURDEN OF PROOF.
A tract of land held in common by two persons was divided by them by an exchange of deeds, in which the description of the boundary line was confused and ambiguous. Plaintiffs in ejectment, grantees of one of the original owners, claimed up to a line fixed by a construction of the deeds by the supreme court on a former trial of the same cause. Defendants, the grantees of the other owner, claimed under an alleged parol agreement between the original owners, by which they had designated a boundary line different from the one fixed by the construction of the deeds. *Held*, that the burden of proof to show the existence of such agreement, that the boundary line was located as they claimed, and that it had been accepted and acted upon and treated by the original owners as the true line, was upon the defendants.
2. SAME—PAROL AGREEMENT—ESTOPPEL.
In a case where the boundary line fixed by the deeds is ambiguous and confused, a parol agreement fixing a line will operate as an estoppel if acquiesced in, notwithstanding the period of such acquiescence might fall short of the time fixed by the statute of limitations for gaining title by adverse possession.
3. SAME—EVIDENCE.
Held, further, that this agreement could be shown by acts of acquiescence during the time the respective portions were owned by the original owners, the making improvements by defendants' grantor on the land in dispute, and declarations made after the agreement by plaintiffs' grantor while he was still the owner, against his title.

Error to circuit court, St. Joseph county; RUSSEL R. PEALER, Judge.

Riley & Shipman, for plaintiffs, appellants. *D. C. Page*, (*Keightley & Knowlen*, of counsel,) for appellee.

MORSE, J. This is the third time this case has appeared in this court. See *Jones* v. *Pashby*, 48 Mich. 634, 12 N. W Rep. 884, and 29 N. W. Rep. 374. A sufficient statement of the matters in controversy will be found in the opinions filed heretofore. When the case was last here we held that the language of the deeds exchanged between Charles and James Richardson intended a division of the 100 acres by quantity, each taking 50 acres. But we further said: "There was evidence introduced upon both sides, upon the trial in the court below, tending to show an actual location of the boundary line between James and Charles Richardson, and also between James and Charles and the grantees of James. This testimony should have been submitted to the jury, and if they found therefrom that the line agreed upon was located west of the premises described in the declaration, the defendants should have judgment. If any other line had been agreed upon between the owners as the boundary line, it would govern the case, but if no agreement *or practical construction* had been put upon the deed, in applying it to the subject-matter, by the owners, then the division line which would divide the whole tract so as to give each one-half in quantity is the line which must control the rights of the parties to this case." The case went back to the circuit under this ruling of ours, and upon a trial there had the testimony showing this agreement

was admitted, and the jury found the boundary line to have been fixed by agreement as claimed by the defendants. Judgment passed in their favor.

The plaintiffs bring error, and claim that there was no legal evidence tending to show such an agreement; and even if there was any such testimony, it cannot avail defendants, because only about eight years had elapsed between the making of such agreement and the commencement of this suit. It appears almost conclusively from the record that the agreement was made to fix the boundary line, and that it was acquiesced in and treated as such boundary during the life of James, and while he and Charles owned the respective portions of the 100 acres, and afterwards. The defendants' grantor built an hotel upon the premises now in dispute, and made other improvements upon it. The defendants and their grantors have held and occupied the ground in dispute ever since the division of the 100 acres. At any rate, the jury were warranted in finding as they did.

The declarations of Charles Richardson were admissible against the title of his grantees, the plaintiffs. The court instructed the jury that the burden of proving the boundary line to have been established between Charles and James Richardson, and located as they claimed, devolved upon the defendants. And that they must do this by a fair preponderance of evidence before they could recover. Also that, before they could find a different line than the one established by the deeds, as interpreted by the supreme court, they must find from the evidence that they were agreed as to such other line as between them, and applied the deed to such line, and assumed and acted upon the assumption that the other line (as claimed by defendants) was the boundary line, and treated it as such; and that the center line was the only one claimed by them, and was the one recognized and treated as the boundary line. "The landmarks which were agreed upon at the time, and recognized since, as fixing the dividing line, by the brothers, in making the division, must govern regardless of where the words of the deed would draw the line; if you find the defendants have shown by a fair preponderance of evidence that there was such a line fixed and recognized as the dividing line, it must govern." This instruction was good law, and fairly stated. It is not necessary to here decide how long such an agreement would have to be acted upon and acquiesced in to bind the parties. Sufficient it is to say that, under the charge of the court as given, the jury must have found an acquiescence by all the parties in this boundary line up to the purchase of Charles Richardson's title by the plaintiffs, and such time was long enough to settle such boundary line beyond controversy. It has been frequently held in this state that where parties by mutual agreement, and for that express purpose, meet and fix a boundary line, and thereafter acquiesce in the line so established between them, such line will be considered the true line between them, notwithstanding the period of such acquiescence falls short of the time fixed by the statute of limitations for gaining title by adverse possession. *Smith* v. *Hamilton*, 20 Mich. 433; *Joyce* v. *Williams*, 26 Mich. 332; *Stewart* v. *Carleton*, 31 Mich. 270; *Dupont* v. *Starring*, 42 Mich. 492, 4 N. W. Rep. 190.

In this case the deeds were so ambiguous as to require their meaning to be settled in this court as to where the division line would run between the parcels conveyed and divided thereby. It was therefore a case where Charles and James might well be in doubt as to where the line was located by such deeds, and therefore, in order to settle such doubt, they were authorized to meet and agree where the boundary line should be under such deeds. And a parol agreement under such circumstances would act as an estoppel, if acquiesced in for years, and the statute of frauds would not intervene to prevent the enforcement of such estoppel. *Cronin* v. *Gore*, 38 Mich. 384. And in my opinion it would not take the number of years shown in this case, where, as here, the parties contesting such agreement purchased with full knowledge of the occupancy and possession up to such line.

We find no error in the proceedings, and the judgment will be affirmed, with costs. The record in this case will be remanded to the court below for further proceedings under the statute, if desired.

SHERWOOD and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

PEOPLE v. BURNS.

(*Supreme Court of Michigan.* November 10, 1887.)

1. BURGLARY—BREAKING AND ENTERING STORE—EVIDENCE.
   On the trial of an information for the offense of breaking and entering a store on the night of November 2, 1884, if other evidence showed that defendant, together with another who had been convicted of the same crime, occupied a rented room both before and after the commission of the crime, and were seen together about 7 o'clock on the evening of November 2, 1884, evidence that defendant was seen in company with the same person on October 25, 1884, is admissible.
2. CRIMINAL PRACTICE — EXCLUDING WITNESSES FROM COURT-ROOM — DISCRETION OF COURT.
   The exclusion of witnesses from the court-room during a trial is discretionary with the court. And if, on the trial of a criminal case, defendant moves to exclude a prosecuting witness, who is a detective, and who caused the arrest of defendant, and the court permits the witness to remain and suggest to the prosecuting attorney facts relating to the testimony which the witness had learned while investigating the case, there is no abuse of the discretion.
3. SAME—EVIDENCE.
   On the trial of a criminal case, where the evidence shows that defendant was arrested in bed at a house of ill fame with a pistol under his pillow, evidence of what occurred at the time of the arrest, and that defendant resisted, is admissible.
4. SAME—CIRCUMSTANTIAL EVIDENCE—PROVINCE OF JURY.
   At the close of the trial defendant moved the court to instruct the jury that he "could not be convicted on the evidence of the breaking and entering charged." The court denied the motion. The evidence was largely circumstantial. *Held* that, under the facts and circumstances of the case, the denial was proper.

Appeal from recorder's court of Detroit; GEORGE S. SWIFT, Judge.

Information against William Burns, *alias* Walter Young, for breaking and entering the store of one Alderman in Detroit, Wayne county, Michigan, about 11 P. M., November 2, 1884, and stealing therefrom 30 dozen pairs of suspenders valued at $260, and belonging to Alderman. There was a presidential election in November, 1884. The trial occurred September 17, 1885. The evidence in the case was as follows: The evidence for the prosecution tended to show that, between 6 P. M. on Saturday, November 1, 1884, and 11:30 P. M. on Sunday, November 2, 1884, some one had committed the breaking and entry charged, and that, in addition to the suspenders, three sample cases, into which the stolen suspenders were evidently put, were taken, the total value of the stolen property being about $280. The store had been entered by breaking the glass in a back door, and had been closed and fastened between 5:30 P. M. and 6 P. M. of November 1, 1884. About 15 dozen pairs of suspenders were afterwards taken from one Anspach, and from persons to whom he had sold them, and these suspenders were identified by prosecuting witnesses as part of those stolen. Alderman was a prosecuting witness, and identified one particular pair by the way the stitching was done, and the quality and manner of the work. One McDonnell, a detective and a prosecuting witness, testified that he knew defendant many years, as William Burns, and with another detective met him in the company of one Stone on October 25, 1884, and then stood and talked with them; that in November, 1884, he and another detective saw defendant half a block distant, and defendant, seeing them, turned and ran, and witness and companion ran after him, but couldn't catch him; that witness and two others arrested defendant asleep in bed, with his door locked, in a house of ill fame, and defendant resisted all he could, and had a revolver under his pillow; that at that time defendant said nothing, but afterwards asked what it was for,

and that afterwards witness told defendant that there was a warrant out for him in this case; that witness arrested Stone on November 5, 1884, and found on him goods stolen from the store of one Mabley, and $50.25 in money, and a pair of new suspenders. These suspenders had been used in evidence on the trial of Stone, hereinafter mentioned. Witness also testified to arresting one Commeau on election night, and found a pair of suspenders, which he identified, and which the witness Alderman had identified as part of the stolen property, and that, on the morning after arresting defendant, he got from Charles Gannon's house, 58 Brewster street, a pair of pants, and produced them, and testified that they were in the same condition as when he got them, including the name Walter Young on the watch pocket. The evidence for the prosecution further tended to show that, in October before the Alderman burglary, defendant and Stone rented together a bedroom at the house 134 Larned street, and said that they would take it for all winter; that Stone there claimed that he was engaged in selling silverware, and his partner in selling cigars. The evidence also tended to show that on November 1, 1884, Commeau was introduced by Stone, and rented another bedroom in the same house; that one O'Leary came to share Commeau's room the next morning; that neither defendant, Stone, Commeau, nor O'Leary occupied their rooms on the night of November 2d. One prosecuting witness testified that defendant left the house about 6 P. M. of November 2d, and that Stone, Commeau, and O'Leary left together about 7:30 P. M. The evidence further tended to show that all four of them were in the house on Monday, November 3d; that Stone and O'Leary came in about 8 A. M., and defendant alone soon after, and that defendant afterwards asked to have some mud on the floor of his room removed; that on the next Wednesday Stone offered suspenders for sale to Anspach, and that Anspach started with Stone and defendant for the house on Larned street, and on the way were joined by defendant; that Stone called defendant his partner, and defendant talked about selling the suspenders, and said they were at the depot. Defendant told Stone to take Anspach to their room, and wait for him. Defendant returned to the room with samples of the stolen suspenders, and the stolen suspenders were sold by these samples to Anspach for $50. Stone delivered them at Anspach's side door the same afternoon, and got the money. The evidence further tended to show that O'Leary was seen by a private watchman about 10:30 P. M., November 2d, walking up and down about half a block from Alderman's store. About 11:30 P. M. the watchman heard glass breaking, and in a minute or two found Alderman's back door open, and the glass broken out of it, and the back gate open, though he had found it shut half an hour before, but saw no burglars. Hattie Gannon, a prosecuting witness, testified that she lived at 58 Brewster street, and remembered the officers getting a pair of pants there belonging to her husband or defendant, she could not tell which; that defendant was at her house on November 2d, and went out about 6:30 or 7 P. M., and returned about 9 P. M., and did not go out again, and that herself and her husband Charles Gannon, defendant, and defendant's aunt, Miss Oliver, were in the house that night; that her husband never went by the name of Walter Young, and witness never knew of his putting that name on his pants pockets, nor saw her husband wear these pants. Witness volunteered that she never saw Burns wear them. She further testified that nobody's pants but her husband's and Burn's were there. The pants were allowed in evidence to show that they had the name Walter Young on them, and belonged to the husband or to defendant. Rebecca Oliver, a witness for defendant, corroborated Hattie Gannon as to defendant's whereabouts on the night of November 2d.

O'Leary, a witness for defendant, testified to his own conviction, along with Stone and Commeau, of the Alderman burglary, and that he knew defendant, Burns, and knew who committed that burglary, but that defendant was not one of the burglars; that himself, Stone, and Commeau committed it

on a Saturday night between 9 and 10 o'clock; got in by the back way, and carried off the suspenders in three sample cases; that the goods were sold to a man in town, but witness was not present at the sale. On cross-examination O'Leary denied having been sworn on the same subject before, but said that he was examined in a police court on the burglary charge, along with Stone and Commeau, but didn't know whether he was sworn there or not. Witness identified his signature to a paper alleged by the prosecuting attorney to contain O'Leary's testimony as given at the police court, and said he told the truth at the police court, and swore there that he knew nothing about the affair, and had nothing to do with it. In answer to a question if he swore at the police court that he was arrested because of the prejudice of the officers against him, he said first he did not so swear, then that he didn't remember, then that he didn't think he did. Witness admitted having broken into one Mabley's store, and blown the safe, and having been convicted for it, and having been convicted, on his own trial, of breaking into Alderman's store on a Sunday night. He also admitted falsely swearing, on his own trial, that he was not present at the Alderman burglary, and admitted that he had been in prison before. He said that he and defendant had been together at a certain house about a week, and in answer to a question by what name defendant was there known, said he didn't think defendant was there; then, being asked when defendant was not there, said defendant had been there off and on, but witness had not kept track of the time. Witness said he knew defendant there by the name of Burns, and called him by his first name, Billy, but never heard any one else there call him Billy. In answer to a question whether he ever swore, except on his own trial, that he was not present at the Alderman burglary, witness said he didn't recollect. Witness admitted having used the name Walter Young once, on his own trial, with Stone and Commeau, in speaking of defendant. Witness also said that he opened Alderman's back gate, and broke the glass in the door, and denied having been at Alderman's on Sunday night, November 2d, but admitted having been at the back end of Mabley's store that night, and volunteered that the Alderman burglary occurred on Saturday night. The testimony of O'Leary taken at the police court was then without objection read, as follows: "I know nothing about this whatever; I had nothing to do with it. I was arrested because the officers are prejudiced towards me. I did go into Mabley's store about 10:30 P. M., and remained in the store until 3 o'clock, and blowed the safe. Stone was not there. I know where the house 134 Larned street is. I left there Sunday evening between seven and eight o'clock. Stone was in the house when I left there."

John G. Hawley, for appellant. *Geo. S. Robison*, Pros. Atty., for the People.

SHERWOOD, J. The respondent was charged with breaking and entering a store in the night-time. He was convicted of the offense in the recorder's court in the city of Detroit, and sentenced to imprisonment for the period of 12 years.

The information charges he committed the crime on the second day of November, 1884, and the prosecuting attorney was allowed to prove that on the twenty-fifth day of October preceding the respondent was seen in company with one Moses Stone, who was afterwards convicted of committing the burglary charged in the information. This is complained of as error. It appears from the record that the respondent and Stone occupied a rented room together, both before and after the burglary was committed, and that they were seen together on the evening of the second day of November, about 7 o'clock. Under these circumstances the evidence was properly admitted.

Upon the trial the prosecuting attorney upon the examination was allowed to have the detective, who had caused the arrest of the respondent, sit by his

side and suggest to him facts relating to the testimony, as he had ascertained them in his ferreting out the case. This was also assigned as error, inasmuch as the respondent had asked for the exclusion of the detective, who was a witness for the people, while the other witnesses were examined. This was a matter entirely within the discretion of the trial court, and the record discloses no abuse of that discretion.

Witness McDonald, one of the officers who made the arrest of respondent in bed at a house of ill fame, with a pistol under his pillow, was permitted to state what occurred at the time he made the arrest, and that the respondent resisted the arrest. We find nothing improper in the admission of this testimony.

At the close of the trial the respondent's counsel asked the court to charge the jury that the "respondent could not be convicted on the evidence of the breaking and entering charged." The court declined to charge as requested, and respondent's counsel excepted. The case upon its facts and circumstances was clearly one for the jury upon all the material allegations made in the information, and no error was committed in refusing the request.

The record discloses no error, and the judgment must be affirmed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

PEOPLE v. KIRSCH.

(*Supreme Court of Michigan.* November 10, 1887.)

1. FISHERIES—"HARBOR."
   The Grand river, Michigan, at a point three miles up stream from the mouth, is not a "harbor" in the sense in which that word is used in the statutes of the state of Michigan regulating fisheries.
2. SAME—POWER OF MUNICIPALITY TO ESTABLISH HARBOR LINES.
   The power granted to the common council of Spring Lake, Michigan, is special, and it has not authority to make the general laws of the state inoperative, nor to establish harbor lines in Grand river.
3. SAME—ACT NOT REPEALED.
   Act No. 10, Laws Mich. 1885, regulating and protecting fisheries, is not repealed by implication by act No. 61 of the same year.
4. CONSTITUTIONAL LAW—TITLE OF ACT—LAW PROTECTING FISHERIES.
   The title to Michigan Act No. 10, Laws 1885, reads as follows: "An act to amend an act entitled 'An act to protect fish and preserve the fisheries of this state,' or act No. 350 of the Session Laws of 1865, approved March 21, 1865, and all acts amendatory thereto, and being found as amended in chapter 63, compiler's section 2195, How. Ann. St. Mich." *Held*, not in violation of the constitution by reason of defect of title.

Appeal from circuit court, Ottawa county.

Moses Taggart, Atty. Gen., and *Walter I. Lillie*, for the People. *V. W. Seely*, for respondent.

SHERWOOD, J. In this case the respondent was convicted upon a complaint made before a justice of the peace of the city of Grand Haven, in the county of Ottawa, charging him with having on the ninth day of May, 1887, at the village of Spring Lake, in said county, "caught and taken fish with a fyke net, so called, it being a species of continuous net, in the waters of Grand river, in this state, and not being in Lakes Michigan, Superior, Huron, St. Clair, the St. Clair and Detroit rivers, Lake Erie, and the harbors connected with said lakes, and not being a private fish-pond, contrary to the form of the statute in such case made and provided." The cause was appealed to the Ottawa circuit before Judge ARNOLD, and tried with a jury, and who, at the re-

quest of counsel for the people, directed a verdict against the respondent. He now asks a review in this court.

The facts were all stipulated by counsel for the parties, and, as they stand in the record, are as follows: "(1) That the fishing alleged and set forth in the complaint and warrant herein, occurred within the corporate limits of the village of Spring Lake, on Grand river, in said county of Ottawa, and at the time and with the nets specified in said complaint and warrant. That said nets were set on the north side of said river. That between the mouth of Grand river and the point where said nets were set, there are two bridges crossing said river, one a railroad bridge, and the other a turnpike bridge, both being draw or swing bridges. That there are saw-mills located and operated on the banks of said river, east of the point where said nets were set, as follows: One at Nortonville, one at Spoonville, one at Eastmanville, and one at Jenisonville. (2) That lake vessels are in the habit of going to Nortonville and Spoonville for cargoes of lumber; and in going to said saw-mills said vessels are towed up. That the current of said river, at its mouth, runs out into Lake Michigan twenty-five rods beyond the piers. That the piers at the mouth of said river are about thirty-two hundred feet long, but do not extend up said river to the point where said nets were set, and do not extend within two miles of the same. (3) That said draw or swing-bridges are usually closed, and are only open when vessels pass up and down said river. (4) That there is a river steam-boat, known as the 'Barrett,' running between Grand Haven and Grand Rapids. (5) That vessels do not sail up said river, but are towed up. That it is not the custom of vessels coming in from Lake Michigan to go further up the river to tie up or lay up than three-quarters of a mile from the mouth, unless they are towed up, or go up for freights, except said Barrett, and that does not come from Lake Michigan. (6) That it is three miles from the mouth of said river to the point where the nets were set. That the officer, who made the arrest in this case, was legally authorized to do so, and that the defendant did the fishing complained of." Upon submitting the foregoing stipulation of facts, counsel for respondent requested the court to direct the verdict in his favor, and stated the grounds for his motion as follows: "(1) That Grand river is a common-law harbor from its mouth to Grand Rapids, or, in other words, as far up the river as lake vessels may be navigated; and therefore the defendant is not guilty. (2) That Grand river, to the extent and point and including the place where the fishing in this case took place, is a statutory harbor, and therefore the defendant is not guilty. (3) That by reason of act No. 5, Laws 1883, the defendant was permitted to fish in the manner alleged, and therefore he is not guilty. (4) That act No. 10, Laws 1885, is repealed by implication by act No. 61, of the same year, and therefore the defendant is not guilty. (5) That act No. 10, Laws 1885, is unconstitutional and void, and therefore the defendant is not guilty."

The exception taken to the ruling of the court in directing the verdict against the respondent instead of for him, raises the only question in the case. A harbor, in its usual and ordinary sense, means an indentation in the coast of a lake, sea, or ocean, extending into the country in such manner as to form an inlet or bay, and sufficiently narrow between the headlands as to afford protection to vessels against the wind and storm upon the waters. Gould, Wat. 10; 4 Co. Inst. 140; *Cable Co.* v. *Telegraph Co.*, 2 App. Cas. 394, 419; *Insurance Co.* v. *Dunham*, 11 Wall. 1; *The Fame*, 3 Mason, 147; *De Lovio* v. *Boit*, 2 Gall. 398; 1 Kent, Comm. 30. It was in this sense that the legislature used the word "harbor" in the statutes applicable in this case, and this construction of the statue substantially decides the question raised. The stipulation shows that it is not the custom of vessels from the lake to go further up the river than three-quarters of a mile from its mouth, unless in exceptional cases, and then they are towed up; that it is three miles from the mouth of the river to the point where the defendant's nets were set

when he was complained of in this case; and that it is not customary for boats from the lake to go up the river more than three-quarters of a mile to tie up or lay up.

I think it clearly appears that the fishing was done by the defendant in violation of the statute; that it was done in the river where the prohibition of the statute applies. The prosecution is under act No. 10, Laws 1885, p. 9. Section 1 of this act will be found in the margin.[1] Act. No. 10 is not repealed by act No. 61, Laws 1885, p. 61, as is supposed by counsel for the defendant.

Neither do I think the law of 1885 (act No. 10) is in violation of the constitution on account of any defect in its title. It sufficiently states what sections of the statute are amended, but if the title should be held defective, the law of 1879 would still remain, and which fully covers the case we are considering. Act No. 208, Laws 1879.

No city or village has the power, by ordinance or by-law, to make the general laws of the state inoperative. The power granted to the common council of Spring Lake is special. It has no power to establish harbor lines in Grand river. It cannot by ordinances encroach upon the general laws of the state.

The ruling of the court must be affirmed, and the circuit court is advised to proceed to judgment.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

McKAY v. WILLIAMS and others,

(Supreme Court of Michigan. November 10, 1887.)

PRINCIPAL AND AGENT—POWER OF ATTORNEY—CONVEYANCE BY AGENT TO SELF—FRAUD—EJECTMENT.

S. appointed her husband her attorney in fact to sell and convey certain real estate. The power of attorney was filed for record June 9, 1886. On the same day the husband, as attorney, conveyed the premises to one Knight, who immediately reconveyed to the husband. On July 9, 1886, the husband conveyed to defendant, and on July 27, 1886, S. conveyed to plaintiff. *Held*, that the conveyance to Knight, and by him to the husband, were on their face fraudulent and absolutely void, and could be avoided by an action of ejectment.

Appeal from superior court of Grand Rapids; E. A. BURLINGAME, Judge.

D. E. Corbitt, for plaintiff. *Maher & Felker*, for defendant.

CHAMPLIN, J. Plaintiff brought ejectment against defendants. Mary McNerna is made a party simply as tenant in possession under her co-defendant at the time the suit was brought. On the twenty-first of May, 1886, one Ida J. Shults was the owner of the premises in question. On that day she executed to her husband, Oliver C. Shults, a power of attorney to convey, by good and sufficient deed, said premises. This was recorded in Kent county register's office on the ninth day of June, 1886, at 8:45 o'clock A. M. On the same

[1] Pub. Acts 1885, No. 10, § 1: "That it shall not be lawful hereafter at any time to kill or destroy, or attempt to kill or destroy, any fish in any of the waters of the state of Michigan, by the use or aid of dynamite, herculean or giant powder, or any other explosive substance or combination of substances, or by the use of India cockle, or any other substance or device which has a tendency to stupefy the fish; nor shall any person or persons kill or attempt to kill, or injure by shooting or spearing, any fish, during the months of March, April, May, June, July, August, and September, in any of the waters of this state, except Lakes Michigan, Superior, Huron, St. Clair, the St. Clair and Detroit rivers, and Lake Erie, and the harbors connected with said lakes; nor shall any person catch or take any fish with seines, pound nets, trap nets, or any species of continuous nets, in any of the waters of the state, except Lakes Michigan, Superior, Huron, St. Clair, the St. Clair and Detroit rivers, and Lake Erie, and the harbors connected with said lakes," etc.

day Oliver C. Shults, as attorney in fact for Ida J. Shults, executed a deed in the name of his principal of the premises in question to Henry H. Knight. This was duly witnessed and acknowledged. And again, on the same day, Henry H. Knight executed a deed of the premises to Oliver C. Shults. This was also witnessed and acknowledged. Both these deeds purported to be for the consideration of $600. The notary who drew the deeds and took the acknowledgments saw no money consideration pass between the parties. Both deeds were recorded the same day and at the same time. On the twenty-seventh of July, 1886, Ida J. Shults conveyed the premises to the plaintiff in this suit. And on July 9, 1886, Oliver C. Shults conveyed the premises to Jane A. Williams, defendant. The plaintiff claims that the deeds from Ida J. Shults, executed by Oliver C. Shults as her attorney in fact, to Knight, and from Knight to Oliver C. Shults, are fraudulent and void upon the face of the transaction; that they show upon their face the case of an agent conveying the property of his principal to himself; and that they should be so declared by the court in an action of ejectment brought by the principal or her grantee. The judge of the superior court of Grand Rapids, before whom the case was tried, held that in the absence of proof of actual fraud the title to the property passed from Ida J. Shults to Knight, and from Knight to Oliver C. Shults, and from him to defendant Williams; and, consequently, the plaintiff acquired no title by virtue of his deed from Ida J. Shults.

If, as the judge of the superior court held, the legal title passed by the deeds to defendant notwithstanding the apparently fraudulent transaction between Oliver C. Shults and Knight, then the later deed, executed by Mrs. Shults to plaintiff, only conveyed an equitable title, the defendant being simply a trustee of the legal title for the plaintiff, and the remedy of plaintiff would be in equity to compel a conveyance of the legal title by Williams to McKay. Plaintiff's counsel contends that the fraud which presumptively exists upon the face of the papers vitiated the transaction and rendered the deeds wholly void, and therefore the legal title did not pass by the execution of the deeds; that Mrs. Shults held the legal title all the time until she conveyed it to plaintiff. Here, then, there are two persons, each claiming the legal title to the same real estate, and who trace their source of title to a common grantor. The record discloses that Oliver C. Shults, as attorney in fact of Ida J. Shults, on the ninth of June, 1886, conveyed the premises to Knight, and that he immediately reconveyed them to Oliver C. Shults. These deeds, bearing the same date, executed between the same parties, conveying the same subject-matter, must be construed together. The language they speak is plain. By this transaction the agent authorized by Ida J. Shults to sell the land in question and convey the same, has sold and conveyed it to himself. Such a transaction cannot stand. It bears upon its face its own condemnation. It is *prima facie* void, and as between the parties the principal is not bound by the deeds, and may repudiate the transaction and recover the land. Public policy will not tolerate such misdoing on the part of an agent, and courts will not stop to inquire whether a fraud was intended, but, looking alone at the relation of the parties, will, upon that relation appearing, declare the conveyance invalid. *Gillett* v. *Peppercorne*, 3 Beav. 78; Whart. Ag. § 232; 2 Sugd. Vend. c. 20, § 2; *Gilbert* v. *Burgott*, 10 Johns. 457; *Claflin* v. *Bank*, 25 N. Y. 293; *Obert* v. *Hammel*, 18 N. J. Law, 74; *Michowd* v. *Girod*, 4 How. 503; *Clute* v. *Barron*, 2 Mich. 192.

In very many of the cases which have been brought to the attention of the courts the agents or trustees have so covered their misfeasance as to make it necessary for the injured party to go into a court of equity to obtain adequate relief. But when the fraud appears upon the face of the papers or conveyances the remedy can as well be administered in a court of law as in a court of equity. Thus in *Claflin* v. *Bank*, cited above, an action was brought to recover upon three checks drawn by the president of the bank and certified by

its president as good. The defense that the president committed an abuse of his fiduciary relation with the bank was permitted to be shown. Judge SELDEN said: "The act of the agent is deemed to be unauthorized, and the contract is void;" and that "there could be no *bona fide* holder of such an instrument," for the reason that the want of authority in the president to bind the bank appeared on the face of the check. In *Gilbert* v. *Burgott*, 10 Johns. 457, which was a contest between the grantee of an unrecorded deed and a subsequent grantee who first placed his deed of record, the court held that actual notice to the second grantee of the existence of the unrecorded deed might be shown in an action of ejectment. Chief Justice KENT held that the action of the subsequent grantee in obtaining and recording a deed when he had notice of the first conveyance was a fraud upon the holder of the unrecorded deed, and he said: "Fraud will invalidate in a court of law as well as in a court of equity, and annuls every contract and every conveyance infected with it." *Obert* v. *Hammel*, *supra*, was a case in point, and the court held in an action of ejectment that the sale and conveyance could be avoided in a court of law, citing several English cases in support of the position. It is laid down by Sugden on Vendors and Purchasers, and supported by numerous authorities, that "when the trustee buying is the trustee for sale the purchase is absolutely void." Chapter 20, § 2, (8th Amer. Ed.) p. 689, bottom note *n*. "So careful," said Mr. Justice MANNING, in the case of *People* v. *Township Board of Overyssel*, 11 Mich. 222, "is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction; as to buy of himself, as agent, the property of his principal or the like. All such transactions are void, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances." Mr. Justice CHRISTIANCY concurred with Justice MANNING. Mr. Justice CAMPBELL assented to the general doctrine stated, that the same person cannot be vendor and purchaser, because his contract lacks the necessary element of two parties, but he also stated that "even these contracts are not universally void. They are usually voidable at the option of the party defrauded or affected, but they are not absolutely void, except where, by reason of the identity of the vendor and vendee, a contract in the eye of the law is impossible." *Railroad Co.* v. *Dewey*, 14 Mich. 477, 488; *Sheldon* v. *Estate of Rice*, 30 Mich. 296. In these two cases the doctrine was again asserted, the first being a chancery case, and the other a case at law. In cases of sales by executors, administrators, and guardians, the statute expressly forbids them to purchase, directly or indirectly, and declares sales made in violation of that section void. How. St. § 6042. This statute was merely an affirmance of the common law.

Attention is called by counsel for the defendants to the remarks of Mr. Justice ELMER, in *Runyon* v. *India Rubber Co.*, 24 N. J. Law, 475, criticising the former decisions in that state which held that ejectment might be brought by the heirs to recover land fraudulently conveyed by an administrator to himself. And in *Obert* v. *Obert*, 12 N. J. Eq. 427, where it is said that "there can be no doubt that, according to the decided weight of authority, the principle that a trustee cannot be the purchaser of the trust-estate is a mere rule in equity, and that if proper forms are observed the conveyance is good at law." We think that the principle has a broader foundation than a mere rule in equity. Mr. Justice COOLEY, in *Sheldon* v. *Rice*, *supra*, said: "The law esteems it a fraud in such a trustee to take, for his own benefit, a position in which his interest will conflict with his duty."

It cannot be claimed that Mrs. Williams is a good-faith purchaser, without notice of the invalidity of her grantor's title. A purchaser of real estate is bound by what appears in the chain of title through which he claims. The defendant was chargeable with notice of the fraud which appeared upon the face of the conveyances. If defendants have equities which entitle them to

relief in the court of chancery, there is no obstacle to their applying to such court. The bill of exceptions shows that defendant Williams has filed her bill of complaint in which she sets forth that she agreed to pay $400 for the land, and paid $100 down, and prays for equitable relief. In holding that the deeds introduced by the defendants are *prima facie* void upon their face, we do not militate against the rule declared by this court in several cases, that in ejectment all defenses are excluded that are not legal, and that neither equitable titles nor equitable defenses can avail either as a basis of recovery or of defense. The plaintiff does not claim to recover upon the strength of an equitable title, and under the facts of this case the judgment should have been given for the plaintiff.

The judgment must be reversed, and a judgment entered here upon the finding in favor of plaintiff, with costs of both courts. The record will be remanded, in order that further proceedings may be had under the statute if desired.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

O'NEIL *v.* LAKE SUPERIOR IRON CO.

(*Supreme Court of Michigan.* November 10, 1887.)

JURY—JUROR—UNFAMILIAR WITH ENGLISH—COURT MAY EXCUSE SUA SPONTE AFTER PEREMPTORY CHALLENGES EXHAUSTED.

Where a juror did not appear to be very conversant with the English language, *held*, that the judge might of his own motion excuse a disqualified juror, although the plaintiff objecting had exhausted all his peremptory challenges.

Error to circuit court, Marquette county; C. B. GRANT, Judge.

Action for negligence.

F. O. Clark, for plaintiff and appellant. *Hayden & Young*, for appellee.

CHAMPLIN, J. The only question presented by the assignment of error in this case relates to the action of the circuit judge in excusing a juror. While the jurors were being impaneled, and the counsel for the plaintiff had exhausted his peremptory challenges, one of the jurors who previously had been examined by plaintiff's counsel, but not rejected, informed the circuit judge that he did not think he had a sufficient understanding of the English language to qualify him to sit as a juror, and requested to be excused from sitting. The circuit judge made the request known to the counsel for the parties, and inquired if they had any objections to his being excused, saying that from his own personal examination of the juror he did not consider him qualified, and that he ought to be excused. Counsel for plaintiff objected to his being discharged, for the reason that he had exhausted his peremptory challenges, and consequently some person would be drawn in his stead against whom he would be debarred from exercising his privilege of a peremptory challenge. The juror was further examined by court and counsel, after which the court excused the juror, against the wish of plaintiff's counsel, to which action of the court counsel for plaintiff excepted. The panel was then filled in the usual manner, and a trial had, which resulted in a verdict for defendant.

There was no error in the proceedings. The statute requires that jurors shall be conversant with the English language, (How. St. § 7555,) and the circuit judge has authority beyond question, at any time before the jury is sworn, to excuse any person from panel who is disqualified. The fact that the party had exhausted his peremptory challenges before the juror was excused invaded no right of the plaintiff. Peremptory challenges are given in civil cases by the statute *ex gratia*, and a party is not entitled to them independently of the statute as matter of right. Peremptory challenges are exercised by a party, not in the selection of jurors, but in rejection. It is not

aimed at disqualification, but is exercised upon qualified jurors as matter of favor to the challenger. *Hayes* v. *Missouri*, 120 U. S. 71, 7 Sup. Ct. Rep. 350. If, then, the party has exercised the privilege to the extent given by the statute, it cannot be alleged as error that qualified jurors are afterwards drawn or placed in the panel. His right to have his case tried before a fair, impartial, and qualified jury remains unimpaired, and its selection is secured through the exercise of the challenge for cause, which still remains.

The judgment of the circuit court is affirmed.

SHERWOOD and MORSE, JJ., concurred. CAMPBELL, C. J., did not sit.

BROWN v. STARRET.

(*Supreme Court of Michigan.* November 10, 1887.)

SALE—CONSTRUCTION—QUANTITY OF BRICK IN KILN.

A contract purported to sell "all the brick now situated and being in a certain kiln, * * * to the amount of 530,000." Five hundred thousand were delivered and paid for. The provisions in the contract for payment tended to show that the parties did not contemplate a sale of more than 500,000, and this construction was confirmed by a written undertaking signed by defendant "to load 420,000 brick or the balance of 500,000 not shipped," etc. *Held*, that only 500,000 passed under the contract.

Appeal from circuit court, Muskegon county.

This was an action of trover for the conversion of 24,000 brick claimed by plaintiff, under the contract set out in the opinion.

Smith, Nims, Hoyt & Erwin, for defendant and appellant.

The contract was only executory. The number of brick sold was not determined, and had to be ascertained before the contract could be completed. The price depended on the quantity of bricks delivered, and on freight. The goods sold were in mass, and no title passed until a portion was appropriated. *Hahn* v. *Fredericks*, 30 Mich. 223; Benj. Sales, (2d Amer. Ed.) § 318. It was not a credit sale, and no title passed until performance. Benj. Sales, (2d Amer. Ed.) § 320. Delivery on the cars was a condition precedent to passing title, to be performed by the vendor. *Lingham* v. *Eggleston*, 27 Mich. 324; Benj. Sales, (2d Amer. Ed.) § 319.

Delano & Bunker, for plaintiff and appellee.

The question of passing title was one of intention for the jury, and their verdict should be sustained.

CHAMPLIN, J. The parties to this suit entered into a contract dated September 30, 1885, as follows: "MUSKEGON, MICH., September 30, 1885.

"Know all men by these presents, that I, Thomas Starret, of Holton, Muskegon county, Michigan, have this day sold S. E. Brown of Muskegon, Michigan, all the brick now situated and being in a certain kiln in the township of Sheridan, Newaygo county, Michigan, to the amount of about five hundred and thirty thousand brick, to be delivered on the cars in Muskegon, Michigan, as said Brown may direct, between now and the first of May, 1886, for the consideration of three and 75-100 ($3.75) dollars per thousand, one thousand dollars to be paid on the delivery of this agreement, and the balance, one and 75-100 per M. after deducting freight, to be paid as brick are delivered. It is agreed that Starret shall not deliver said brick faster than said Brown may direct, and said Brown not to want the brick faster than it is possible for Starret to get cars, or reasonably load them. THOMAS STARRET.

"S. E. BROWN.

"Witness: WILLIAM W. FELLOWS."

Under this contract Starret delivered, and Brown paid for, 500,000 brick, and Starret claims that this was all he was to deliver under the contract. He afterwards sold to another party 24,000 brick from the same kiln, and for this act the plaintiff brought an action of trover. The jury, under the instructions of the court, returned a verdict for plaintiff. The circuit judge charged the jury that the terms of the contract covered all of the brick in the kiln, and he left it for the jury to find as a fact whether it was the intention of the parties that the title should pass from Starret to Brown on the execution of the contract.

Where parties to a contract have put their agreement in writing, the terms of such agreement and the intent of the parties must be gathered from the written contract, if free from ambiguity. In construing this contract the first question is what quantity of brick does it cover. Does it cover the whole out-put of the kiln or only a certain quantity? It starts out by saying that Starret has this day sold to Brown all the brick now in the kiln, but this language is immediately modified by saying "to the amount of 530,000 brick;" this quantity is again modified by what then follows. The consideration is plainly expressed to be $3.75 per 1,000. The contract then goes on to provide for the payment at that rate for 500,000 brick. It says $1,000 shall be paid down on the delivery of the agreement, "and the balance, one dollar and seventy-five cents per thousand, after deducting freight, to be paid as brick are delivered." This indicates that $2 per 1,000 was paid at that time on some quantity, and as just $1,000 was paid down, that quantity must have been 500,000 brick. There can be no doubt but that the minds of the parties met upon the consideration, or price per 1,000 which Brown was to pay, and Starret receive, which was $3.75. Now if we give this contract the construction which the plaintiff contends for, Starret would be obliged to sell and deliver all the brick contained in the kiln, over 500,000, at Muskegon, and pay the freight for, $1.75 per 1,000. This is preposterous. But the plaintiff, on cross-examination, put in evidence another writing between the parties as follows: "MUSKEGON, MICH., November 27, 1885.

"For the consideration of two hundred and fifty dollars, one hundred and fifty received to-day, and the balance of one hundred to be paid January 1, 1886, by S. E. Brown, I do hereby guaranty to load 420,000 brick or the balance 500,000 brick not shipped, the same as sold said S. E. Brown on contract, to be loaded on cars at the county line near Dash post-office, Michigan.

"THOMAS STARRET.

"January 11, 1886. received on within one hundred dollars.

"THOMAS STARRET."

This paper speaks of the 420,000 brick as the *balance of the* 500,000 *brick not shipped*, the same that was sold said S. E. Brown; thus again showing the intent of the parties, by their own construction of the contract of sale, was that the quantity bought by Brown was only 500,000 brick. The court should have instructed the jury that the contract of sale only conveyed 500,000 brick, and that the plaintiff could not recover.

The judgment must be reversed, and a new trial granted.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

WRIGHT *v.* DICKINSON and another.

(*Supreme Court of Michigan.* November 10, 1887.)

1. ASSUMPSIT—COMMON COUNTS—BILL OF PARTICULARS—EVIDENCE OF VOID CONTRACT. Plaintiff declared in *assumpsit* on common counts, and subsequently filed a bill of particulars. At the trial evidence was objected to as irrelevant which tended to show a contract void, but which was not alleged so to be in the bill of particulars.

Held, that such evidence should have been admitted. A bill of particulars is for the purpose of avoiding surprise at the trial, and defendants did not claim that this evidence would be a surprise to them.

2. SAME—CONTRACT TO CONVEY—FAILURE TO MAKE TITLE—RECOVERY OF MONEY PAID—TENDER OF PERFORMANCE.
Plaintiff had agreed to purchase, and defendants to convey, land in fee-simple. Defendants could not make out a title, and plaintiff brought action to recover money paid under the contract. *Held*, it was not necessary for plaintiff to have tendered performance to entitle him to recover.

3. SAME—RESCISSION—STATU QUO.
Plaintiff had contracted to purchase land of defendants, who agreed to convey in fee-simple. Plaintiff entered into possession and hewed timber, and leased a portion of the land, when both defendants and plaintiff were enjoined from cutting timber from the lands. Defendants could not make out a title, whereupon plaintiff brought action to recover money paid under the contract. Defendants contended that the contract could not be rescinded, and the money paid under it recovered, as they could not be placed *in statu quo*. *Held* that, when the value of property can be ascertained, a party entitled to rescind a contract may do so although he cannot place the other *in statu quo*.

4. SAME—EQUITIES DETERMINED IN LAW COURT.
In an action of *assumpsit* for money had and received, where the question of the rescission of a contract and placing defendants *in statu quo* was involved, *held*, that the law court could measure the equities of the case, and ascertain all facts necessary to determine what amount should be paid to defendants.

5. SAME—VOID CONTRACT NEED NOT BE RESCINDED.
A void contract need not be rescinded before bringing action to recover money paid under it.

Appeal from circuit court, Allegan county.

This was an action in *assumpsit* to recover money paid under a contract for the purchase of land which defendants had agreed to convey to the plaintiff in fee-simple. Plaintiff had entered into possession and cut timber, and leased a part of the land, and had been subsequently restrained from using the lands by injunction, defendant not having title to convey. The plaintiff's bill of particulars is set out in the opinion.

H. Bacon, for plaintiff and appellant.

As defendants had no title, it was not necessary for the plaintiff to tender the purchase money and demand a deed. Plaintiff had a right to regard the contract as rescinded when he found out that defendants had no title. *Benson* v. *Cowell*, 52 Iowa, 137, 2 N. W. Rep. 1035; *Pratt* v. *Philbrook*, 41 Me. 132; *Miller* v. *Phillips*, 31 Pa. St. 218; *Atkinson* v. *Scott*, 36 Mich. 18.

Howard & Roos, for defendants and appellees.

Plaintiff should not show any cause other than that contained in his bill of particulars. 1 Green, Pr. 512; *Waterman* v. *Waterman*, 34 Mich. 490. Plaintiff cannot rescind without placing defendants *in statu quo*. *Cilley* v. *Burkholder*, 41 Mich. 749, 3 N. W. Rep. 221. Plaintiff cannot maintain this action; his only remedy is an action for damages or a bill in equity. *Axtel* v. *Chase*, 77 Ind. 74; *Gwynne* v. *Ramsey*, 92 Ind. 414; *Hendricks* v. *Goodrich*, 15 Wis. 679; *Long* v. *Saunders*, 88 Ill. 147; *McCrillis* v. *Carlton*, 37 Vt. 139.

CHAMPLIN, J. Plaintiff declared against the defendants upon the common counts of *assumpsit*, and filed therewith a bill of particulars as follows:

"SIRS: Please to take notice that the following is a bill of particulars of the plaintiff's demand in this cause, and for the recovery of which this action is brought, to-wit: The plaintiff's bill of particulars is for moneys paid on a certain land contract made by Chase H. Dickinson and William F. Dickinson and the plaintiff above named, of which Exhibit B hereto annexed is a true copy; and plaintiff's claim is that the land described in said contract was not, at the date of said contract, owned by said William F. Dickinson and

Chase H. Dickinson, defendants above named, nor have they since owned said real estate in fee, and have never been the owners of said real estate, so that they could convey to said plaintiff a good and unincumbered title in fee-simple; and said plaintiff claims that the moneys were so paid by him on such land contract without any consideration. The amounts and dates of such payments are as follows:

1872.		
July 20.	To cash paid by plaintiff to defendants,	$100
Sept. 20.	To cash paid by plaintiff to defendants,	400
		$500

"The plaintiff's bill of particulars is further for moneys paid on certain other land contract made by said Chase H. Dickinson and William F. Dickinson and the said John A. Wright, of which Exhibit A hereto annexed is a true copy. And plaintiff claims that the said William F. Dickinson and Chase H. Dickinson never were the owners of the land described in this contract, so that they could give to the said plaintiff a title in fee-simple. The amounts and dates of such payments are as follows:

1872.		
July 20.	To cash paid said defendants,	$ 100
Sept. 18.	To cash paid said defendants,	1,400
Nov. 8.	To cash paid said defendants,	100
		$1,600

"*Dated December* 18, 1880."

Exhibits A and B referred to in the bill of particulars are two land contracts, being the same contracts passed upon by this court in the case of *Dickinson* v. *Wright*, 56 Mich. 42, 22 N. W. Rep. 312.

The defendants pleaded the general issue. On the trial of the cause before a jury the land contract, Exhibit A, was introduced in evidence. It was signed by Chase H. Dickinson, and said Chase H. Dickinson signed the name of William F. Dickinson. Attention of plaintiff, who was a witnes in his own behalf, was called to the words: "This contract approved. WILLIAM F. DICKINSON,"—indorsed on the contract, and he stated that he did not know anything about the indorsement; that it was not there when it was made. The witness' attention was called to a like indorsement on Exhibit B, and he was asked: "Do you know at any time of any indorsement of these words, 'Contract approved,' and signed 'William F. Dickinson,' on the back thereof?" To which he answered: "No, sir." The question was then again repeated as to the indorsement upon Exhibit A, to which the defendant objected, on the ground that it was irrelevant and immaterial under the issue in this case, and under the bill of particulars as furnished in this case; that the plaintiff had declared and furnished a bill of particulars, declaring upon the contract as a valid one, and he was bound by his bill of particulars. Counsel for plaintiff disclaimed having declared upon the contract, or seeking to recover for a breach of it. He stated that he sought to recover back money paid to defendants under the count for money had and received, because the contract was void under the statute of frauds, and because there was no consideration, as the defendants had no title which they could convey. But the court held that the plaintiff was confined to the declaration as he had made it, and that there was no notice given that plaintiff sought to recover because his contract was not a binding contract; but, on the contrary, the only inference from the bill of particulars was that it was a valid contract, and that the trouble was that he had no title to convey; that under the declaration and bill of particulars he did not think it was competent that this contract was void for want of due execution, and sustained the objection. We think the court erred. The declaration was for money had and received.

The bill of particulars pointed out that the plaintiff sought to recover back money paid without consideration. Whether the want of consideration arose from the fact that the defendants had no title to convey, or whether the contract was void for want of due execution, was not material to be stated, only so far as such statement was proper to apprise the defendants of the claim of plaintiff, and afford them an opportunity to be prepared to try the case upon the merits. Defendants did not claim that this evidence would be a surprise to them or that they were not prepared to meet such evidence upon the trial. A bill of particulars, in practice, is considered in some respects as an amplification of the declaration, but it is considered sufficient if it fairly apprise the opposite party of the nature of the claim, so that there can be no surprise. *Brown* v. *Williams*, 4 Wend. 360. In *Davies* v. *Edwards*, 3 Maule & S. 380, the action was for debt upon a demise of land, and the plaintiff furnished a bill of particulars describing the premises as being in a certain parish, and on the trial introduced an indenture of demise between the parties of lands in another parish. It was insisted that by reason of this misdescription in the bill of particulars the plaintiff could not recover. The trial judge overruled the objection, being of the opinion that the bill of particulars disclosed substantially the subject-matter of the action, which was rent; and it not appearing that the defendant was misled by it, a verdict was entered for the plaintiff. On a rule *nisi* obtained, Lord ELLENBOROUGH, C. J., said: "If the defendant could have shown, not only that he might have been, but that he was actually surprised, there would have been some foundation for the agreement," and he discharged the rule. So, in this case, the subject-matter is the money which the defendants have had of the plaintiff, the consideration for which has failed. Here it seems to me that the plaintiff has been shut out by a strict construction, and concluded by a particular, fairly meant, against the justice of his case. See, also, *Duncan* v. *Hill*, 2 Brod. & B. 682; *McNair* v. *Gilbert*, 3 Wend. 344.

In *Davis* v. *Treeman*, 10 Mich. 188, this court said: "The office of the bill of particulars is to inform the opposite party of the cause or causes of action the party giving it intends to rely on on the trial, not specifically set out in the declaration, or notice accompanying the general issue." And in *Freehling* v. *Ketchum*, 39 Mich. 299, it was said: "The purpose of the rules allowing bills of particulars to be demanded is to enable defendants to avoid surprise, and not enable them to make vexatious requirements." In *Cicotte* v. *Wayne Co.*, 44 Mich. 173, 6 N. W. Rep. 236, Mr. Justice GRAVES said: "The object of the practice for the production of bills of particulars is to obviate the uncertainty of general pleading. The intent is to secure such information as will enable the parties to make an intelligent preparation for trial, and to enter upon the investigation before the court or jury with an understanding as to what is really in controversy. The bill is often mentioned as being an amplification of the declaration, or as entitled to be considered as a part of the pleading. But such expressions are metaphorical. The bill is never in strictness a component of the pleading. It may have the effect of a pleading in so far as it restricts the proofs to what it contains." This case is cited by plaintiff's counsel to support the ruling of the court below. The statement of the learned judge is accurate, but the question to be determined is, what proofs are admissible under the contents of the bill, and is the variance, if any, harmful to the opposite party in that it operates as a surprise to him? *Collins* v. *Beecher*, 45 Mich. 436, 8 N. W. Rep. 97.

The plaintiff then testified to the money paid to the defendants upon the contracts, and that the lands were mostly timbered lands, and he made the arrangements to purchase them for the timber. On cross-examination he testified that he went to lumbering on the lands in the winter of 1872 and 1873, and also that he leased the right of way for a horse railroad—a lumber railroad—to go across section 4, to Samuel Rogers'. This lease was offered in

evidence by defendants, and was dated July 12, 1872, for the term of 15 years. Plaintiff further testified that the railroad had been abandoned for years. He also testified that he had cut probably about 150,000 feet of white pine on sections 17 and 18, and took off four or five oak trees from section 4; that he never paid or offered to pay the defendants for the timber so taken off, and never paid or offered to pay the balance payable by the contracts.

It appeared on the trial that in the spring of 1873 the defendants were enjoined by the United States court from cutting timber on the land covered by the contracts, and that injunction was also served upon the plaintiff, in consequence of which he quit lumbering upon the lands; that plaintiff informed Dickinson that he was enjoined, and he advised that he stop cutting, which he did; and that since that time in 1873 the plaintiff has not been in the possession of or occupied it, or in any manner been possessed of the land. The plaintiff's counsel then offered in evidence the original patent of the United States to Mary Hannahs, covering the land named in the contracts, for the purpose of showing that the title was not in the Dickinsons, as plaintiff had claimed. To which defendants' counsel objected, and stated his reasons as follows: "For the same reason that, under the admissions of the plaintiff himself upon the stand, he cannot recover in this action; for the reason that he admits that he cut off of sections 17 and 18 a matter of 150,000 feet of pine, and on section 4 has cut some timber,—some ten dollars' worth,—and has executed a lease for fifteen years of a certain other part of it, which had not expired at the time of the commencement of this suit; and for that reason it was impossible, at the time this suit was commenced, for him to rescind and place us *in statu quo;* and that under the testimony of the plaintiff himself he cannot maintain this action. We object to it on the further ground that the plaintiff admits himself, upon the stand, that he never tendered any money to Mr. Dickinson on this contract, other than the payments already made, and that he never demanded a deed, and that these defendants were under no obligation to make him a deed, or perfect their title, until such time as he was willing and made a tender of the purchase price. To make our objections cover all points, we repeat here that we object to the introduction of this question of title, or any other evidence in the case, because from the admission of Mr. Wright, the plaintiff, upon the stand, he was in no position to rescind, and could not in law rescind, this contract. *Second*, that from like admissions of plaintiff on the stand it appears that he has not in fact rescinded, (that is, independent of the question whether he could or not.) Now, provided he could rescind, the evidence shows that he has not rescinded, and never gave any notice of rescission, or has never taken any steps in fact to rescind before the commencement of this suit." The court sustained the objection and excluded the testimony.

The plaintiff's counsel then made the following offer, namely: *Plaintiff's Counsel.* "I desire to make this offer in this case: That we admit this plaintiff shall pay, and the defendants shall have deducted and allowed them, the full amount of all timber or anything else that was taken from this land by the plaintiff, or by his agents, up to the commencement of this suit. And I now offer to show in the case, as we have started to show: *First.* That the defendants, at the time plaintiff demanded his money back, and before this suit, had no title to the land at the time the suit was commenced. *Second.* We further offer to show that, at the time the plaintiff took the contract and paid the money on it, he supposed the defendants had a title to the land, and didn't know to the contrary until a short time before this suit was commenced; that at the time this suit was commenced he had fully investigated the title; that he then knew the owners of the land, and informed Mr. Dickinson who they were. *Third.* We further offer to show that the land was bought for the timber only; that the plaintiff was restrained and enjoined from cutting or removing timber or trees from any of these lands, by an injunction issued

out of the circuit court of the United States for the Western district of Michigan, in a suit wherein the creditors of one Timothy Morse (who in his lifetime owned these lands, and the lands then belonged to his estate) were complainants, and the defendants were the Dickinsons and one Seaver; and that that suit was commenced, and an injunction issued, because of the fraudulent practices of the Dickinsons, the defendants in this suit. That Mr. William F. Dickinson, in collusion with the administrator of the estate of Timothy Morse, caused these lands to be sold, whereby he could get a title without paying any value for them, and it was through that title that they were pretending to claim when they were going to sell to plaintiff. That plaintiff investigated that matter at the time he investigated the title. *Fourth.* We offer further to show that this injunction remained in full force up to the year 1878. *Fifth.* That during the pendency of this injunction the fires had destroyed the timber on these lands, and without the fault or neglect of plaintiff. *Sixth.* That since this suit was brought these defendants have sold and conveyed these lands to other parties." *The Court.* "The objection to the offer of the patent, or other evidence of title in this case, will be sustained." Plaintiff's counsel here offered in evidence the record and files in a case wherein the Dickinsons (these defendants) were plaintiffs, and Mr. Wright (this plaintiff) was defendant, being the case reported in 56 Mich. 42, 22 N. W. Rep. 312; which was objected to by defendant's counsel as irrelevant and immaterial, which objection was sustained by the court, and to which ruling the counsel for plaintiff did then and there except.

We think the court erred. The plaintiff's cause of action was not entirely based upon the contracts. In *Dickinson* v. *Wright*, 56 Mich. 42, 22 N. W. Rep. 312, these same contracts were in issue. The Dickinsons in that case brought suit to recover the balance of the money payable by the terms of these contracts, and failed, for the reason that the contracts were void under the statute of frauds, for the want of authority in Chase H. Dickinson to sign William F. Dickinson's name thereto. The invalidity of the contracts in question was settled by that adjudication; and it does not matter that this suit was first commenced. The fact that rendered the contracts invalid did not appear until upon the trial of that case. The issue, however, in this suit was broad enough to admit evidence of the invalidity of the contracts in question. Purchase money paid for the purchase price of land can be recovered in an action for money had and received, whether the consideration fails for want of title or for want of a valid contract to convey.

In either case the purchaser must place the other party *in statu quo*, so far as is practicable for him to do so. And in either case the equities, so far as they can be measured by a pecuniary standard, can all be settled and adjusted in the suit. In this case there is no occasion to call for the interposition of a court of equity. There are no deeds to be surrrendered up and canceled—nothing which is required to be perpetuated by a decree. All there is to be ascertained can be ascertained by a jury; and that is, how much in equity and good conscience ought the defendants to repay of the purchase money they have received. All benefits which the plaintiff has received will have to be deducted, and these can be ascertained and allowed for in a common-law proceeding. The value of the timber cut and removed, and all other benefits which the plaintiff has derived from these contracts, can be adjusted in this action.

A void contract needs no rescission. But if these contracts were valid, and the plaintiff, either on account of title in defendants, or because they have placed it out of their power to perform, rescinded the contract, he could do so under the circumstances of this case without either tendering performance or placing the party *in statu quo*. Through procrastination and delay, for which he was not in fault, the subject-matter of the contract which formed his inducement to purchase has been destroyed. Under such circum-

stances, must he tender the purchase money? It would be unreasonable to require it. Must he place the defendants *in statu quo*? That is impossible. Plaintiff entered into the contract in good faith, paid his money according to the agreement, and went on and severed 150,000 feet of pine, the timber which he bought for the purpose of manufacturing into lumber. He cannot restore the severed trees. It is impossible for him to restore the property in the same condition it was in when he received it. The law does not require impossibilities to be performed. The only thing he can do is to restore its money equivalent, and that he offers to do. In cases where, acting in good faith, property has been so changed or lost that it cannot be restored in specie, and when its value is capable of being ascertained, a party entitled to may rescind a contract, although he cannot place the other party *in statu quo*. That is the law of reason, and it is the law of justice. If the current of authority is the other way, based upon technicalities, I cannot yield my assent to the doctrine. As no rule of property is involved, and as the rights of the parties can be settled and determined in this equitable action, I must hold thatthe learned judge erred in excluding the testimony offered.

The judgment must be reversed, and a new trial granted.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

DOXEY *v.* TOWNSHIP BOARD OF SCHOOL INSPECTORS, MARTIN TP.

(*Supreme Court of Michigan.* November 10, 1887.)

1. SCHOOLS AND SCHOOL-DISTRICTS—ATTACHING PORTIONS OF TWO DISTRICTS TO ANOTHER—PROCEEDINGS BY BOARD OF INSPECTORS.
   The proceedings of a board of school inspectors in detaching lands from two separate districts, and attaching them to another district, are valid where the board votes separately upon the question of detaching the territory of each district, and where those present have ample opportunity of being heard on each proposition, even though the lands are detached at the same meeting and under the same notice.
2. SAME—CONSOLIDATION OF DISTRICTS—CONSENT OF TAX-PAYERS—CERTIORARI TO REVIEW ACTION OF BOARD.
   How. St. Mich. §§ 5033, 5041, provide that the township board of school inspectors may regulate the boundaries of school districts as circumstances require, and that the inspectors in their discretion may detach property from one district and attach it to another, but that no district shall be divided into two or more districts without the consent of the resident tax-payers of said district, and no two or more districts be consolidated without the consent of a majority of the resident tax-payers of each district. *Held*, that under these provisions a writ of *certiorari* would not lie to review the action of a board of inspectors in detaching property from one district and adding it to another, where it did not appear that the board undertook to divide or consolidate the districts, unless such action would practically destroy a district; and that the fact that by this action the board was enabled subsequently to evade the statute forbidding consolidation is immaterial.

Certiorari to township board of school inspectors of the township of Martin, Allegan county.

Ed. J. Anderson, (*W. B. Williams*, of counsel,) for plaintiff in *certiorari*. *Padgham & Padgham*, for defendants.

MORSE, J. The writ of *certiorari* in this cause was sued out to review the proceedings of the board of school inspectors in detaching certain territory and property from school-district No. 5, in the township of Martin, Allegan county, and attaching it to school-district No. 1, in the same town. On the fourth day of May, 1887, the clerk of the board of school inspectors gave notice that the board would meet at a certain place designated in the notice, on the twenty-first day of May, 1887, at 4 o'clock P. M., for the purpose of altering the boundaries of school-districts Nos. 1, 4, and 5, in which notice the proposed alterations were specifically set forth. The board met pursuant to

said notice at the time and place mentioned, and proceeded to and did make the alterations as proposed in said notice. Doxey's land was among the lands taken from No. 5 and attached to No. 1, and he claims in his affidavit for the writ to have been greatly damaged by such action.

The objections urged against these proceedings of the school inspectors are two, namely: *First*, that the consent of a majority of the resident tax-payers of district No. 5 was not obtained to the detaching of this territory, and that, in effect, it was dividing the district into two districts, contrary to the statute; *second*, that said board under the same notice, and at the same meeting, detached lands from districts Nos. 4 and 5, being two separate districts, and attached them to district No. 1.

In relation to this last objection, it appears that the board voted separately upon the question of detaching the territory from each district, and those present had ample opportunity of being heard upon each proposition. There was no such connection between the two hearings, or the action upon the proposed detachments of territory, as to lead to any confusion or prejudice to the rights of those interested. We can see no valid objection to these matters being contained in one notice, or being acted upon separately at one meeting of the school inspectors.

As to the first objection, its consideration must depend entirely upon the statutory powers of the board. By section 5033, How. St., the township board of school inspectors are authorized to divide the township into such number of school districts as they may consider necessary from time to time, and they may regulate and alter the boundaries of the same as circumstances shall render proper. This power is subject to certain restrictions found in the same chapter. Chapter 196, subc. 2, How. St. The limitations of their power necessary to be noticed in the consideration of this case are found in section 5041 of the same statute. This section authorizes the inspectors *in their discretion* to detach the property of any person or persons from one district, and attach it to another. It further provides that "no district shall be divided into two or more districts without the consent of the resident tax-payers of said district, and no two or more districts be consolidated without the consent of a majority of the resident tax-payers of each district." It is conceded that such consent was not obtained in this case. It is contended by the plaintiff in the writ that the action of the board on the twenty-first of May, 1887, supplemented by further action at subsequent meetings, has in fact destroyed district No. 5 for all practical purposes of a school-district. That there are now left within the boundaries of said district only three farms, and three families. The number of school children therein is not stated. No relief, however, is asked against this subsequent action of the board, and it is only brought into the case to show that, indirectly, the board has accomplished, without the consent of the tax-payers, what the statute forbids the school inspectors to do directly, and at one time.

The board in their answer to the writ in this case return that they have no *data* from which to ascertain or state the assessed value of the property detached on the twenty-first day of May from district No. 5, and attached to No. 1, but they think that the value of the property left in No. 5 exceeded that taken away and attached to No. 1. It also appears from said return that the subsequent proceedings by which additional territory was detached from No. 5 was with the consent, and at the urgent solicitation of, a majority of the tax-payers then residing in the district, excluding the tax-payers set out of said district, by the action taken on the twenty-first day of May, but the records of the subsequent meeting, which was on the first day of June, 1887, does not show such consent. But we cannot concern ourselves with what was done at this meeting of June 1st, or any subsequent meeting. We are called upon by this writ only to determine the validity of the proceedings of May 21st.

As to these proceedings, if the board had jurisdiction in the premises, we cannot interfere with their discretion, or review their action. *Brody* v. *Penn Tp.* 32 Mich. 272. The school inspectors in this case did not undertake to divide the districts into two or more new districts, or to consolidate No. 5 with No. 1. If they had the power to detach any territory from No. 5 and attach it to No. 1, they had the right to take what they saw fit, unless such action would practically destroy the district. It is not shown that their action on the twenty-first of May produced any such result. If their proceedings on that day did not destroy the district, but left territory enough for school purposes, it was certainly competent for the board afterward, with the consent of the remaining resident tax-payers, to consolidate the whole territory left within the district with No. 1 or any other district, if such other district also consented through its resident tax-payers.

It is not necessary for us to determine here whether they could take such action as to leave only three tax-payers in the district, as the plaintiff in this writ does not complain of such action, and it is doubtful if he could be heard to complain; having before said first day of June been lawfully detached from said district No. 5. It follows that the writ in this cause was improvidently issued, and must be quashed, with costs.

SHERWOOD and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

BUCHTEL *v.* MASON and another.

(*Supreme Court of Michigan.* November 10, 1887.)

INTEREST—UPON ARREARS OF INTEREST.

The holder of past-due negotiable paper is not entitled to interest upon arrears of interest from the maturity of the obligation.

Error to circuit court, Muskegon county.

Delano & Bunker, for defendants and appellants. *Smith, Nims, Hoyt & Erwin*, for appellee.

SHERWOOD, J. The plaintiff brought his suit in *assumpsit*, against the defendants in the Muskegon circuit, to recover the amount due upon a promissory note of which the following is a copy:

"1,500. MUSKEGON, MICH., July 1, 1880.

"Twenty-six months after date we promise to pay, to the order of William Buchtel, fifteen hundred dollars, at the Bank of Akron, Ohio, value received, with interest. L. G. MASON.

"C. S. DAVIS."

The declaration was upon the common counts. Plea, general issue.

On the twenty-first day of March last, the cause was tried and judgment rendered for the plaintiff, for the sum of $2,278.50, the court holding as matter of law, that interest should be computed on the $1,500, until it became due, and upon the principal with the interest added from that date until the time of rendering judgment. To this ruling counsel for the defendant excepted, and claimed, as no installment of either principal or interest was payable until the note matured, when both became due, the interest should have been computed on the note, at the rate of 7 per cent. per annum, from its date, and which, added to the principal, should have been the amount for which judgment should have been rendered. We think the amount should have been computed upon the note, as claimed by the defendants' counsel, and the circuit judge erred in holding otherwise. *Hoyle* v. *Page*, 41 Mich. 533, 2 N. W. Rep. 665; *Rix* v. *Strauts*, 26 N. W. Rep. 638; *Voigt* v. *Beller*, 56 Mich. 140, 22 N. W. Rep. 270; *In re Bartenbach*, 11 N. B. R. 61; *Brewster* v. *Wakefield*, 22 How. 118; *Hart* v. *Dorman*, 50 Amer. Dec. 285.

The judgment must be reversed, and judgment will be entered in this court in favor of the plaintiff, for the amount found to be due upon the note on a computation of the interest, in accordance with the rule herein suggested, and the defendants must be allowed their costs in this court, and the plaintiff his in the court below, to be taxed by the clerk of this court.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

COOPER v. CITY OF BIG RAPIDS.

(*Supreme Court of Michigan.* November 10, 1887.)

APPEAL—APPELLANT CANNOT CHANGE CAUSE OF ACTION ON.

Where plaintiff relies in the trial court upon an injury caused by a defective sidewalk, he cannot, on appeal, change his cause of action and claim damages for the injury as caused by a defective street.

Error to circuit court, Mecosta county.

Jennings & Mann, for plaintiff and appellant. *Austin Herrick*, for appellee.

MORSE, J. On the twenty-first day of January, 1886, the plaintiff, in walking upon the sidewalk along State street, in the city of Big Rapids, stepped off therefrom into the street, suffering injury thereby. In her declaration against the city for damages she alleged substantially that the common council of the city, on the fifth day of November, 1885, adopted a resolution directing the street commissioner to procure suitable scrapers for cleaning snow from sidewalks throughout the city, and to employ such assistance as he might deem necessary to keep such sidewalks clear from snow; that acting under such resolution, on the morning of the day the plaintiff was injured, a snow-plow or scraper was used in cleaning the snow off from this particular sidewalk, and that in so using it, it was not kept on the sidewalk, but was negligently and carelessly allowed by the employes of the city to run on one side of the elevated sidewalk, and therefore made a pathway through the snow which projected and extended beyond and off from the sidewalk and over the street. It appeared to be on the sidewalk, and where the plaintiff stepped off there was nothing to indicate, and she had no reason to suppose, that she was not walking directly on and over the sidewalk. Where she stepped off it was from one and a half to two feet to the ground. The declaration also alleges that the employes of the city were acting in the course of their duty as employes and agents of the city in clearing the walk, and that the city had knowledge and notice of the unsafe and unfit condition of the said "pathway, sidewalk, and street," and had reasonable time and opportunity before the accident to place said pathway in a safe condition, but it carelessly and negligently failed to do so, contrary to its duty in the premises. The duty of the city to "keep in reasonable repair, and in a condition reasonably safe and fit for travel, all public streets and sidewalks in said city," and the street and sidewalk in question, was also averred as being declared under the statutes of this state. And the injury to the plaintiff was alleged to have been occasioned, without fault on her part, by the neglect of the defendant to perform this duty. The defendant pleaded the general issue.

Upon the trial the counsel for the defendant objected to any evidence being received on behalf of the plaintiff, for the reason that the declaration did not set up any cause of action against the defendant. It being conceded on both sides as appears from the record, that the action was brought under act No. 214 of the Session Laws of 1885, which by its title was an act amending the law of 1879 "so as to make said act cover damages sustained by reason of defective sidewalks," the circuit judge held that the declaration did not bring the case therein made within this statute, and directed the jury to render a verdict for the defendant. We have since such trial held this act to be

unconstitutional and void. *Church* v. *Detroit*, 31 N. W. Rep. 447; *Losch* v. *Village of St. Charles*, 32 N. W. Rep. 816.

Upon bringing the case into this court by writ of error, the counsel for plaintiff undertakes to claim that his declaration counts upon an injury occasioned by a defective street. Without denying his claim or investigating it, we must affirm the judgment. We cannot allow the plaintiff to shift her position and claim damages here for a cause of action not urged in the court below. There she planted herself upon an injury occasioned by a defective sidewalk. She cannot now abandon that ground and gain a new footing in this court by which she may have standing in the court below, to recover upon a new trial in this same action, for an injury caused by a street being defective or out of repair.

The judgment of the lower court will not be disturbed, and the defendant will recover its costs in this court.

SHERWOOD and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

MOFFITT *v.* SHIELDS.

(*Supreme Court of Michigan.* November 10, 1887.)

REPLEVIN—GOODS OBTAINED BY FRAUD—TENDER OF AMOUNT BORROWED.

Defendant agreed to lend plaintiff $50 to pay off a mortgage on certain chattels, the money to be repaid in six months. Plaintiff was induced by defendant's fraud to give him a bill of sale of the chattels. Defendant afterwards, without plaintiff's knowledge quitclaimed to her a piece of land, claiming that it was in payment for the chattels. Plaintiff first learned of the deed of the land at the trial, and at once tendered to defendant a deed back. *Held*, that it was not necessary for plaintiff, in order to entitle herself to recover the chattels in an action of replevin, brought before the expiration of the six months, to tender the defendant the $50 lent; and plaintiff's tender of a deed back as soon as she learned of the conveyance to her, was sufficient to entitle her to sue.

Error to circuit court, Mecosta county; C. C. FULLER, Judge.

Jennings & Mann, for defendant, appellant. *Andrew Hanson*, for appellee.

CHAMPLIN, J. Plaintiff brought replevin for certain articles of personal property. The defense relied upon was a purchase of the property by defendant of plaintiff. He introduced in evidence a bill of sale signed by the plaintiff purporting to sell and transfer the property to him. He testified that he paid plaintiff by executing and delivering to her a quitclaim deed of 40 acres of land, and assumed and paid a mortgage on a portion of the property amounting to $50. The plaintiff gave evidence tending to show that the bill of sale was obtained by defendant through deception and fraud; that defendant agreed to loan her $50 to pay off the chattel mortgage, and give her six months' time to pay money loaned from him; that he presented a paper for her to sign, which he told her was an agreement to pay him the money borrowed in six months; that she could not read printed words very well, and could read writing scarcely at all; that she inquired of defendant if the paper presented to her to sign was a bill of sale or a chattel mortgage; that if it was either she would not sign it; and he answered her it was not, but was simply the agreement they had made regarding the loan of the money and time of payment; that, relying upon these representations, she signed the paper, which turned out to be a bill of sale; that she was not aware and never knew that defendant had deeded to her 40 acres of land until on the trial of the cause in the court below, when she executed a deed of the land back to him, and tendered it on the trial to defendant. These statements of plaintiff relative to her being deceived were all controverted by the defendant. It is sufficient to

say that an issue of fact was presented to the jury, and they have found the issue in favor of plaintiff. Two points are raised upon the argument here.

Defendant claims first that there was no evidence that he was in the actual or constructive possession of the property at the time the writ issued. There was evidence tending to show that he was in possession, and none that he was not. The question was submitted to the jury and they found against defendant.

The second claim advanced here is that plaintiff could not maintain the action without first tendering back what she received, namely: the land and the $50. To this it is answered that plaintiff tendered back a deed of the land as soon as she ascertained that a deed had been made to her; and, second, that she made a valid agreement with defendant for the loan of $50 for six months, which was not due at the time the suit was commenced. This was her theory before the jury, upon which she prevailed. Under this theory, she was not obliged to reconvey the land under the facts testified to by her, nor to repay the money before bringing the suit.

The judgment should be affirmed.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

NORTON, Guardian, etc., *v.* OHRNS and others.

(*Supreme Court of Michigan.* November 10, 1887.)

1. GUARDIAN AND WARD—MORTGAGE TO GUARDIAN FOR BENEFIT OF WARD—FORECLOSURE BY SUCCESSOR.

The Michigan statutes authorize a guardian to demand, sue for, and receive all debts due to his ward. Where a mortgage was executed to a man as guardian, for the benefit of his ward, and the guardian died, but a successor to him was appointed by the probate court, *held*, that such successor could maintain a bill in equity against the mortgagor to foreclose.

2. PAYMENT—DEMAND, WHEN NECESSARY—FORECLOSURE OF MORTGAGE.

A mortgage stipulated that the amount due the mortgagee, a guardian, should be paid at a certain dwelling-house on the mortgaged premises, on the order of the guardian. On a bill by the guardian to foreclose, defendant demurred, on the ground that there was no averment that payment had been demanded at the place designated. *Held*, the omission to make the demand might prevent a recovery for costs, but could not affect the right to foreclose.

Appeal from circuit court, Macomb county, in chancery; HERMAN W. STEVENS, Judge.

T. M. Crocker, for defendants, appellants. *A. L. Canfield*, (*Eldridge & Spies*, of counsel,) for appellee.

CHAMPLIN, J. This case comes before us upon demurrer for want of equity to a bill filed by the complainant as guardian of Ebenezer Hilliard to foreclose a mortgage given by the defendants to George L. Phelps, guardian of Ebenezer Hilliard. Phelps died, and complainant was appointed guardian by the probate court to succeed him. The reasons upon which the demurrer is based are stated in the brief of counsel for defendants, as follows: "(1) Because Phelps was a trustee, and after his death his only proper successor would be some one appointed for that purpose by the court of chancery to execute the trust. (2) Because Norton has not such an interest in the mortgage as to give him a standing in court as complainant. (3) Because there is no averment in the bill that an order of the guardian, either written or verbal, was made at the dwelling-house on said premises, as required in the mortgage described in the bill.

We think the bill of complaint sufficient. Complainant's appointment by the probate court was proper, and the statute expressly authorizes the guardian to demand, sue for, and receive all debts due to his ward. This authorizes him to collect moneys due upon bonds and mortgages. *Livingston* v.

Jones, Har. Ch. 165. He may bring suit to recover personal property or debts due his ward in his name as guardian. The third objection is not available on general demurrer. The bill alleges that a certain amount is due and unpaid. If the money was not demanded at the place where it was payable, and defendants had the money there to pay it, the only effect would be that the guardian may not be able to recover costs against defendants.

The demurrer is overruled, and the record will be remanded for further proceedings in accordance with the rules and practice of the court. The complainant will recover his costs.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

PARR *v.* JOHNSON and others.

(*Supreme Court of Minnesota.* November 23, 1887.)

1. CONTRACT—TO PAY IN GOODS—RECOVERY IN MONEY—DEMAND.
   Upon a contract for the payment of a certain sum in goods, the goods being deliverable upon demand, an action for a recovery in money cannot be maintained without an allegation and proof of a demand, or refusal to deliver the goods.
2. SAME—DEMAND NOT AVERRED—DEFENSE NOT LOST BY PLEADING FRAUD.
   In such an action, in which no demand is averred, the defendant, alleging in defense fraud in the making of the contract, and demanding a rescission, does not thereby lose the right to avail himself of the fact that upon the plaintiff's case there is no right of recovery.

(*Syllabus by the Court.*)

Appeal from municipal court of Minneapolis; BAILEY, Judge.

Kellogg & Thompson, for Parr, respondent. *Merrick & Merrick*, for Johnson and another, appellants.

DICKINSON, J. The complaint is in the ordinary form for the recovery of an alleged unpaid balance of the agreed price of a horse which the plaintiff had sold to the defendants. The answer alleges that the unpaid balance was, by the terms of the contract, to be paid in furniture, and this is admitted by the reply. The answer also sets forth false and fraudulent representations made by the plaintiff as to the qualities of the horse, upon which the defendants relied, and that they had tendered and demanded a rescission of the sale. They demand judgment for so much of the price of the horse as they have paid to the plaintiff.

Upon the issues of fact the evidence was conflicting, and the verdict of the jury is fairly justified by it. The only serious question presented by the appeal is whether, there having been no demand upon the defendants for the delivery of the furniture, a recovery can be had in money for the unpaid balance of the price of the horse. Such a recovery cannot be had, under the admitted terms of the contract, unless the defense is to be deemed to have been made upon grounds wholly inconsistent with the theory that a demand might have been complied with, so that it is quite apparent that a demand would have been refused. See *Kellogg* v. *Olson*, 34 Minn. 103, 24 N. W. Rep. 364.

We are unable to say that the course of the defendants in this cause does clearly show that they abandoned any right to avail themselves, in defense, of the fact that they had not been called upon to deliver the furniture, nor does it certainly appear that if a demand had been made they would not have complied with it. They were not required to affirmatively indicate by their answer that they should avail themselves of their legal rights in this respect. They need not allege that there had been no demand. Under the contract, as admitted by their reply, it was an essential element in the plaintiff's cause of action, which should have been averred in the complaint, that a demand had been made, and compliance with it refused. The nature of the defense pleaded in the answer and supported by evidence, the fraud, and the demand that the

contract be rescinded, may well induce in our minds the belief that a demand would not have been complied with; but we are hardly justified in presuming that such would have been the case, and in denying to the defendants, upon that ground, the benefit of the fact that, upon the case as alleged in the complaint and shown at the trial, the plaintiff was not entitled to a recovery. No affirmative act or averment on the part of the defendants was necessary to make this available to them. The affirmative defense set up by them, and to which their evidence was directed, was not inconsistent with the claim now made. Whether or not they should succeed in defeating the action by proof of the fraud, it was open to them to claim that, upon the case as presented in the pleadings and by the evidence, there was no right of recovery.

Because there was no averment or proof of a demand for the furniture, the verdict cannot stand, and the order refusing a new trial must be reversed.

LAKE v. ALBERT, Adm'r, etc.

(*Supreme Court of Minnesota.* November 23, 1887.)

1. APPEAL—BY CREDITOR FROM DISALLOWANCE OF CLAIM IN PROBATE COURT—APPLICATION FOR APPEAL.
   Under the statute authorizing any executor, administrator, or creditor of an estate to appeal from the allowance or disallowance in the probate court of claims against the estate, a *notice* of appeal served and filed is effectual as an "application" for an appeal.
2. SAME—TRIAL IN DISTRICT COURT WITHOUT PLEADINGS.
   The trial of such an appeal in the district court without pleadings is an irregularity merely, not jurisdictional.
3. ACTION—PARTIES—CONTRACT FOR BENEFIT OF THIRD PERSON.
   One with whom or in whose name a contract is made for the benefit of another may prosecute an action thereon in his own name.
4. SAME—PAYEE OF NOTE FOR BENEFIT OF THIRD PERSON—"CREDITOR."
   The payee of a note given for the benefit of another is a "creditor," within the meaning of the statute allowing appeals from the probate court.

(*Syllabus by the Court.*)

Appeal from district court, Otter Tail county; BAXTER, Judge.

C. L. Lewis, for Lake, respondent. *E. E. Corliss*, for Albert, appellant.

DICKINSON, J. 1. The right of appeal to the district court from the order of the probate court disallowing the plaintiff's claim was regulated by section 24, and the following sections of chapter 53, Gen. St. 1878. *Auerbach* v. *Gloyd*, 34 Minn. 500, 27 N. W. Rep. 193. This section specified, as a means of effecting an appeal, the filing in the probate court of an "application for such appeal." In view of the fact that the party seeking to appeal had a right to do so, which the court could not refuse, it is considered that a *notice* of appeal, served and filed, was all that was required by the language or purpose of the statute. The statute does not contemplate any other action by the probate court, upon the "application" of an executor, administrator, or creditor, than the allowance of the same as a matter of course, and the certifying of the record to the appellate court.

2. The trial and determination of the claim in the district court, without pleadings having been made up as prescribed by statute, was a mere irregularity not going to the jurisdiction of the court. This respondent was authorized by the statute to prosecute the claim in district court in his own name. The note in question was made to him, but in reality for the benefit of another, who was his principal. This was within the exception of the statute as to real parties in interest. "A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." Section 28, c. 66, Gen. St. 1878.

3. The payee of the note was a "creditor" of the estate within the meaning of that term as affecting the statutory right of appeal.

4. The evidence justified the findings of the court as to the nature of the transaction, and that the same was not usurious.

The order refusing a new trial will be affirmed.

SMITH and others *v.* GILL.

(*Supreme Court of Minnesota.* November 23, 1887.)

1. MECHANIC'S LIEN — AGAINST PROPERTY OF MARRIED WOMAN — KNOWLEDGE OF HUSBAND'S ACTS.

A provision of the mechanic's lien law, making the "knowledge and consent" of a married woman to the furnishing of material in certain cases evidence that the husband acted as agent of the wife, *held*, applicable as a rule of evidence, not merely for the purpose of establishing a lien, but for the purpose of a personal recovery against the wife. But proof of the "knowledge" only of the wife is not sufficient.

2. SAME — PERSONAL JUDGMENT — FAILURE OF LIEN.

In an action to recover *in personam* for material sold to the defendant, and to have the recovery adjudged to be a lien, under the statute the former relief may be had, the complaint and the evidence being sufficient, although it be found that no lien had ever been perfected.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; REA, Judge.

E. C. Chatfield, for Smith and others, respondents. *Hooker & Nunn*, for Emily L. Gill, appellant.

DICKINSON, J. This action is for recovery against the defendant, Emily L. Gill, of the value of certain building materials alleged to have been purchased by her and to have declared and enforced against her property an alleged statutory lien for the same. Upon trial before the court a personal judgment was recovered for the value of the property, but it was found that the alleged lien had not been perfected. It is now urged that the evidence was insufficient to charge this defendant with liability. It appears that the transaction constituting the sale was wholly with the husband of the defendant; that the material was sold and delivered to him to be used in the erection of a house upon the land of his wife, and that it was so used. The goods were charged to the defendant. There was no evidence that the husband was authorized to act as the agent of the wife, excepting the admission upon the trial that the goods were sold to the husband "with the knowledge of the defendant," and that it was for, and was used in, the erection of a house being built by him upon her land. This was insufficient as proof of his agency.

The mechanic's lien law (chapter 43, Gen. Laws 1883, amended by chapter 46, Gen. Laws 1885,) declares that the "knowledge and consent" of a married woman to the furnishing of material shall be "sufficient to establish that such husband acted therein as agent of the wife." We deem the statute applicable as a rule of evidence, not merely for the purpose of establishing and enforcing a lien, but also where a mere personal judgment is sought. But the case was not brought within the statute, for the "consent" of the wife was not shown, either directly or by proof of any fact from which consent could be inferred. For this reason there must be a new trial.

The appellant's point that the court had no jurisdiction to render a person judgment for the recovery of the price of the goods where, as in this case, the plaintiff failed to establish his asserted lien, is not well taken. This was an ordinary civil action in which, upon the facts alleged as the cause of action, the plaintiff sought relief by a personal recovery upon the contract, and by having the same adjudged to be a specific lien upon certain property, and to be enforced as such. The jurisdiction of the court did not depend upon a case being shown upon the trial which would have justified the granting in full of the particular relief sought.

We may add that if the evidence had been such as to have charged the defendant with personal liability upon the contract, it would not have been error to have allowed a recovery *in personam*. *Abbott* v. *Nash*, 35 Minn. 451, 29 N. W. Rep. 65; *More* v. *Ruggles*, 15 Wis. 275; *Phillips* v. *Gilbert*, 101 U. S. 721; *Patrick* v. *Abeles*, 27 Mo. 184.

Judgment reversed, and new trial ordered.

STATE *ex rel.* KEMERER *v.* GURLEY.

(*Supreme Court of Minnesota.* November 28, 1887.)

1. CONSTITUTIONAL LAW—SPECIAL ACT DETACHING CITY FROM TOWNSHIP.
A special law of 1887, detaching the city of Ortonville from the township of Ortonville, *held* not unconstitutional, it not appearing that it had the effect of depriving the people of the opportunity of holding the general town election for that year.
2. MUNICIPAL CORPORATIONS—CITY ASSESSOR.
The city after being so detached was entitled to have its own assessor, and the assessor of the township is not entitled to discharge the duties of city assessor.
(*Syllabus by the Court.*)

Appeal from district court, Big Stone county.

Writ of *quo warranto*.

Moses E. Clapp, Atty. Gen., *J. J. Whittemore*, and *L. R. Jones*, for State *ex rel.* Kemerer, relator. *Cliff & Crawford*, for Gurley, respondent.

DICKINSON, J. *Quo warranto* upon the petition of the relator, who, being the assessor of the town of Ortonville, claims by virtue of that office to be also the lawful assessor of the city of Ortonville. Chapter 33, Sp. Laws 1881, is entitled "An act to incorporate the city of Ortonville in the counties of Big Stone and Lac qui Parle." By its terms certain designated territory "is hereby set apart and incorporated as the city of Ortonville, under the provisions of" chapter 139 of the General Laws for 1875, (the general law for the incorporation of villages;) and certain persons were designated as commissioners to carry out the provisions of section 9 of the act of 1875. Some special provisions were made by the act of 1881, respecting the offices of city marshal and city justice, the powers of the city council, and some other matters. Section 8 provides that nothing in the act shall change or affect the township organization of the township of Ortonville, except as provided in the above act of 1875; that the city should continue to be a part of that township, and that the said township should be as heretofore, one election district for all purposes not in conflict with the provisions of this act; that the township and general elections might be held in the city, and that the qualified voters of the city should be qualified voters of said township. Chapter 302, Sp. Laws 1887, expressly repealed the above section 8, and in terms separated and set apart from the township of Ortonville, the territory within the city, and declared the same to be a separate and distinct corporation for all corporate purposes. Through the legislation above referred to, and the organization effected under it, this municipality became incorporated as a city; its corporate charter being the village act of 1875, as modified by the special provisions contained in the act of 1881.

If the act of 1887, repealing section 8 of the act of 1881, and detaching the city from the town, was valid, it entitled the city to have an assessor, and the claim of the relator that by virtue of being the assessor of the town he was also the assessor of the city, cannot be sustained. Each township is required to elect one assessor, (section 14, c. 10, Gen. St. 1878,) and each incorporated city shall have and exercise within its limits, in addition to its other powers, the same powers conferred by this chapter upon towns, (section 112, Id.)

It is claimed, upon the authority of *State* v. *Fitzgerald*, 32 N. W. Rep. 788, that this act of 1887 was unconstitutional for the reason that it in effect de-

prived the electors of the town of an opportunity to hold a town meeting, and to vote in 1887. The relator cannot be sustained in this, for it does not appear that the town-meeting for 1887 had not been appointed to be held, as it might have been, in the township outside of the limits of the city. The city charter makes sufficient provision for all city elections. The other grounds upon which this act is claimed to be unconstitutional are clearly untenable. These grounds are, in brief, that it contravenes the constitutional prohibition of special legislation granting corporate powers or privileges, except to cities; that it embraces more than one subject; that it, in effect, divides an organized township, and that it is opposed to general statutory provisions.

It not appearing that the relator is entitled to the office, judgment will be for the respondent.

JESMER *v.* RINES.

(*Supreme Court of Minnesota.* November 28, 1887.)

1. SALE—LOGS—QUANTITY ASCERTAINED BY SCALING.
   A contract of sale of all the logs at D. bearing a designated mark, the vendee to pay a specified sum per 1,000 feet "for 273,840 feet, more or less, scaled in the boom of M. & R. at P.," construed as providing that the quantity of the logs, supposed to be about 273,840 feet, should be determined by the scaling of the same at P., and that the aggregate price should be determined thereby.
2. SAME—ACTION FOR PRICE—PLEADING PERFORMANCE OF PROVISIONS.
   In an action by the vendor to recover the price, *held* that, in the absence of any averment or proof of a scaling of the logs at P., or that the contract had been changed, or that the provisions for such scaling had been dispensed with in any manner, the plaintiff could not recover.

(*Syllabus by the Court.*)

Appeal from district court, Mille Lacs county; COLLINS, Judge.

Taylor & Stewart, for appellant. *Bruckart & Reynolds*, for respondent.

DICKINSON, J. The complaint alleges the sale and delivery to the defendant of 281,020 feet of logs, at the agreed price of six dollars per 1,000, for the amount of which, less $610.60 paid, a recovery is demanded. The answer denies the sale and delivery of any logs in excess of 121,130 feet. It further alleges that this purchase and sale was under a contract by which the plaintiff sold and conveyed said logs, to-wit, 121,130 feet, scaled in the boom of Mudgett & Rines, (this defendant,) for which defendant agreed to pay six dollars per 1,000 feet, according to said scale; that plaintiff under this contract delivered that quantity and no more in said boom; and that the same were scaled in said boom at that number of feet. The reply simply denies the new matter averred in the answer. Upon the trial, the plaintiff introduced in evidence a written instrument as the agreement of the parties respecting these logs, whereby the plaintiff, in terms, sold and conveyed to the defendant "all those logs now in the Dunham boom, * * * marked J R. O. O;" in consideration of which the defendant agreed to pay at the rate of six dollars per 1,000 feet "for 273,840 feet, more or less, scaled in the boom of the parties of the first part, (Mudgett & Rines,) at Princeton." This was a different boom from that designated as the Dunham boom. It appeared from the evidence that the logs in question were in the Dunham boom when this contract was made; that the logs were delivered to the defendant at the Dunham boom, and were thereafter taken from that place by the defendant. The plaintiff also offered some evidence showing a scaling of logs claimed to be the same here in controversy, before the making of the above contract, and before they had been brought down the stream to the Dunham boom, and that the quantity so scaled was 273,840 feet. It did not appear, except as admitted by the answer, that any of the logs had been scaled in the boom of Mudgett & Rines, nor was there any averment or proof of any fact going to excuse or dispense with that.

The plaintiff having rested, the court dismissed the action, but afterwards, upon attention being called to the fact that, upon the admissions of the answer, the plaintiff was entitled to recover $116.18, with interest, the court made an order granting a new trial, unless the defendants should stipulate that judgment might be entered for that sum, with costs, but refusing a new trial if that condition should be complied with. Such a stipulation was made, and the plaintiff appealed from that order, as an order refusing a new trial.

The effect of the contract in connection with the fact of delivery at the Dunham boom, was this: The plaintiff sold and conveyed to the defendant all of the logs bearing the designated mark in that boom. The amount, estimated or supposed to be about 273,840 feet, was to be definitely determined by the scaling of the logs in the boom of Mudgett & Rines, at Princeton; and the defendant was to pay for the property at the rate of six dollars per 1,000 feet as determined by such scaling. In the absence of any allegation or proof that the terms of this contract had been changed by the agreement of the parties, or of anything avoiding the effect of the provision of the contract respecting the scaling of the logs in the boom of Mudgett & Rines, the plaintiff could recover only for logs shown or admitted to have been scaled at that place. The parties might stipulate upon that manner of determining the quantity, and the plaintiff was bound by that agreement, unless it had been in some way changed, or the specified means of determining the quantity dispensed with.

The court therefore was right in excluding evidence offered to show the quantity of logs bearing this mark, before they had been driven down the stream to the Dunham boom; and that all of such logs had been thus brought down. Nor, upon the case, was the plaintiff entitled to recover except for logs the quantity of which had been determined as prescribed by the contract. Such a recovery may be had upon the stipulation of the defendant; and there is no reason why a new trial should be granted.

Order affirmed.

SINGER MANUF'G CO. *v.* MCALLISTER.

(*Supreme Court of Nebraska.* November 10, 1887.)

1. PLEADING—SPECIAL DEMURRER—WAIVER OF EXCEPTIONS BY ANSWERING.
   The filing of an answer by which issue is joined upon all the averments of the petition is a waiver of exception to the decision of the court in overruling a special demurrer.
2. DEPOSITIONS—NOTARY IN OFFICE WITH ATTORNEY.
   The fact that a notary before whom a deposition was taken has his office in a room occupied by the attorneys who represented the parties taking the deposition, is not of itself sufficient to warrant the exclusion of the deposition when offered to be read upon the trial. The practice of taking depositions in the office of an attorney interested in the cause is objectionable, yet there is no law to prohibit it.
3. APPEAL—DISCRETION OF COURT—CONTINUANCE.
   A motion for a continuance is addressed to the sound legal discretion of a court, and its decision thereon will not be reversed unless there has been an abuse of such discretion.
4. CONTINUANCE—ABSENCE OF DOCUMENT—AFFIDAVIT—DILIGENCE.
   Where an affidavit in support of a motion for a continuance on account of the absence of a document necessary to be used in the cause as evidence is filed, it should be made to appear affirmatively thereby, not only that the party seeking the continuance has been diligent in trying to procure such document, but that it is at least probable that the evidence can be had in case the adjournment should be granted.

(*Syllabus by the Court.*)

Error from Platte county; POST, Judge.

J. M. Macfarland, for plaintiff. *McAllister Bros., pro se.*

REESE, J. Defendants in error filed their petition in the district court, in which they allege that in 1883 one F. J. Schwartz was employed by plaintiffs in error as traveling salesman, for the purpose of selling sewing-machines, and that during the year he sold a large number of such machines, so that by the first day of November of that year plaintiff in error was indebted to him in the sum of $499. The assignment of the claim to defendants in error is alleged in the usual form, and judgment is demanded. To this petition plaintiff in error filed a demurrer, which was overruled, whereupon an answer to the merits was filed. It is alleged here that the district court erred in overruling the demurrer; but this question cannot be noticed, as the filing of the answer waived any exceptions to this ruling. *Farrar* v. *Triplett*, 7 Neb. 237.

It is contended that the court erred in overruling plaintiff's exceptions to the deposition of the witness Schwartz. This deposition was taken at the office of and before P. L. Pollock, a notary public, in the city of Denver, Colorado. These exceptions were based on the alleged fact that the notary was interested in the suit, and that this interest was in behalf of defendants in error, and that he was attorney for defendants in error; and for the further reason that he was in the employ of Sampson & Millett, the attorneys who represented defendants in error, in taking the deposition. Attached to this motion, and made a part of the record, is the affidavit of Schwartz, to the effect that prior to the taking of the deposition the notary saw the witness in the interest of defendants in error, and talked over the material facts as to what he would testify to, and that the notary was an attorney at law, and works for and has been working for Sampson & Millett, the attorneys named, and for the further reason that the depositions were taken at their office. The substantial facts stated in these affidavits are that the notary had his office in the same room with Sampson & Millett, and that prior to the taking of the deposition he saw witness and had a conversation with him as to what his testimony would be. Whether he sought to influence that testimony in any degree is not shown. It is true, it is said that he saw the witness "in the interest" of the defendants in error; but this as a statement of fact is insufficient. If anything improper was said to the witness, it should have been stated in the affidavit, instead of the mere conclusion. As there is no proof of any prejudice to the plaintiff in error, the ruling of the district court was correct. The practice of taking depositions in the office of an attorney in the cause wherein the deposition is taken should not be encouraged; yet we know of no law by which it is prohibited.

It is next insisted that the court erred in admitting in evidence parts of certain documents which it appears were introduced by defendants in error. These objections cannot be considered, for two reasons: *First*, there was no exception taken to the ruling of the court; *second*, the entire documents were afterwards introduced by plaintiffs in error and admitted. Assuming that there may have been error in the first ruling, it was effectually cured by the subsequent action of plaintiff in error. During the trial plaintiff in error sought to introduce in evidence a contract entered into between it and one Shoff, its agent, and, presumably, the person by whom Schwartz was employed. The contract was identified by Shoff as being a duplicate copy, and was offered in evidence. Defendants in error cross-examined him as to the genuineness of this instrument. He then testified that the instrument was not a duplicate, but was a copy of the contract, instead of the original. He at first testified that the signature was his own handwriting, but finally said that it was not. The copy was offered in evidence and excluded. Plaintiff in error then filed a motion for a continuance, supported by affidavits, by which he sought to continue the cause on the ground of surprise, which ordinary prudence could not have guarded against. The motion for continuance was overruled, and the trial proceeded. The affidavit in support of the motion was to the ef-

fect that it was necessary to show that Shoff was a special agent of plaintiff in error, not having general authority, and that it was material to show what authority Shoff had to employ Schwartz as the agent of plaintiff in error. Prior to the time of trial he delivered the instrument to the attorney for plaintiff in error, believing it to be a duplicate of the original contract. It was sought to continue the cause until the original or duplicate could be procured. In this ruling of the court we see no error. There is no good reason assigned why Shoff might not have procured the original, instead of the copy. Neither is it shown where the original was at the time of trial, nor that it could be obtained, should the continuance be granted. While it is said in the affidavit that the attorney for plaintiff in error used every diligence to get the original contract, yet there is no showing as to what this diligence consisted of, nor what efforts were made. The motion for a continuance is directed to the sound discretion of the court, and its rulings will not be reversed, except for an abuse of such discretion. There is nothing in the record to show such abuse. *Jamason* v. *Butler*, 1 Neb. 119; *Billings* v. *McCoy*, 5 Neb. 190; *Johnson* v. *Dinsmore*, 11 Neb. 394, 9 N. W. Rep. 558; *Williams* v. *State*, 6 Neb. 337; *Ingles* v. *Nobles*, 14 Neb. 273, 15 N. W. Rep. 351. We cannot, therefore, see that the court erred in its rulings. Objections are made to matters occurring upon the trial under the supervision of the court, but as it is not perceived that anything was done to the prejudice of plaintiff in error, they need not be noticed, as error can never be presumed, but must appear of record.

No error affirmatively appearing upon the record of the case, the judgment of the district court is affirmed.

(The other judges concur.)

OMAHA & R. V. R. CO. v. STANDEN.

(*Supreme Court of Nebraska.* November 10, 1887.)

1. PLEADING—ACTION FOR NEGLIGENCE—PETITION—CODE RULES.
   Where an action is brought to recover damages for the negligent construction of a railway bridge across the Platte river, whereby it became an unlawful obstruction therein, *held*, under the liberal rules of construction of the Code, that the petition alleged sufficient to authorize a recovery.
2. RAILROAD COMPANIES—DEFECTIVE CONSTRUCTION OF BRIDGE—"DAMAGES."
   The insertion of the words "or damaged" in section 21, art. 1, of the constitution of 1875, was intended to give a right of recovery which did not previously exist, and was not intended to restrict or limit any remedy previously existing.
3. SAME—RIGHT OF ACTION—OVERFLOW OF LAND.
   Where a railway bridge is so negligently constructed across a river as to form an unlawful obstruction, and become a nuisance by causing an overflow of the river, no right of action accrues to a land-owner until he sustains an actual injury caused by such unlawful obstruction—as by the overflow of his lands.
4. NUISANCE—CONTINUING—RECOVERY NOT A BAR TO SUBSEQUENT ACTION.
   Where a nuisance is a continuing one, in consequence of which damages are sustained, a recovery is limited to damages which may have accrued before the action is brought, and one action is not a bar to a second action brought for damages thereafter sustained.[1]

(*Syllabus by the Court.*)

Error from Saunders county; MARSHALL and POST, Judges.

W. R. Kelly, for plaintiff. *E. F. Gray* and *W. H. Munger*, for defendant.

MAXWELL, C. J. The defendant in error brought an action against the plaintiff to recover damages for the negligent and wrongful construction of its bridge across the Platte river, whereby it is alleged that in March, 1886, a gorge was formed above the bridge, which threw the water of the Platte

[1] See note at end of case.

river out of its channel over the lands of the defendant in error, and thereby caused him a large amount of damage. The railroad company demurred to the petition upon the grounds that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled, and the company declining to answer, a judgment was rendered against it for the sum of $1,000. It now prosecutes a petition in error in this court; the question being, "Does the petition state facts sufficient to constitute a cause of action?"

It is alleged in the petition that "the said defendant now is, and ever since the year 1875 has been, a corporation duly incorporated and organized under and pursuant to the laws of the state of Nebraska; and ever since the year 1877 has been the owner of and engaged in running and operating a railroad leading from Valley Station, in Douglas county, to Lincoln, through the counties of Douglas, Saunders, and Lancaster in the state of Nebraska; that the plaintiff now is, and ever since the year 1882 has been, the owner in fee and in the actual possession of the lands described, as the south-west quarter of section six, in township fifteen north, of range ten east, and the north-east quarter of the south-east quarter and north half of the south-east quarter of the south-east quarter, and lot seven, and the north twenty-six and 40-100 acres of lot nine, of section one, of township fifteen north, of range nine east, comprising two hundred and fifty-nine acres in all, and all lying and being on the bottom land of the Platte river, and bordering on said river on the north bank thereof, in Douglas county, Nebraska. That ever since the year 1882, down to the committing of the wrongs and injuries hereinafter complained of, the plaintiff resided on said lands with his family, and erected and maintained a dwelling-house, barn, stables, store-houses, *corrals*, feed-yards, field and pasture fencing thereon, and cultivated a large portion of said land as a farm, and on a portion forest trees grew naturally, and on a portion plaintiff maintained a meadow for hay and pasture for cattle, horses, and hogs, and carried on the business of raising, feeding, and fattening cattle and hogs, and kept many horses and large quantities of hay and grain on said lands; that plaintiff's immediate grantor of said lands, one Everett G. Ballou, had for not less than ten years, immediately preceding his sale and conveyance to plaintiff of the same, owned and been in actual possession of and resided on said land, and cultivated, used, and maintained the business thereon, the same as the plaintiff after his ownership and occupation thereof, as aforesaid; that the plaintiff's said lands, ever since the year 1872, and as in its natural state and condition, were and have been lower than the banks of said Platte river, and as well as all the lands roundabout the plaintiff's said land, for many miles, were and have been ever since the year 1872, and as in its natural state, lower than the banks of said river; and plaintiff's said lands, as well as the said lands roundabout, ever since the year 1872, and as in its natural state, were and have been liable to be overflowed by any obstruction of the natural flow of said river; that the defendants, well knowing all of the foregoing facts, and of the said conditions of said lands, and of the occupation, improvements, and business thereon, maintained as aforesaid and against and contrary to notice and warning, did, negligently, unlawfully, and wrongfully, in the month of November, 1876, commence, and by the month of July, 1877, complete and construct and erect, a railroad bridge on its said line of railroad, between the counties of Douglas and Saunders in Nebraska, over and across the said Platte river, for its exclusive use, at a point about one-quarter of a mile above the plaintiff's said lands, in a westerly direction therefrom, the said bridge being so erected and constructed as to create an unlawful obstruction in said river, and to prevent the natural flow of ice and water therein, and to cause the natural flow of ice and water in the spring of the year to gorge, back up, and overflow the banks of said river, and thereby greatly injure and damage adjoining lands and property, and especially the said lands

of the plaintiff as aforesaid, and the property thereon and the business thereon maintained as aforesaid; that by reason of the said bridge and as well the approaches thereto, being so negligently, wrongfully, unlawfully, and improperly constructed and erected by said defendant as aforesaid, the said bridge and its approaches, on or about the twenty-seventh day of February, 1886, did so obstruct the natural flow of ice and water in said Platte river as to threaten an ice-gorge and blockade at such point, and thereby cause the ice and water in said river to break over the north bank thereof, and to flow over the adjoining lands, and especially of the plaintiff's said lands to the immediate injury thereof, and to the injury and destruction of the plaintiff's said property and business thereon, all of which facts defendant well knew at the time of such threatened and impending overflow and damage; that, notwithstanding such knowledge, and although notified of the then condition of said river, and of the obstruction and threatened overflow as aforesaid, and warned then of the probable consequences of permitting such obstruction to remain, and then it being practicable for the defendant to have removed said obstruction, and thereby to have prevented the gorge and overflow and damage to plaintiff that followed, with little expense, within not exceeding one day's time, and before any considerable overflow was caused, or any considerable damage was done, with but slight injury to said bridge, yet the defendant neglected and refused to remove said obstruction, or to make a sufficient opening in said bridge to allow the ice and water of said river to flow in the natural channel thereof; that as the direct, natural, and probable result of permitting said bridge and approaches to remain as an obstruction in said river as aforesaid, a large ice-gorge, at said last-mentioned date, commenced to form at said bridge and approaches, and so did form and continue for twenty-four days, of sufficient height and strength to completely turn the entire flow of ice and water running in said river, against, over, and through the said north bank of said river, at and above said bridge, and above the plaintiff's said lands, and to cause the said ice and water of said river to rush and flow with great force, depth, and violence over the plaintiff's said land, and over the surrounding lands, for many miles in extent, and so continue for twenty-four days, and until the pressure of ice and water against said bridge broke through and carried away a portion of the same, when said ice and water immediately receded and flowed down the natural channel of said river; that by reason of said ice and water being forced over and through said north bank as aforesaid, and the ice and water with great force, depth, and violence rushing and flowing over the plaintiff's said lands as aforesaid, and over the surrounding lands as aforesaid, the plaintiff's said lands, and the lands surrounding the same for many miles in extent, were inundated and overflowed for the space of twenty-four days, and thereby and in consequence of said ice-gorge and obstruction and wrongful and unlawful and improper erection and construction of said bridge and approaches, the plaintiff was greatly injured and damaged in this, to-wit: his said cultivated farm land of 125 acres was stripped of its soil over its entire extent, and the same was gullied out in places, and ridges of sand formed in places thereon, and large deposits of sand spread over the whole of it, so as that the said 125 acres, which was good farming land at the time of said overflow, was by said overflow greatly injured and rendered unproductive to the plaintiff's damage in this behalf in the sum of $625; his said meadow and pasture land of 134 acres was stripped of its soil over its entire extent, its grass killed out, its surface gullied out and ridged, and the whole covered with a deep deposit of sand, and the natural forest trees, growing on a portion of said pasture land, were broken down, rooted up, and destroyed, to the plaintiff's damage in this behalf of $767.50; his fencing on said land to the extent of 480 rods of fencing was broken down and washed away and destroyed to his damage in this behalf $720; his corn in field on his said lands to the amount of 1,000 bushels was washed away and destroyed to his

damage in this behalf of $200; his hogs to the number of 20, his cattle to the number of 18, and his horses to the number of 7, were forced from their stalls, feed-yards, and shelters, and exposed to cold storms, and to stand in snow, ice, and water for twenty-four days, without regular feed and care, and greatly reduced in flesh and condition, and injured to plaintiff's damage in this behalf $400; his hay on said lands to the amount of ten tons was wet and destroyed to his damage in this behalf $30; his labor and expense, in endeavoring to save and care for said animals and preserve his said property from the consequences of said overflow, amounted to not less than $100; to his damage in this behalf $100; and the plaintiff, in consequence of said overflow, was otherwise put to great expense, trouble, inconvenience, and hardship, and that the plaintiff's entire losses and damages in the premises are $2,842.50. Wherefore the plaintiff prays judgment against the defendant for the sum of $2,842.50 damages and costs."

The plaintiff in error contends that there is no sufficient allegation that the bridge was negligently constructed, and that it forms an unlawful obstruction in the Platte river. The allegations in the petition as to the negligent construction of the bridge, and that it forms an unlawful obstruction in the river, are not as definite as they might be made; but under the liberal rules of construction of the Code they will be held sufficient to justify a recovery. The plaintiff in error contends that the insertion of the words "or damaged" in section 21, art. 1, of the constitution of 1875, restrict the right of recovery to such damages as may have been reasonably anticipated at the time the structure was erected. The rule contended for was not taken into consideration by the constitutional convention in amending the section named. It is a matter of regret that the proceedings of the constitutional convention were not published, but it is a matter of unwritten public history of this state that the section above quoted was reported by the committee having it in charge, without the words "or damaged" inserted therein. And the words "or damaged" were inserted in open convention, on motion of a member, to cover a class of cases, not embraced in the former section, as where no property of the party injured had been taken. It was intended to furnish an additional remedy, not to curtail or restrict any right which previously existed, and the language will not warrant the narrow construction contended for.

This action is brought to recover damages for a bridge, alleged to have been negligently and unlawfully constructed by the plaintiff in error across the Platte river, so as to form an unlawful obstruction and create a nuisance. In such case there could be no recovery until actual damages had been sustained. Thus, suppose the owner of the land at the time the bridge was built had brought an action, could he have recovered for anticipated overflow? We think not. There must be actual injuries resulting from the unlawful obstruction to justify a recovery. *Miller* v. *Railway Co.*, 16 N. W. Rep. 567; *Drake* v. *Railroad Co.*, 19 N. W. Rep. 215; *Cain* v. *Railroad Co.*, 3 N. W. Rep. 737. But it is contended that the plaintiff below being the grantee of Ballou, who owned the land when the bridge in question was constructed, the present owner cannot therefore recover. This position, however, is untenable. If the bridge in question is a nuisance, and an unlawful obstruction in the river, then every continuance of said nuisance is a new nuisance for which, when damages have been sustained, an action may be maintained, the recovery being limited to such damages as have accrued before the action was brought. *Beswick* v. *Combdon*, Moore, 353, 1 Cro. Eliz. 402, and *Penruddock's Case*, 5 Co. Rep. 205; 3 Bl. Comm. 220; *Rosewell* v. *Prior*, 2 Salk. 460; *Fay* v. *Prentice*, 1 C. B. 828; *Bowyer* v. *Cook*, 4 C. B. 236; *Holmes* v. *Wilson*, 10 Adol. & E. 503; *Thompson* v. *Gibson*, 7 Mees. & W. 456; *McConnel* v. *Kibbe*, 29 Ill. 483, 33 Ill. 175; *Staple* v. *Spring*, 10 Mass. 72; *Hodges* v. *Hodges*, 5 Metc. 205; *Baldwin* v. *Calkins*, 10 Wend. 167; *Beidelman* v. *Foulk*, 5 Watts, 308; *Blunt* v. *McCormick*, 3 Denio, 283; *Cumberland, etc., Corp.* v.

Hitchings, 65 Me. 140; *Thayer* v. *Brooks*, 17 Ohio, 489; *Beach* v. *Crain*, 2 N. Y. 86; 1 Suth. Dam. 202; Gould, Waters, § 387. It is said, however, that one recovery will bar a future action. This, in many cases, no doubt is true, and if a railroad had been constructed along a street, in front of the plaintiff's property, whereby he sustained damages, one recovery would bar a future action for the same injury. But where damages result from a continuing nuisance, a different rule applies, and a recovery may be had for each injury as it occurs.

There was no error, therefore, in overruling the demurrer, and the judgment of the court below is affirmed. Judgment accordingly.

REESE, J., concurs.

COBB, J., (*dissenting.*) I cannot concur in the conclusion of the majority of the court, or the reasoning of the chief justice, by which it is reached. The case of *Railroad Co.* v. *Brown*, 14 Neb. 170, 15 N. W. Rep. 321, was an action for damages alleged to have been caused by the same bridge involved in the case at bar, in the spring of 1881. In that case the trial court instructed the jury "that notwithstanding the fact that the railroad company, when it constructed its bridge, did so in a prudent manner, according to the best information it could obtain at the time of its construction, yet, if it subsequently appeared that its construction was such that damage would result from the gorging of ice against the bridge, and that damage did result to the plaintiff and other property holders in the vicinity of the bridge, by reason of the overflow of ice and water in consequence of said gorge, and the defendant had time and opportunity and means, by a reasonable effort on its part in that behalf, to avoid or prevent such damage, it was its duty so to do, and it was required to use all such reasonable efforts to avert such damages, and if it failed so to do, it is liable to plaintiff for the damages sustained by him, as resulted directly from such failure." This court held the above instruction to be erroneous, and for that reason reversed the judgment of the district court.

As I understand the petition in the case at bar, the *gravamen* of the charge against the railroad company is not the unskillful or negligent manner in which it built the bridge, but its negligence in failing to remove it, or change its construction when the ice-gorge was threatened, and it was notified thereof. If I am correct in this, and the instruction in the case above cited was wrong, and this court justified in so holding, then the petition in the case at bar fails to state a cause of action. But if it was the object of the pleader to attack the original construction of the bridge, I do not think the petition sufficiently intelligible as to whether it seeks to charge the railroad company with negligence in building a bridge at the point where they did, or in building the kind of a bridge which they did.

The majority of the court, I think, understand the petition to charge the railroad company with keeping and maintaining a nuisance, in the bridge in question. Of course no one will contend that a railroad bridge across the Platte river, at or near the site of this one, is a nuisance *per se*, or that it is not a great public necessity. Accordingly I think that, if it was the object of the pleader to charge the railroad company with the erection of a bridge in such a negligent and faulty manner as to be a nuisance, the petition should state by what fault of construction, which in the nature of things could have been avoided, the bridge became a nuisance.

My own view is that if, in planning and constructing the said bridge, the railroad company brought to its execution the engineering knowledge and skill ordinarily practiced in small works, and such knowledge and skill were practically applied to the building of said bridge, if the property of any person was damaged or became liable to damage, so that its value was depreciated by reason of the erection of such bridge, the case comes within the provision of the

construction referred to in the opinion of the chief justice, that such damage should be compensated once for all, and that such bridge is not a nuisance. And I think that the burden of pleading, at least, was upon the plaintiff below, to show that the said bridge did not come within the above terms.

NOTE.

NUISANCE—PERMANENT OR CONTINUING—ACTION FOR. Every continuation of a nuisance is in law a new nuisance. Ramsdale v. Foote, (Wis.) 13 N. W. Rep. 557; and only such damages are recoverable in an action for a continuing nuisance as accrued prior to the commencement of suit. Stadler v. Grieben, (Wis.) 21 N. W. Rep. 629; Carl v. Railroad Co., (Wis.) 1 N. W. Rep. 295. For subsequent damages a new action may be brought. Fell v. Bennett, (Pa.) 5 Atl. Rep. 17; Cain v. Railroad Co., (Iowa,) 3 N. W. Rep. 736; Hazeltine v. Case, (Wis.) 1 N. W. Rep. 66. Where a railroad company builds its track upon a highway, without first granting compensation to the abutting owners, in the manner prescribed by law, or obtaining the private property in the street, the railroad becomes a continuing nuisance as to such owners, Uline v. Railroad Co., (N. Y.) 4 N. E. Rep. 536; Carl v. Railroad Co., (Wis.) 1 N. W. Rep. 295; and where a side track was built on a public highway in violation of a city ordinance, held, that the injury and annoyance resulting from the operation of the road in running cars over it and allowing them to stand in front of plaintiff's dwelling, constituted a nuisance for which successive actions could be maintained so long as it continued. Cain v. Railroad Co., (Iowa,) 3 N. W. Rep. 736. But where a nuisance is of a permanent character, so that it will continue without change, unless some human agency interposes, and its continuance will necessarily result in injury, but one action can be maintained, and the recovery allowed is for all damages, past and prospective. Stodghill v. Railroad Co., (Iowa,) 5 N. W. Rep. 495; Bizer v. Hydraulic Power Co., (Iowa,) 30 N. W. Rep. 172; Baldwin v. Gas-Light Co., (Iowa,) 10 N. W. Rep. 317. A nuisance committed in the operation of a railroad, and consisting in the throwing of smoke, cinders, and ashes upon the premises of a property owner, is held to be of a permanent character, for which only one recovery can be had, and the right of action for such nuisance accrues upon the construction of the road. Railroad Co. v. McAuley, (Ill.) 11 N. E. Rep. 67; Railroad Co. v. Loeb, (Ill.) 8 N. E. Rep. 460.

OMAHA & R. V. R. Co. *v.* BROWN.

(*Supreme Court of Nebraska.* November 10, 1887.)

Error from district court, Saunders county; MARSHALL and POST, Judges.
W. R. Kelly, for plaintiff. *E. F. Gray* and *W. H. Munger*, for defendant.

MAXWELL, C. J. The questions involved in this case are the same as those in *Railroad Co.* v. *Standen*, *ante*, 183, (just decided:) and the same judgment will be entered. The judgment of the district court is affirmed.

REESE, J., concurs. COBB, J., dissents.

HAMMOND *v.* JEWETT and others.

(*Supreme Court of Nebraska.* November 10, 1887.)

1. EVIDENCE—SUFFICIENCY.
The evidence examined, and *held* not sufficient to sustain the verdict of the trial jury.
2. SAME—VERDICT UNSUPPORTED.
When issue is presented by the pleadings, the verdict of a jury thereon cannot be sustained unless supported by some evidence.

(*Syllabus by the Court.*)

Error from district court, Clay county; MORRIS, Judge.
Dilworth & Smith and *W. P. Shockey*, for plaintiff. *Leslie G. Hurd*, for defendant.

REESE, J. This action was commenced before a justice of the peace of Clay county. Such proceedings were had as resulted in a removal of the cause to the district court, where new pleadings were filed, and a trial had, resulting in a judgment in favor of defendant in error, and against plaintiff in

error. The allegations in the petition are that plaintiff in error was a local dealer in stoves and hardware in the town of Harvard, and was agent of defendant in error for the sale of their stoves. That through plaintiff in error, as such agent, defendant in error sold a stove to one Goehring for the sum of $70; that the sum of $50 of the purchase price of the stove had been paid to the plaintiff in error, but that he had failed to pay the same over to defendants in error, and that of the amount thus collected there were $54.48 due to defendants in error. Plaintiff in error, by his answer substantially admits the sale of the stove through him as agent, but alleges that the same was paid for to him by Goehring, and that on the thirteenth of October, 1878, he paid to defendants in error the whole amount due and owing to them growing out of such sale. The reply was a general denial.

The only question involved in the case is one of payment; for plaintiff in error and Goehring, in their testimony, both state unequivocally that the stove was purchased through plaintiff in error as alleged, and paid for by Goehring. We have examined the record and the testimony carefully, and are forced to the conclusion that the verdict is contrary, not only to the weight of evidence, but to the whole thereof.

W. R. Webster, the traveling agent of defendants in error, by whom the stove was sold, testified to its sale and shipment, and states unequivocally that he has no knowledge as to whether the debt had been paid or not; that he is not the book-keeper of defendants in error, nor is he the cashier, and does not have access to the books of the defendants in error, and only depended upon the statements given him by them for collection. When asked if the debt had ever been paid, his answer was: "It has not, to my knowledge; of course, I have not full knowledge of these things." It will not serve any good purpose to give a critical examination of his testimony; it is fair to say that, throughout the whole of his examination, there is no proof whatever that the debt has not been paid.

It is quite probable that, by the issues, the burden of proof did not rest upon the defendants in error to establish the negative of this proposition by a preponderance of testimony; but it appears that they assumed this responsibility upon the trial of this question. The question does not enter into the case, for the reason that plaintiff in error, upon the witness stand, testified positively and unequivocally that he had paid the debt by a draft sent to defendants in error at their place of business in Chicago, Illinois. He testifies with Goehring as to the time of the payment of the money to him by Goehring, and that immediately thereafter, or, at any rate, within a short time, he forwarded to defendants in error a draft for the full amount due upon the stove.

We here quote a part of his testimony: "*Question.* You may state to the jury whether or not you have paid the plaintiffs in error for that stove. *Answer.* Yes, sir; I paid them for it, and got their receipt. *Q.* Have you the receipt for that with you now? *A.* No, sir; I got it burned up when I burned out. There were several of these after I lost the receipt. I sent to Chicago to get a statement from the house. Look at that paper, [referring to paper marked Exhibit A,] and state whether or not this is the return. *A.* Yes, sir; that is it. The stove is charged $50, four months' time. On October 31, 1878, I have credit for $50. *Q.* That is the credit it speaks about for the stove? *A.* Yes sir; that is it." He also testifies that the $50 payment made to him was paid directly upon this purchase. In his cross-examination he is asked the question: "*Question.* You sent the house $50 on this stove? *Answer.* Yes, sir. *Q.* And Jake [meaning Goehring] paid you $50? *A.* Yes, sir; and I sent them a draft for $50."

There is no conflict of testimony upon this subject. Webster was again called to the stand, and did not contradict any of this testimony; in fact, it was wholly and entirely uncontradicted. The statement referred to as having been sent to plaintiff in error by defendants in error shows the charge

for the stove to have been made on the twenty-fourth day of July, 1878, and a credit of $50 on the thirty-first day of October of the same year.

The answer of plaintiff in error squarely and fully presented the issue of payment. No preparation seems to have been made, by deposition or otherwise, to meet this issue on the part of defendant in error, and it is shown by the witness Webster that another person than himself had charge of the books, and doubtless could have testified as to whether payment had been made or not. This is not a case of conflicting testimony; therefore the well-established rule in this state, that a verdict upon conflicting testimony will not be molested, can have no application. There was, it seemed, a total absence of negative proof on the part of defendant in error, and therefore the verdict in his favor cannot stand.

The judgment of the district court is set aside, and the cause remanded for further proceedings. Judgment accordingly.

(The other judges concur.)

LARSON *v.* BUTTS.

(*Supreme Court of Nebraska.* November 10, 1887.)

1. SPECIFIC PERFORMANCE—CONTRACT TO CONVEY HOMESTEAD BY WIFE ALONE.
   A contract to convey a homestead, entered into by a wife in her own name, will not be specifically enforced, as the statute requires the instrument of conveyance to be signed and acknowledged by both husband and wife.[1]
2. SAME—SEPARATION—VALIDITY OF WIFE'S CONTRACT TO CONVEY HOMESTEAD.
   The fact that the husband and wife are not living together at the time the contract was made, will not render her contract for the conveyance of the homestead valid.
3. APPEAL—DECREE AGAINST CLEAR WEIGHT OF EVIDENCE.
   A decree against the clear weight of evidence will be set aside.

(*Syllabus by the Court.*)

Appeal from district court, Dodge county; Post, Judge.

E. F. Gray, for plaintiff. *C. Hollenbeck* and *Frick & Dolezal*, for defendant.

MAXWELL, C. J. The plaintiff brought an action in the court below for specific performance of contract, and alleged in his petition "that defendant, Martha Butts, on the eighteenth day of June, 1886, being the owner in fee-simple of the premises hereinafter described, sold and agreed to convey the same to the plaintiff, Louis P. Larson, and then executed in the name of M. W Butts, and delivered to him, an instrument in writing, in words and figures following, to-wit: "NORTH PLATTE, NEB., June 18, 1886.

"Received from L. P. Larson the sum of fifty dollars, as part payment of lots seven and eight, in block 184, city of Fremont, Dodge county, Nebraska. Each lot is 66 by 132, besides the alleys, which are also included. The purchase price is thirty-seven hundred and fifty dollars, less a mortgage of one thousand dollars, with interest to be deducted. This does not include the houses, which I agree to remove in the spring of 1887, as soon as the frost is out

[1] A conveyance or mortgage will not pass the title to premises occupied as a homestead, unless jointly executed by husband and wife. In *California*, Graves v. Baker, 8 Pac. Rep. 691. *Iowa*, Bruner v. Bateman, 24 N. W. Rep. 9; Goodrich v. Brown, 13 N. W. Rep. 309. *Kansas*, Bird v. Logan, 10 Pac. Rep. 504; Schermerhorn v. Mahaffie, 8 Pac. Rep. 199. *Kentucky*, Honaker v. Cecil, 1 S. W. Rep. 392; Kimmell v. Caruthers, Id. 2. *Minnesota*, Williams v. Moody, 28 N. W. Rep. 510; Coles v. Yorks, 10 N. W. Rep. 775. *Nebraska*, Swift v. Dewey, 29 N. W Rep. 254; Aultman & Taylor Co. v. Jenkins, 27 N. W. Rep. 117; McHugh v. Smiley, 24 N. W. Rep. 277, and 20 N. W. Rep. 296; Bonorden v. Dressen, 12 N. W. Rep. 831. Nor can a contract for such conveyance or mortgage be enforced unless so executed. Hall v. Loomis, (Mich.) 30 N. W. Rep. 374; Cowgell v. Warrington, (Iowa,) 24 N. W. Rep. 268; Donner v. Redenbaugh, (Iowa,) 16 N. W. Rep. 127; Moses v. McClain, (Ala.) 2 South. Rep. 741.

of the ground. The deed free of all incumbrances, except as above, I agree to deliver to said L. P. Larson, between June 21, 1886, and July 1, 1886, upon payment of balance due me in cash, less $250, which amount is to be paid next spring, without interest. M. W. BUTTS."

That at the same time plaintiff paid defendant $50, as a part purchase price, as in said instrument recited, and on the twenty-fifth day of June, 1886, before the commencement of this action, tendered to said defendant the sum of $2,406.56, the same being the balance of the purchase price of said lots, after deducting the principal and interest of the mortgage set forth in said instrument, and the $250 in said contract mentioned as payable next spring, and also tendered then to defendant his promissory note for said $250, payable without interest on the first day of March, 1887, as was agreed he might do, and requested her to convey said premises to plaintiff according to the terms of said agreement; but defendant refused, and still refuses, to execute and deliver such conveyance, and said defendant has been and still is trying and proposes and intends to sell and convey said premises to persons other than plaintiff, in violation of said agreement, and upon request declared she never would convey said premises to plaintiff. There are other allegations to which it is unnecessary to refer.

The defendant in her answer alleges: "*First.* That defendant is a married woman, having a husband now living in this state named P. O. Butts; that the property in plaintiff's petition described, now is and has been owned, used, and occupied by defendant as a homestead for the past fifteen years; that defendant has no other home for her family and herself, except the two lots described in the agreement set forth in said petition; that said premises are now, and were at the time of the making of said agreement, occupied as a homestead by defendant and her family, consisting of herself and her minor daughter, Ada West, a child by former marriage, and defendant has never left said premises except for temporary purposes, and has never intended to permanently abandon the same; that her said husband, P. O. Butts, has no home or homestead except as above stated. Defendant avers that, by reason of the foregoing premises, said receipt or agreement set forth in said petition is void in law, and of no effect whatever; that defendant has tendered to plaintiff said $50 paid her by him, and that she is now ready and willing to pay plaintiff said sum of $50. *Second.* That defendant occupies said premises and holds the same under and by virtue of a deed of trust from her former husband, Gideon West, for certain specific uses and purposes therein expressed, and defendant has no other right, title, or interest in and to said premises, except such as is created by said deed; that, by the terms of said deed, defendant has no authority or right to sell or convey said premises, except for the purpose of paying the debts of said Gideon West, or for the purpose of supporting the children of said Gideon West and defendant until said children become of age, and paying taxes on certain other property; that neither the conveyance demanded of the defendant, nor the agreement set forth in said petition, are intended or made to carry out the purposes or any of them expressed in said deed of Gideon West; and the children of said West are not of age." There are other allegations in the answer to which it is unnecessary to refer.

The reply substantially denies the facts stated in the answer.

On the trial of the cause the court rendered a decree of specific performance, from which the defendant appeals to this court. The undisputed testimony shows that the defendant is a married woman, but that her husband has not lived with her for two or three years last past. No divorce has been obtained, however, and, for aught that appears, there is nothing to prevent them living together as husband and wife. The undisputed testimony also shows that at the time the contract was entered into, and for a long period before that time, the defendant had her residence on the lots in question, where her minor daughter, Ada West, resided, and that it was *her* home. The defend-

ant also testifies that that was *her* home, although she was temporarily absent at various points selling goods, particularly at North Platte, where she seems to have rented a room and sold millinery goods. The testimony also tends to show that she filed a petition in the district court of Lincoln county for a divorce from her husband, in which she alleged she was a resident of Lincoln county. No decree was obtained on the petition, however, and, so far as appears, the allegations in the petition are merely formal, and can scarcely be said to be an admission of the fact that she was a resident of that county. In any event, it was a mere circumstance to be considered with others to determine the question of her residence. There are also certain admissions alleged to have been made by her as to her residence in North Platte. There is no denial, however, except inferentially, by the admissions heretofore referred to, of her testimony, that during all the time mentioned her home was upon the lots in question, and no denial whatever that her daughter above named was residing there, and that it was her home. This, in our view, is decisive of the case. The defendant, being a married woman, could not, under the statute, convey her homestead, unless her husband joined with her in signing and acknowledging the same instrument. Comp. St. *c.* 36, § 4; *Aultman* v. *Jenkins*, 19 Neb. 211, 27 N. W. Rep. 117; *Swift* v. *Dewey*, 20 Neb. 107, 29 N. W. Rep. 254; *Bonorden* v. *Kriz*, 18 Neb. 121, 12 N. W. Rep. 831. The fact that the husband and wife are not living together, does not change the rule.

The second point in the answer need not be considered. The judgment of the district court is reversed, and, upon defendant's paying to the clerk of this court the sum of $50 for the use of the plaintiff, the action will be dismissed. Judgment accordingly.

(The other judges concur.)

POLLARD *v.* TURNER, EX'X, etc.

(*Supreme Court of Nebraska.* November 10, 1887.)

1. EVIDENCE—BOOKS OF ACCOUNT.
   Books of account are receivable in evidence only when they contain charges by one party against the other, and then only under the circumstances and verified in the manner provided by statute. *Van Every* v. *Fitzgerald*, 21 Neb. 36, 31 N. W. Rep. 264.
2. APPEAL—REVERSAL—PREJUDICIAL ERROR.
   It is not every error that calls for a reversal of a judgment. To have this effect the error must appear to have been prejudicial to the party seeking to take advantage of it. *Dillon* v. *Russell*, 5 Neb. 484.

(*Syllabus by the Court.*)

Error from district court, Fillmore county; MORRIS, Judge.

Eller & Sloan and *John Barsby*, for plaintiff. *A. A. Whitman*, for defendant.

REESE, J. This was an action for the value of a windmill alleged to be the property of defendant in error, but wrongfully converted by plaintiff in error to his own use. Plaintiff in error admitted by his answer that he had the windmill in his possession, and that he retained the same, but alleged that he was the owner thereof; that prior to the death of Byron H. Turner he had purchased the property of him, and paid him for it. A trial was had to a jury, who, by direction of the court, returned a verdict in favor of defendant in error. Plaintiff in error, who was defendant below, brings the cause to this court by proceedings in error.

The questions presented will be noticed in their order.

Plaintiff in error took the witness stand in his own behalf. It being incompetent for him to testify to the transaction by which it was claimed he purchased the windmill of the deceased, he sought to introduce his cash-book showing the payment of $55 in cash, and the transfer of a note on J. B. Wes-

cott for $35. His testimony and the book were objected to, and both were excluded. It is urged that both rulings were erroneous. As we view the case, the decision must depend entirely upon the admissibility of the cash-book. If it was incompetent for any purpose, it would follow that the ruling of the court upon the testimony offered for the purpose of identifying it could not be material in the final determination of the case. The book referred to is proven sufficiently, perhaps, to be the cash-book of plaintiff in error. The page introduced in evidence is a list of the items of money paid by him for various purposes. On the upper line occurs the words "Paid Out." It contains no items of charges to any persons, but seems rather to be an account of money paid out, such as the following first three items:

	Telephone rent, - - - - -	3 50
February 1.	Clerk hire, - - - - - -	40 00
" "	Freight bills, - - - - - -	7 63, etc.

The only authority of which we have any knowledge—aside from the common-law rule, which is superseded—is section 346 of the Civil Code, which is as follows: "Books of account containing charges by one party against another, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility: *First*, the books must show a continuous dealing with persons generally, or several items of charges at different times against the other party in the same book; *second*, it must be shown by the party's own oath, or otherwise, that they are his books of original entries; *third*, it must be shown, in like manner, that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof; *fourth*, the charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made."

It is not deemed necessary to enter into a discussion of any of the provisions of this section, as this was fully done in the opinion written by Judge COBB in *Van Every* v. *Fitzgerald*, 21 Neb. 36, 31 N. W Rep. 264. It is sufficient to say that the book referred to was not shown to be the book of original entries of plaintiff in error, nor does it show a continuous dealing with persons generally, or several items of charges at different times against the other party. It was simply a private memorandum, evidently kept by plaintiff in error for the purpose of enabling him the better to remember his expenditures, and for what purpose they were made. The book itself being inadmissible in evidence, it could serve no good purpose to examine plaintiff in error as to when or under what circumstances the entries were made.

On the oral argument it was urged that the trial court erred in admitting in evidence a part only of a stipulation entered into by the attorneys, without requiring the whole to be read to the jury. This stipulation is as follows: "It is hereby stipulated by and between the parties to this suit that, for the purpose of this trial, the following facts are hereby admitted by both parties, to-wit: That one J. B. Wescott, on or about the second day of February, 1884, made and delivered a certain promissory note for the sum of thirty-five dollars, with interest at ten per cent. from date, due about August 2, 1884, and delivered the same to one C. D. Lindley, and that on the same day the said C. D. Lindley sold the same to the defendant in this case. It is further agreed that the windmill in question is of the value of eighty-five dollars."

The clause which was admitted was the last paragraph, in which it was agreed that the value of the windmill was $85. Suppose that part of the stipulation excluded had been read to the jury, what benefit could plaintiff in error have derived therefrom? Most clearly none. There was no proof that plaintiff in error had transferred the note to the deceased, and, if there had been, the fact that the windmill was the consideration for such transfer was

clearly wanting, and could not have been supplied by any testimony which was offered. This being true, no prejudice could result to plaintiff in error, even were the ruling technically erroneous. This must also apply to another stipulation offered and excluded, by which it was agreed that Wescott, if present, would testify that the deceased showed him the note referred to, and stated that he had received it from plaintiff in error in a trade. This would still fall short of proving, or tending to prove, that the note was given in part payment for the windmill. This proof being entirely wanting, it could not have bettered the condition of plaintiff in error had the stipulation been admitted in evidence, and the verdict would still have had to be in favor of defendant in error.

The judgment of the district court must therefore be affirmed, which is done.

(The other judges concur.)

NEWMAN *v.* STATE.

(*Supreme Court of Nebraska.* November 10, 1887.)

CRIMINAL PRACTICE—NON-RESIDENT WITNESSES—DEPOSITIONS—CONTINUANCE.

Plaintiff in error was prosecuted upon information filed by the district attorney, charging, in two counts, the forgery and uttering as true and genuine a promissory note. The information was filed on the eleventh day of October. He was placed upon his trial on the nineteenth day of the same month. Prior to the day of trial he filed a motion for a continuance, which was supported by his affidavit, in which it was alleged that he could prove by four witnesses, all non-residents of the state, and none of whom were present, naming them, that the notes were placed in his hands for the purpose of sale by one B., and that, as requested, he sold the notes simply as an accommodation, and returned all the money to the person for whom the sale was made. The residence of two of the witnesses out of the state was given, so that their depositions might be taken. The proposed evidence being material, and sufficient time for procuring their deposition not having elapsed, it was held that the district court erred in overruling the motion for a continuance.

(*Syllabus by the Court.*)

Error from district court, Washington county; NEVILLE, Judge.

Jesse T. Davis, for plaintiff. *The Attorney General*, for defendant.

REESE, J. Plaintiff in error was convicted of the crime of uttering and publishing as true and genuine a forged and fraudulent promissory note. The prosecution was upon an information, consisting of two counts,—the first for the forgery of the note, the second for uttering the same. The jury, by their verdict, found him guilty as charged in the second count of the information. Of the questions presented, it is deemed necessary to notice but one, as a majority of the court are of the opinion that upon it alone a new trial must be granted. This assignment is that the court erred in overruling plaintiff's motion for a continuance. It appears by the record that the promissory note alleged to have been forged was dated September 7, 1886. It was sold on the twentieth of the same month. On the twenty-fourth, plaintiff in error was arrested and placed in jail, where he remained until the eleventh of October, when the information was filed against him, and he was placed upon trial on the nineteenth of the same month. Prior to the trial he filed a motion and affidavit for a continuance, by which he sought to show the absence of witnesses material to his defense, and whom he could not procure in time for the trial. His line of defense was that, just before he sold the forged instrument, he was in Fremont with his wife, and was contemplating a trip to Blair on business. At this time one Bradley, with whom he was acquainted, approached him, and asked him to take some notes to Blair, sell them for him, and return him the money; and that he did so, under the honest belief that the notes were true and genuine, and without any fraudulent intent. In his affidavit, by which the motion for a continuance is supported, he deposed that one Parsons, who

resides in the city of New York, at "1180 Canal street;" J. C. Moore, whose residence is not disclosed; I. B. Davis, whose residence is in Kansas, but whose post-office address was not then known; and Anna Newman, the wife of affiant, who resided in Marysville, Missouri,—were present with him at the Eno Hotel, in Fremont, at the time the notes were delivered to him, and saw their delivery, and heard the request and instructions from Bradley, together with a statement as to where the makers of the notes resided, and the consideration for which they were given; that Anna Newman was present in Fremont when he returned, and saw him pay over to Bradley, without charge or deduction, the sum of four hundred dollars and fifty cents, the proceeds of the sale of notes. It is averred that there were no other witnesses by whom these transactions could be proved, and that by reason of his poverty, and the short time intervening between the filing of the complaint and the day set for trial, he was unable to procure the desired testimony.

For the purposes of a decision upon a motion for a continuance, the statements of the affidavit must be taken as true, and cannot even be contradicted by counter-affidavits. *Hair* v. *State*, 14 Neb. 503, 16 N. W. Rep. 829. Assuming, as we must, that the allegations contained in this affidavit were true, no question can arise as to the materiality of the evidence set out. The only inquiry, therefore, can be as to the diligence of plaintiff in error in securing this testimony in time for the trial. It was believed by the writer that there was not sufficient showing to warrant the court in finding that the testimony of the witnesses could be procured by a subsequent term. The residence of two of the witnesses was not given, and there is nothing in the affidavit which would lead any one to suppose that their testimony could be had at a later day; but the residence of Anna Newman and of Parsons is given, and, if the statements concerning them are true, their testimony could be had by depositions, under the provisions of section 462 of the Criminal Code. The time intervening between the filing of the information and the commencement of the trial, would have been clearly insufficient, under any degree of diligence, to have procured the presence of Parsons or his deposition, and insufficient to procure the deposition of Anna Newman. Both witnesses being without the state, their attendance could not under any circumstances have been coerced. Plaintiff in error was therefore guilty of no negligence, so far as the testimony of these witnesses was concerned; the statute above referred to not permitting the taking of a deposition until after issue joined by the plea. For this error the judgment of the district court must be set aside, and a new trial awarded. The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

(The other judges concur.)

FAGER v. STATE.

(*Supreme Court of Nebraska.* November 10, 1887.)

1. RAPE—TESTIMONY OF PROSECUTRIX—CORROBORATION.
In a prosecution for rape it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

2. TRIAL—INTERROGATION OF WITNESS BY TRIAL JUDGE.
While it is the right of a trial judge to interrogate witnesses when essential to the administration of justice, yet the practice of so doing, except when absolutely necessary, should be discouraged. The common-law rule conferring arbitrary power upon trial judges has been so far modified by the Code and the advanced civilization of the age as to greatly limit the power, and in case of its abuse a reviewing court would not hesitate to give a new trial to the unsuccessful party.

3. APPEAL—RULINGS ON EVIDENCE—EXCEPTION MUST BE TAKEN AT THE TIME.
Where it is claimed that improper testimony was allowed to be given to a jury in the trial of a cause, it must appear by the bill of exceptions that objection thereto was made, upon which there was an adverse ruling, and to which exception was taken at the time, otherwise it cannot be reviewed in the supreme court.

(*Syllabus by the Court.*)

Error from district court, Saline county; MORRIS, Judge.

E. S. Abbott and *R. D. Stearns*, for plaintiff. *The Attorney General*, for defendant.

REESE, J. Plaintiff in error was convicted of the crime of rape. The record is quite voluminous, and were we inclined to go outside of the questions presented for decision, it is quite probable sufficient objection might be found to justify the reversal of the judgment of the district court; but as it has been the uniform holding of this court that it will not travel outside the case presented by the counsel, except when the question of jurisdiction is involved, or in favor of life, we can notice only questions presented for decision.

It is insisted by plaintiff in error that there is no proof of rape, or even of contact, except that of the prosecutrix. While this is true in one sense, yet in the sense in which corroborating circumstances may aid the prosecutrix it is not true. We do not understand the rule in such cases to require corroborating testimony to the positive fact of the rape. If such were required, convictions could seldom be had, even in the most flagrant cases. Men engaged in the commission of offenses of this kind seldom call witnesses to the fact, or attack women who are not alone and within their power.

The testimony shows that plaintiff in error was engaged in collecting cream for a creamery in the neighborhood in which the prosecutrix resided, and that prior to the time of the alleged crime, when getting cream of the family with whom the prosecutrix resided, they had met and knew each other. The prosecutrix was a girl about 14½ years old, and resided with the family of A. J. Miller. Her younger sister resided near by, with the family of C. A. Helms. Miller and his family were away from home in York county, to be absent at least overnight. Helms and his wife were also away from home, and returned late in the evening on which the crime was alleged to have been committed. By the testimony of the witness Munson, who resided with Helms, and who was acquainted with plaintiff in error, it is shown that plaintiff in error went to the house of Helms on the evening in question in a covered buggy, hitched his horse, went to where Mr. Munson was, and asked where Mr. Miller was. Upon being informed that he was in York county, he then inquired where Iva Smith, the prosecutrix, was. Munson informed him she was there and in the house. He then told Munson there was to be a party at Mr. Parks' that night, and they wanted her to come down, and requested Munson to see her and inform her of what he said. Munson remarked he did not think she would come, as Miller was "pretty strict with her," but he would tell her. She was informed, and, after some hesitation, got into the buggy, and went with plaintiff in error; going first to Miller's and changing her clothing.

A. J Miller testified that soon after the occurrence he, with Mr. and Mrs. Helms and Mr. Munson, went with the prosecutrix to the spot where she claimed the crime had been committed, and there found horse's tracks south of the road, as she had stated, and from the appearance of the tracks in the grass it was evident the horse had stood there for some little time. These facts are also testified to by others who observed the same things.

Mr. Helms testified that he was in Dorchester on the afternoon of the day in question, and saw plaintiff in error with a horse of the kind testified to by Munson, hitched to a covered buggy, going north, which was in the direction in which Mr. Helms lived. This was about one-half hour before sundown.

Late in the evening Mr. Helms went home, and, as he supposes, about 9 or 10 o'clock, when within a mile or so from home, he met plaintiff in error in a buggy driving rapidly to the south. The witness thought at this time that some person was with plaintiff in error in the buggy, but as to who it was, if any such were there, witness could not tell.

Another witness, Mr. J. M. Johnson, met plaintiff in error the same night, somewhat later, about a mile north of Dorchester, driving south, towards town, with a horse and buggy of the same description as that given by the other witnesses, and, as was the case with Mr Helms, plaintiff in error did not give the road, and a collision seemed imminent. Mr. Johnson spoke to the horse, and he stopped. Plaintiff in error was alone, and appeared to be asleep. The witness says, "I slapped him on the face with my hat." He said, "There, get out, or pull out."

The testimony of these witnesses, all of whom were acquainted with plaintiff in error, when added to the positive testimony of the prosecutrix, who also knew him, leaves no doubt whatever upon the mind as to his identity.

The theory presented by the plaintiff in error is, to the mind of the writer, entirely improbable. He admits that probably it was the horse and buggy, but denies that it was himself. He claims that he started upon an errand, and went some two or three miles out of Dorchester, where he overtook a young man, who claimed he had been at work for a neighbor, and took him into the buggy; that the young man had a bottle of liquor, out of which plaintiff in error took a drink or two, and that upon reaching the timber of the West Blue river he was drunk; that the young man left him there asleep, and went away with the horse and buggy; that after a while the young man returned, helped plaintiff in error into the buggy, and sent him home about midnight. While this is pressed with considerable ingenuity by counsel, yet we cannot adopt it. The testimony of Munson is clear, direct, and positive, and we can see no reason why it is not entitled to credit.

It is next claimed that the testimony of the prosecutrix as to what happened at the time of the alleged commission of the offense is unsatisfactory, and in some important matters contradictory. In some respects this is true, and indeed it could hardly be expected to be otherwise. The testimony of the witness occupies 36 printed pages of the record. Her cross-examination was rigid, searching, and of great length, and when coming to minute details of the perpetration of the crime, in her efforts to detail, in answer to the questions, she made some statements which may seem unreasonable. It is hardly probable that a girl of her age and want of experience would form proper conceptions of what was done, or just how it was done, and be able to detail them upon the witness stand without apparent contradictions, resulting from lack of a clear understanding of the question, or some other cause. By a fair analysis of her testimony, however, many seeming contradictions are more apparent than real. The examination in chief was not skillfully conducted, many of the interrogatories embodying three or four questions, the last of which was, very naturally, answered by her, while those preceding it were left unanswered. The order of events was necessarily lost sight of by her, and she was placed in the attitude of answering many questions which might be applied to any stage of the transaction. The cross-examination of course tended to increase these apparent discrepancies. But the testimony of the witness throughout, corroborated as it is upon many important facts, leaves no question but that the verdict of the jury is sufficiently supported by the testimony so far as the objections presented by the plaintiff in error attack it.

Before making his statement to Munson, plaintiff in error seems to have satisfied himself that neither the family of Miller nor Helms was at home. Upon the plausible representations made to her, the prosecutrix accompanied

him, as one of her age and lack of judgment might be liable to do. Whether or not there was a party at the residence of Mr. Parks neither party seems to have thought it necessary to inquire, perhaps rightly, as no effort was made to reach the place designated. It can hardly be necessary to give a detail of what occurred at the time of the commission of the offense. It is not contradicted, and no good could result from entering upon its narration.

Upon the oral argument, it was insisted that there was error in the case because the prosecutrix was permitted to detail the complaint she made to Mrs. Helms immediately after the alleged offense, upon her return to Mrs. Helms' house. Had the question of the admissibility of this testimony been presented to the trial court by the proper objection and exception to its ruling, if adverse, this question would have been presented for review. But no such objection was made, therefore no ruling or exception. So far as is shown by the record, the examination was made with the consent of the plaintiff in error, and he cannot now object. These observations apply with equal force to the questions propounded to the prosecutrix by the court, so far as they relate to the testimony of the witness as to the complaint made. No objection was made to any of them. If any error existed, it was waived.

At another period in the trial, and during the examination of the witness, the court propounded certain questions to her as to the character of her under-clothing, and the exact position of plaintiff in error with reference to her, during the occurrence, which were objected to by him upon the grounds—*First*, because the court asks them; *second*, because they were irrelevant, immaterial, and incompetent. As to the first objection, it must be sufficient here to say that circumstances might arise in which it would be the duty of the court to propound questions, and insist upon direct and unequivocal answers. It sometimes becomes necessary for the presiding judge to take this course, especially if there is an apparent misunderstanding between the witness and the person propounding the question, or where a witness is diffident, obtuse, or unfriendly; and the simple fact that the questions here referred to were propounded by the court would not of itself be sufficient to reverse the judgment. As to the materiality, irrelevancy, or incompetency of the testimony, there could be no doubt. The question was concerning the condition of the underclothing of the prosecutrix, the principal one of which was as follows: "Were the drawers you wore that night tight drawers? *Answer.* Yes, sir." We can see no good reason why the plaintiff in error can complain of this. The answer was beneficial to him, rather than otherwise. Even were the relevancy or materiality of this testimony questionable, it was wholly without prejudice.

The next question presented is as to the conduct of the presiding judge during the trial. The objection is to the course pursued by him in the examination of the witnesses. Questions were asked by him, some of which were upon material points, and somewhat leading at times. The question here presented has not been before this court heretofore, and is one of importance, as bearing upon the practice in this state, and also as affecting the authority and duties of the presiding judge. It is insisted that as public prosecutors are provided by law, and at public expense, it should be left to them alone to conduct prosecutions, without any suggestions from the court; that the prosecuting attorneys of the several district courts are selected by the people with a view to their fitness and qualification for the position, and that it is the spirit of the law that trial judges leave the matter of presenting testimony entirely in their hands. As a matter of practice in this state, we think the rule generally adopted by the judges has been to avoid examining witnesses, and to permit the case to go to the jury as made by the attorneys. This, of course, is subject to the exception above stated, in which case there can be no doubt as to the right and duty of a trial judge. Courts should also see that the examination of a witness is conducted in fairness to both of the litigants, and to the witness.

Whether or not the judge has the right to go beyond this, under the provisions of our Criminal Code, might become a serious question. At common law the right was not questioned.

In Whart. Crim. Ev. (8th Ed.) § 452, it is said: "The trial court, at any period of the examination, may put questions to the witness for the purpose of eliciting facts bearing on the issues, and the witness may even be called for this purpose, or a witness not called by the parties may be called and examined by the court. Nor is the court, as to evidence, bound by the rule excluding leading questions; but an answer, not in itself evidence, brought out by the questions of the court, may be ground for reversal." This rule has been sustained in *Epps* v. *State*, 19 Ga. 102. See, also, Archb. Crim. Pl. 163; 1 Whart. Ev §§ 281, 496; *State* v. *Lee*, 80 N. C. 484.

Assuming that the rule above cited is the correct common-law rule, the question arises, has the Code so far changed this rule as to require a reversal of the judgment in this case upon the conduct of the trial judge? As a matter of law, we cannot say that in this case the trial judge so far exceeded the rule which is claimed to have been established by the Code as to require a new trial for that cause alone. While it is apparent that the course pursued by the trial judge was not prejudicial to plaintiff in error, yet we deem it proper to suggest that the judges have, to a very great extent, been shorn of the arbitrary power conferred upon them by the common law. It is not necessary here to refer to that which is known by every student of the law, that at common law the authority of the trial judge was deemed to be absolute, and in many instances was greatly abused. This power has, to some extent at least, been removed by the beneficent provisions and spirit of the Criminal Code. The trial judge must have the right to superintend the general course of trials of causes before him, as well as the conduct of counsel engaged therein, but this authority should be carefully and moderately exercised. The judge should be so absolutely impartial upon the trial of a cause as to give no ground for suspicion that he has any opinion upon the merits of the cause on trial, and the greatest care should at all times be observed that no act or word should escape which would deprive a judge of the well-earned reputation of American courts for absolute impartiality. While, as we have said, the conduct of the trial judge to which objection has been made cannot be said to have worked prejudice to plaintiff in error, and does not call for a reversal of the case, yet we think that, were a case presented involving the abuse of judicial authority to the prejudice of an unsuccessful litigant, the reviewing court should not hesitate to reverse the judgment, that a fair trial might be had.

The last question presented and urged by counsel for plaintiff in error is that the punishment imposed is excessive, and for that reason a new trial should be granted. The judgment is that the plaintiff in error be confined in the penitentiary for the period of 12 years. Under all the circumstances we agree that the punishment is excessive, but this of itself does not require the granting of a new trial. Under the provisions of an act of the legislature approved March 31, 1887, the authority is given directly to the supreme court, in cases of this kind, when in its opinion the sentence is excessive, to reduce the sentence of the district court as in their opinion may be warranted by the evidence. Applying this provision to the case at bar, it is believed that the case requires the exercise of the power conferred, and the sentence of the district court should be reduced to six years.

The judgment of the district court will therefore be so far modified as to reduce the sentence as above indicated; and the judgment will be that the plaintiff in error be confined in the penitentiary, at hard labor, but without solitary confinement, for the term of six years from the date of the judgment of the district court. In all other respects the judgment of the district court is affirmed. Judgment accordingly.

(The other judges concur.)

MAXWELL, C. J. I concur in the modification of the judgment in this case, and also in the points stated in the syllabus. In my view our statute has changed the common law so far as to practically prohibit the presiding judge from examining the witnesses, in whole or in part, in a criminal case. Under the common law, as counsel was not allowed to a prisoner in the trial of a charge of felony, the judge was supposed to act as the prisoner's counsel. It became the judge's duty, therefore, to cross-examine the witnesses, and protect the rights of the accused. In this country, however, the common-law rule which denied counsel to a person accused of felony has not prevailed, and one of the guaranties of the constitution of the United States and of this state is that a party accused of crime shall be entitled to counsel to make his defense, and a trial before an impartial jury. A trial cannot be fair and impartial if the judge is permitted, either directly or indirectly, to express an opinion upon the facts. This opinion necessarily would have great weight with the jury, and as he is not permitted directly to give his views upon the facts, he should not be permitted to do so indirectly, either by his conduct or the form of questions to witnesses. It may be said that in some cases it would be impossible to convict a party unless the judge should bring his influence to bear upon the jury. Such an argument, instead of being in favor of the practice, is directly opposed to it. Ordinarily, if the facts will justify the jury in finding a verdict of guilty, the probabilities are that they will do so. If the testimony leaves the guilt of the accused in doubt, he is entitled to the benefit of that doubt, and no influence outside of the testimony should be brought to bear upon the jury to induce them to overcome such doubt.

Our statute prohibits oral instructions to a jury, except by consent of parties, and this prevents the judge from directing the jury in any manner, unless in writing, in the presence of the parties, where exceptions may be taken to the ruling or direction. A fair trial means a trial before an impartial jury who, without extraneous influence, will be guided by the testimony alone in rendering a verdict. The law clothes the judge with power to determine the law, and intrusts to the jury all questions of fact; and this division of duties should be recognized and adhered to on a trial.

STATE *ex rel.* PEEBLES *v.* THAYER.

(*Supreme Court of Nebraska.* November 16, 1887.)

TERRITORIES—ACT DEFINING BOUNDARIES OF COUNTY—INDIAN RESERVATION.

The act of the territorial legislature of March 7, 1855, entitled "An act defining the boundaries of counties therein named, and for other purposes," in so far as it defines the boundaries of Blackbird county, is inoperative and void, as being in violation of the act of congress approved May 30, 1854, entitled "An act to organize the territory of Nebraska," and which reserved from within the boundaries of the territory the Indian reservation of which said Blackbird county was a part.

(*Syllabus by the Court.*)

Mandamus.

Barnes Bros., for relator. *The Attorney General*, for respondent.

REESE, J. This is an application to this court, in the exercise of its original jurisdiction, for a writ of *mandamus* to the governor of the state, for the purpose of requiring him to designate the temporary county officers and county seat of the county of Blackbird, in order that said county may become organized as one of the counties of the state. The attorney general, representing respondent, appeared and demurred to the petition and alternative writ, upon the ground that they do not state facts sufficient to constitute a cause of action, or entitle the relator to the relief prayed.

From the petition and record before us, it appears that prior to the commencement of this action the citizens of the territory which it is alleged con-

stitutes the county of Blackbird presented to respondent their petition for the organization of said county, the appointment of special county commissioners, and the designation of a temporary county seat, under the provisions of article 2 of chapter 17, Comp. St., entitled "Organization of new counties." This petition was refused by respondent on the twenty-eighth day of June, 1887, for the reason that respondent did not believe he had authority so to do under the provisions of the act of the territorial legislature, by which the boundaries of Blackbird county were alleged to have been established. Two questions are presented by the demurrer for decision, which are—*First*, as to the authority of the *judicial* department of the state to coerce the chief executive officer to perform a ministerial act; and *second*, should this power exist, whether it is the duty of respondent to perform the acts prayed for in the petition of relator?

As we view the case, the decision of the second or last question must be decisive of the whole case; and therefore it becomes unnecessary to inquire as to the first. Considerable has been said by counsel in the argument as to the great inconvenience and annoyance to the settlers upon the territory in question, resulting from a want of proper county organization, the establishment of county government, of public schools, and many other conveniences and necessaries of which they are deprived. The condition of these people is, no doubt, to be deplored; and some action should be taken by the proper authorities at an early day for their relief, and for the establishment of proper government; but this action cannot perhaps be taken by the executive alone. The case at bar involves simply the question of the duty of the respondent under the law, and no consideration can properly enter the case to aid in its solution except this one. The act of the territorial legislature by which it is claimed the boundaries of Blackbird county were established, was approved March 7, 1855, more than 30 years ago. The boundaries of the county are defined in the third section of the act, which is as follows: "That the boundaries of Blackbird county are as follows: beginning at the north-east corner of Burt county, thence up the middle part of the main channel of the Missouri river to a point two miles north of where Omaha creek enters into the Missouri river bottom, thence west 30 miles, thence south to a point due west of the beginning. That the seat of justice of said county be, and the same is hereby, located at Blackbird city." Laws 1855, 342.

It may well be doubted whether the partial boundary thus established would be sufficient to require the executive to organize the territory thus sought to be inclosed. Yet this question need not be decided, and will not be discussed. At the time of the passage of the act above referred to, the territory in question constituted a part of an Indian reservation, and it becomes important to inquire whether or not at that time it was competent for the territorial legislature to assert its authority over it, to the extent of the establishment of county boundaries.

Among other provisions of section 1 of the act of congress approved May 30, 1854, entitled "An act to organize the territory of Nebraska," (Gen. St. Neb. 37,) is the following proviso: "Provided further, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Nebraska, until said tribe shall signify their assent to the president of the United States, to be included within said territory of Nebraska, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise,

which it would have been competent for the government to make if this act had never passed."

It will be seen by the foregoing that all "such territory *shall be excepted* out of the boundaries, and constitute *no part of the territory*, until the assent of the tribe occupying the territory reserved should be obtained." It is not claimed that this assent had been obtained at the time of the passage of the act. By the several treaties between the United States and the Omaha Indians, (Revision of Indian Treaties, 564, 569,) and the Winnebago Indians, (Id. 1014,) and the memorial and joint resolution adopted by the territorial legislature of Nebraska of January 26, 1856, (Laws 1856, 236,) as well as by the public history of the territory and state, it appears that the rights of the Indians to the reservation remained unextinguished up to the time of the admission of the territory as a state in 1867. This being true, it is apparent that at the time of the passage of the act of the territorial legislature in 1855, establishing the boundaries of Blackbird county, neither the legislature nor the territorial government had any jurisdiction or authority to establish county boundaries within the reservation, and that the act in that behalf was void.

This also has been the evident opinion of the territorial and state officers and legislatures, ever since the passage of the act of 1855. No steps have been taken, and no effort has been made, to organize the county, nor to make it a part of the settled portion of the state. There has been no recognition whatever of the existence of such a county for 30 years; and when the state legislature in 1873, by its act of March 3d of that year, defined the boundaries of all the then counties of the state, no reference was made to Blackbird county, and the territory which it is now claimed constitutes that county was not included as a county, save that part which was included within the county of Cuming. Subsequent to that time (1879) another portion of the reservation was placed within the boundaries of Burt county, and in 1881 another portion was added to Wayne county. The act of 1879, defining the boundaries of Burt county, (Laws 1879, 77,) not only separates a part of this territory from the alleged county of Blackbird, but recognizes the existence of the Omaha reservation, by commencing at the south-east corner thereof, as the initial or beginning point of the boundary line of Burt county. These facts present another suggestion, which is that if respondent has authority to cause the organization of the county of Blackbird under the provisions of the act of 1855, he must do so with direct reference to the boundaries established by that act. He has no authority to depart therefrom. The exercise of that authority would be to ignore the acts of the legislature of 1873, 1879, and 1881, by which great confusion would ensue in the collection of state and county revenues, and in the enforcement of the laws—a step which any executive might well hesitate to take until directed by legislative enactments, which would remove the difficulty.

We therefore hold that the act of 1855, in so far as it assumed to establish the boundaries of Blackbird county, was void, and that it is not the duty of respondent to comply with the petition asking the organization of that county. The writ is, therefore, denied.

(The other judges concur.)

McCoy *v.* State.

(*Supreme Court of Nebraska.* November 16, 1887.)

1. Indictment and Information—Alleging Offense Committed within Jurisdiction of Court.

Information charging the defendant with the crime of larceny in the following form: "That on or about the twenty-second day of May, in the year of our Lord one thousand eight hundred and eighty-five, one James F. McCoy, late of the said county of Madison, and state aforesaid, unlawfully, willfully, and feloniously, one brown gelding, of the value of $150, of the personal property of one Victor Cavalin,

did convert to his own use, with the intent to steal the same, the said James F. McCoy then and there being the bailee of said property,"—*held* to be insufficient to support a verdict of guilty and judgment thereon, as not alleging that the crime was committed within the jurisdiction of the court in which the information was filed.

2. CRIMINAL PRACTICE—VERDICT—FORM AND SUFFICIENCY.

The verdict by which the defendant was found guilty of larceny, "in manner and form as charged in the first count or paragraph of the information," without ascertaining the value of the property alleged to have been stolen, is insufficient, under the provisions of section 488 of the Criminal Code, to sustain a sentence of imprisonment in the penitentiary.

(*Syllabus by the Court.*)

Error to district court, Madison county; CRAWFORD, Judge.

W. V. Allen, for plaintiff. *The Attorney General*, for defendant.

REESE, J. Plaintiff in error was convicted of the crime of larceny, as bailee of personal property, under the provisions of section 121 of the Criminal Code. He was sentenced to two years imprisonment in the penitentiary, and brings the cause to this court by petition in error. Pending the proceedings in this court, he made application for a writ of *habeas corpus* by which he seeks to be admitted to bail. His petition for the writ being submitted, was taken under advisement, and, pending decision, the proceedings in error were submitted upon the merits by the counsel for plaintiff in error and the attorney general. The information consists of two counts, one for the larceny of the property described; the other for embezzlement. Upon the trial the court gave to the jury instruction No. 9, which is as follows: "You are instructed to find defendant not guilty as to the second count in the information." By this the cause was retained for trial only on the first count. The charging part of this count is as follows: "That on or about the twenty-second day of May, in the year of our Lord one thousand eight hundred and eighty-five, one James F. McCoy, late of the said county of Madison, and state aforesaid, unlawfully, willfully, and feloniously, one brown gelding, of the value of $150, of the personal property of one Victor Cavalin, did convert to his own use, with intent to steal the same, and he, the said James F. McCoy then and there being bailee of said property aforesaid," etc. It will be observed that this count of the information contained no allegation as to the county or state in which the alleged crime was committed. This was evidently an oversight on the part of the pleader, as it is elementary that, to confer jurisdiction upon the court for the trial of an offender, the information or indictment must allege specifically that the crime was committed within the jurisdiction of the court. No argument upon this proposition is deemed necessary, and its consideration may be dismissed with the remark that the information is clearly insufficient to sustain the judgment.

The verdict of the jury upon which the judgment is based, is as follows: "We, the jury duly impaneled and sworn in the above-entitled cause, do find the defendant, James F. McCoy, guilty in the manner and form as charged in the first count or paragraph of the information, and not guilty as to the second count or paragraph of the information."

The section under which the plaintiff in error was convicted is as follows: "That if any bailee of any money, bank-bill or note, goods or chattels, shall convert the same to his or her own use, with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, and on conviction thereof, shall be punished accordingly." Section 121, Crim. Code. It will be seen that the well-established rule applicable to prosecutions for larceny, established by the Criminal Code of this state with reference to the value of the stolen property, is made applicable to offenses defined by this section. "He shall be deemed guilty of larceny in the same manner as if the original taking had been felonious," etc. By reference to sections 114 and 119 of the Criminal Code, it will be seen that stealing of

property of the value of over $35 is made a felony; under $35, a misdemeanor. Section 488 of the Criminal Code is as follows: "When the indictment charges an offense against the property of another by larceny, embezzlement, or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled, or feloniously obtained." This provision of the Code, although clearly applicable to the case at bar, was wholly ignored. Its provisions are mandatory, and cannot be evaded.

The verdict, therefore, conferred no authority upon the trial court to enter a judgment or sentence by which plaintiff in error was convicted of felony. This question was presented to the trial court by the plaintiff in error in his motion in arrest of judgment, but the motion was overruled, and judgment entered upon the verdict, to which plaintiff in error excepted, and which is now assigned as error by the petition in error. The judgment, therefore cannot stand.

The judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

(The other judges concur.)

HOKE and others *v.* HALVERSTADT.

(*Supreme Court of Nebraska.* November 16, 1887.)

1. TRIAL—JOINT DEFENDANTS—VERDICT AGAINST ALL—MOTION FOR NEW TRIAL.
   Under the provisions of section 429 of the Civil Code, in an action against two or more defendants upon a joint obligation, the evidence being ample as to one, but insufficient as to the other defendants, the verdict and judgment should be against one, and in favor of the others. In such case where the verdict was against all of the defendants, and those against whom there was but insufficient evidence made no motion for a new trial as to themselves alone, and judgment was rendered against all, it will not be disturbed.
2. PLEADING—SUFFICIENCY AFTER VERDICT.
   Petition examined, and *held* sufficient when assailed after verdict.

(*Syllabus by the Court.*)

Error to district court, Johnson county; BROADY, Judge.

Cornish & Tibbetts, for plaintiffs. *L. C. Chapman* and *E. W. Metcalfe*, for defendant.

REESE, J. This is a proceeding in error to the district court of Johnson county. The action was against plaintiff in error Hoke, who was a constable, together with the other plaintiffs in error as sureties upon his official bond. The allegations of the petition may be briefly stated to be that on the twenty-third of January, in the year 1885, the plaintiff in error, as such constable, under and by virtue of an order of attachment placed in his hands for execution, levied upon certain personal property as the property of one E. A. Halverstadt; that at the time of the levy defendant in error held a chattel mortgage on the property to secure a debt of $300, of which plaintiff in error had due notice when the levy was made. Plaintiff in error sold the property in pursuance of his levy, and this action is for damages caused thereby to the holder of the mortgage, by being deprived of the security for his debt.

The answer of plaintiff in error admitted the execution of the mortgage, and alleged that it was fraudulent and void as against creditors, and especially as against the plaintiff in the attachment proceedings. It is further alleged that the mortgaged property consisted of a stock of goods in a grocery, confectionery, and restaurant, and that after the execution of the mortgage, the mortgagor, with the consent of defendant in error, who was the mortgagee, sold the goods in the usual course of trade, with the consent and knowledge of defendant in error. The attachment proceedings are set out in full, but as there is no point made as to their legality, they need not be further noticed.

We may further remark that there is no proof in the record that defendant in error had any knowledge of the sale of the goods, nor that he had given his consent thereto. These facts are also denied by him in his testimony. There is nothing in the mortgage conferring this right, and the contention that the mortgage was void by reason of such sales, may be disposed of with the remark that the verdict of the jury upon this question must be final, it being supported by sufficient evidence. In addition to the averments contained in the answer, to which we have referred, there is a general denial of each and every of the allegations in the petition, except such as are expressly admitted. It is admitted that plaintiff in error, at the time of the seizure and sale, was constable of Todd precinct in Johnson county, as alleged in the petition, but there is no admission that the other plaintiffs in error were sureties upon his official bond, nor that any bond had ever been executed. There was no testimony introduced tending in any way to prove the execution of such bond, or that the other plaintiffs in error, aside from Hoke, were bound to respond for the damages. The verdict of the jury by which the case was tried was in favor of defendant in error, and against all of the plaintiffs in error, for the sum of $130, upon which judgment was rendered against all. This was clearly erroneous, and would call for a reversal of the judgment were it not for the fact that no separate defense or issue was presented by the sureties, separate from the general answer of Hoke, and no separate motion for a new trial was made by them, they preferring to rest their defense and motion for a new trial upon the general issues involved in the case, and the allegations of error presented by the principal defendant, Hoke.

In *Long* v. *Clapp*, 15 Neb. 417, 19 N. W. Rep. 467, which was an action for a breach of a joint warranty in a sale of chattels, it was decided that where the evidence was ample as to one, but insufficient as to another, defendant, the verdict and judgment should be against the one only, and not the other; but where the verdict was against both, and the one against whom there was but insufficient evidence made no motion for a new trial, as to himself alone, and judgment was rendered against both, the judgment would not be disturbed. The then Chief Justice COBB, in writing the opinion, says: "There was a motion for a new trial of this cause, and one of the grounds therein stated is that the verdict is not sustained by sufficient evidence; also that the verdict is contrary to law; but this point is not made that the evidence fails especially in its application to defendant Smith. Under the common-law practice, where the declaration counted upon a joint liability on the part of several defendants, and the evidence only proved a several liability as to one of them, the plaintiff was nonsuited. But not so under the Code." He then quotes section 429 of the Civil Code, which need not be here recopied, but which is to the effect that judgment may be rendered for or against one or more of several plaintiffs, and for or against one or more of several defendants; that it may determine the rights of the parties on either side, as between themselves, and it may grant a defendant any affirmative relief to which he may be entitled. Plaintiff in error, by his motion for a new trial, failed to present to the trial court the question of the want of evidence as against the sureties; no objection was made by them upon that ground. This must be deemed a waiver of their right now to object.

It is now insisted that the petition of defendant in error was not sufficient to entitle him to any affirmative relief. It is true that it is not skillfully drawn, and upon motion for a more specific statement it might have been required to be made more definite and certain; but sufficient appears, when assailed after verdict, to show a cause of action, and the judgment will not for that reason be set aside. There was sufficient to apprise plaintiffs in error of the nature of the claim against them, and of the relief sought. This, under the liberal provisions of the Code, will be held sufficient when assailed after verdict.

No prejudicial error appearing of record, the judgment cannot be molested. It is, therefore, affirmed.

(The other judges concur.)

HOLMES and another *v.* HILL.

(*Supreme Court of Nebraska.* November 16, 1887.)

FRAUD—UNDUE INFLUENCE—EVIDENCE.

The evidence examined, and *held* to sustain the findings and decree of the district court, and not to present a case of fraud or undue influence.

(*Syllabus by the Court.*

Appeal from district court, Gage county; BROADY, Judge.

Lamb, Ricketts & Wilson, for plaintiffs. *Pemberton & Bush*, for defendant.

COBB, J. This is an action by Reginald P D. Holmes and Leonard W. Colby, his guardian, plaintiffs, against Edward M. Hill, defendant. The principal object and purpose of the action was to annul, set aside, and avoid a certain contract entered into between Holmes and Hill, on the fifteenth day of February, 1884, at Beatrice in this state; which contract I copy from the brief of plaintiffs:

"This agreement, made and entered into this fifteenth day of February, A. D. 1884, by and between Reginald P. D. Holmes, of Gage county, Nebraska, party of the first part, and E. M. Hill, of the same county, party of the second part, witnesseth that the said party of the first part, in consideration of the covenants and agreements of the said party of the second part hereinafter contained, covenants and agrees to provide, furnish, and supply said party of the second part a sum of money not less in amount than twenty-five thousand ($25,000) dollars for the purpose of being handled, employed, invested, collected, reinvested, and used by said party of the second part in such manner and for such purposes as he may deem for the best interests of the parties hereto, in accordance with this agreement, said money to be furnished to said second party by said first party for a term of seven (7) years from and after the first day of April, A. D. 1884. Said party of the first part hereby agrees that said party of the second part shall have the sole use, management, and control of said money, and the property in which it may be invested, for said period of seven years, to handle, use, invest, reinvest, collect, loan, buy lands or personal property, or otherwise use, employ, and dispose of it, in such manner and for such purposes as said party of the second part may deem, judge, and consider to be for the best interests of the parties hereto; the intention of the party of the first part being to furnish and supply said money to said party of the second part to be handled, used, managed, controlled, and employed the same as if said money absolutely belonged to said party of the second part, except that it is to be used and employed for the benefit of both parties hereto as herein set forth.

"Said party of the second part, in consideration of the foregoing agreement on the part of said party of the first part, hereby agrees to take, receive, and accept the said sum of money, not less than twenty-five thousand dollars, from said party of the first part, and to use, manage, and employ it in such manner as shall, in his best judgment, produce the best income and largest profits obtainable from it; and to that end the said party of the second part agrees that he will use and employ said money only for such purposes as will, in his best judgment, produce a profit; and will only use and employ it in making such purchases, loans, and investments, and for such purposes, as will, in his judgment, produce a profit on the money invested; and said party of the second part agrees that he will diligently, and to the best of his knowl-

edge, skill, and ability, use and employ said money, and its proceeds, in such manner and for such purposes only as he shall deem to be of benefit to both parties hereto; and that he will faithfully and correctly account to said party of the first part for the one-half of the profits arising from the use and employment of said money, and will pay the one-half of said profits to said party of the first part, at the times and in the manner herein set forth.

"The full amount of said sum of twenty-five thousand dollars ($25,000) principal, and all the profits thereon, except such part of said profits as may be from time to time withdrawn by the parties hereto under this agreement, shall remain and be left in the hands of said party of the second part, to be by him used and employed as herein stated, until the expiration of this agreement; at which time all the profits arising from the use and employment of said moneys, and not before that time divided, shall be equally divided between the parties hereto, share and share alike; and said party of the first part shall receive his said principal sum of twenty-five thousand dollars in full from said party of the second part, except such part of it, if any, as shall have been lost in the course of its use and employments by said party of the second part, without any willful fault on his part. All said party of the second part agrees to do is to use his best judgment in the use and employment of said moneys, and it is agreed that he shall not be liable for any diminution of said principal sum arising from the errors of judgment in the use and employment of it. And it is agreed that neither party shall at any time withdraw from said business a sum of money exceeding the profits of said business for the preceding month, and that either party may, at the first of each month, withdraw from said business for his own use his share of the profits of said business during the preceding month, and no more. But neither party is at any time during the continuance of the agreement to withdraw any part whatever of said principal sum from its employment by said second party for the benefit of both parties in accordance with this agreement.

"In order that said party of the second part may use and employ said money for what is in his judgment for the best interest of both parties hereto, it is agreed that said party of the second part may purchase any kind of property he may see fit, either real or personal, or both, whenever in his judgment it will prove profitable to do so, and may sell, exchange, or otherwise dispose of the same whenever he may deem it proper to do so, and may execute deeds, mortgages, or bills of sale of the same, whenever necessary, in the name of said party of the first part, as his attorney in fact. And said party of the first part agrees to execute a power of attorney to said party of the second part for that purpose, and for the purpose of carrying into effect this agreement, which shall be irrevocable during the existence of this agreement. And said party of the second part shall have the right to loan said money, or any part of it, to such persons, for such time and upon such security as he may deem best, and shall have power to collect and receipt for the same, and may use said money, or any part of it, for any other purpose or purposes, or in any other manner, that he may deem proper for the purpose of producing a profit to the parties hereto. And said first party agrees that he will not in any manner interfere with the use and employment of said money, or the property purchased with it, or any part of it, by second party, and will not make, or attempt to make, deeds, mortgages, or bills of sale to or upon said property, or on any part of it, during this contract, but will leave the use and employment, management, control, and disposition of it wholly and solely to said second party, for the uses and purposes herein expressed.

"And for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties hereto bind themselves, their heirs, executors, administrators, each unto the other, in the sum of one thousand dollars, to be paid by the failing party unto the other as liquidated damages.

"In witness whereof the parties hereto have hereunto set their hands the day and year first above written. REGINALD PLUMER D. HOLMES.
"E. M. HILL.

"In presence of L. M. PEMBERTON."

Also to vacate, annul, and set aside a certain deed of trust executed by the said Holmes, and Nettie, his wife, to the said E. M. Hill, which I also here copy:

"Know all men by these presents that I, Reginald P. D. Holmes, of Gage county, Nebraska, in consideration of the covenants and agreements hereinafter made, and one dollar to me in hand paid by E. M. Hill of said county, do hereby bargain, sell, convey, and confirm unto the said E. M. Hill, all my property, both real and personal, situated and being in the state of Nebraska, in trust to and for the several uses, intents, and purposes hereinafter mentioned, to-wit: In trust to sell and convey, mortgage, and release, incumber, or otherwise dispose of, said property, or any part thereof, to such person or persons, and in such manner, and upon such terms, as to him seem best, and to secure and to receipt for, handle, use, and employ, loan, invest, collect, reinvest, or otherwise use or dispose of said property, or any part thereof, in such way or manner, and to such persons, and upon such terms, as he may deem best; and at the end of seven years from date hereof account, pay over to said Reginald P D. Holmes, his executors, administrators, the principal amounts received by him from the property hereby conveyed, less any losses that may occur without the fault or negligence of said E. M. Hill, or his successors in trust, together with all the moneys and property that may be due to said Reginald P. D. Holmes by virtue of any agreement or contract that may then be existing by and between the said Reginald P. D. Holmes and E. M. Hill, or his successors in trust. In case of the death or disability of the said E. M. Hill to act as trustee, the said Reginald P. D. Holmes hereby covenants and agrees that George G. Hill and Henry M. Hill shall succeed E. M. Hill as trustee, with the same powers hereby conferred upon E. M. Hill; and in case of death or disability of either of the last-named parties the other shall have full power and authority to execute the trust.

"And Nettie Holmes, wife of the said Reginald P. D. Holmes, hereby releases all her rights, including her right of dower and homestead right, in and to all the above-described real estate.

"And the said E. M. Hill doth hereby signify his acceptance of this trust, and doth hereby covenant and agree to and with the said Reginald P. D. Holmes to discharge and execute the same according to the true intent and meaning of these presents.

"In witness whereof the parties hereunto set their hands, this twenty-third day of February, A. D. 1885. REGINALD P. D. HOLMES.
"NETTIE HOLMES.

"W. D HILL, Witness."

And also to vacate, annul, and avoid a certain deed of conveyance whereby the said Holmes conveyed to the said Hill, as trustee, certain real estate in which the funds of Holmes had been invested, as follows, to-wit: "W ½, N. E. ¼, and E. ½, N. W ¼, 10–3–4, Jefferson Co., Neb.; funds invested, $2,582.18. Also N. E. ¼, 12–1–4, Jefferson Co.; funds invested, $1,990.34. Also lots 5 and 6, blk. 73, Beatrice; funds invested, $2,143.81 Also lots 11 and 12, blk. 9, Cortland, Gage Co.; funds invested, $2,822.69."

There was an answer, and a trial to the court, with findings and decree partly for the plaintiff, and partly for the defendant. Both findings and decree are too lengthy to admit of their being set out here, but I will refer to their several parts as I proceed. Both parties excepted to such parts of the findings and decree as were unfavorable to their several and respective sides, and the plaintiffs bring the cause to this court by appeal.

The plaintiffs' ground and cause of action as set out in their petition con-

sists mainly of the following propositions: (1) That the contracts are unfair as against Holmes, the considerations are inadequate on the part of Hill, so that it would be inequitable and against good conscience to allow him to retain their advantages, as appears upon the face of the contracts. (2) That Holmes was induced to enter into the said contracts by means of undue influence, and the abuse of fiduciary relations, which existed between the parties. As a third proposition, subsidiary to the second: That Holmes is a person of weak, vacillating, and infirm mind and will.

Upon the first proposition the trial court did not directly find. Its first finding, and which was doubtless intended to cover this point, is "that plaintiff Holmes is and has been of sound mind and memory, but a rank spendthrift, of much experience of travel on both sides of the Atlantic."

It may be stated as a proposition of general, if not universal, acceptation, that a person of full age and "sound mind and memory" will be bound by his contract deliberately entered into upon a lawful consideration. And as there can be no doubt that the stipulations of the contract on the part of Hill furnish at least a lawful consideration for the contract on the part of Holmes, it was probably sufficient for the trial court to find that Holmes was possessed of a sound and unimpaired mind. The evidence upon which this finding is based is too voluminous to admit of even a *resume* of it here. It is a somewhat significant fact that while Holmes is represented in this litigation by a guardian, such guardian was not appointed for the reason of the mental decadence or imbecility of the ward, but that of his spendthrift habits and dissipation habits, which he acquired subsequent to the date of the first or principal contract.

If we look into the contract itself, we fail to find great evidence of either imbecility or incapacity on the one part, or of the usual craft and overreaching on the other; but it is such a contract as a young man suddenly coming into the possession of a large sum of money, and fully aware of his own financial incapacity and inexperience, and proneness to yield to temptation, might be likely to make, while under the best of influences, for the protection and conservation of his fortune. While it is not necessary, in order to uphold the contract, that its terms should be found to be absolutely fair and equal to each of the contracting parties, yet I think that, fairly interpreted, and honestly and in good faith executed and carried out by both of the contracting parties, it afforded a safe and profitable investment for the funds of the plaintiff.

On the second proposition, the trial court found "that there was no undue influence to vitiate the papers made between the parties, Holmes plaintiff, and Hill defendant, in February, 1884; that the fiduciary relations between the said parties commenced on the receipt of the money by defendant in London, England, in April or May, 1884."

The evidence introduced on the part of the plaintiffs to sustain the charge of undue influence may be summarized as follows:

Holmes was a young man, a native of England, but had resided in Germany with his mother for four or five years. He was about 19 or 20 years of age, of good, fair education, but without a profession, and upon his first appearance at Beatrice was without means. He worked for different people at Beatrice, De Witt, and the country thereabouts, at driving stage, as a section hand on the railroad, and similar employment. While engaged in this employment, and after he had been in that neighborhood a year or more, he casually met, and had an opportunity to show some trifling service to, Mr. Hill, the defendant, who chanced to be at the place where he was working. Some time afterwards,—Holmes thinks in the latter part of the year 1881, or the forepart of 1882,—Hill was again at the house where Holmes was employed, during his absence, and left word that he would like to have him come and work for him. The next day Holmes saw Hill. They had conver-

sation, and Hill asked Holmes if he would not like to work for him. He replied that he would, as he had nothing to do then, and he finally went to work for him, writing in his books. He remained there three or four weeks at that time. During said time, Holmes took his meals at Hill's house, and "slept down at the office on the table." No rate of wages was agreed upon between them. Holmes states that he told Hill, "I thought I would do it for a mere nothing, just what he felt like paying me." "He let me have a little money along. Sometimes he gave me a half a dollar if I asked him for it; sometimes a dollar,—such amounts as that."

Holmes left Hill, and went to peddling fruit trees. Went to Hastings; to Grand Island. Returned to Hastings, worked for a man there a while, quit, and returned to Grand Island. There joined a circus, and "went all over the country." That fall he left the circus at Birmingham, Alabama, and there engaged as a street-car driver. He there received a letter from home informing him of the death of his mother. At the same time he received a postal card from Hill to come to Beatrice immediately on important business. He immediately wrote to Hill saying that he "did not have any money, and for him to send me money, as I wished to see him any way." Hill sent him a railroad ticket and money to Holmes, by means of which he finally returned to Beatrice; arriving there in November, 1884. Upon his arrival at Beatrice, Holmes received from the hands of Hill a letter from London reiterating the statement of his mother's death, and also informing him of the amount of money which she had left him. This letter had been addressed to Holmes in the care of M. E. Hill. After reading it, Holmes handed the letter to Hill, and requested him to read it, which he did. Hill then took Holmes home with him to his house, after stopping and getting their dinners at a temporary eating-house. Holmes continued to live at Hill's house, eating at the family table, and sleeping with Mr. Hill's son from the twenty-third day of November until the twenty-first day of February, when Holmes and Hill left for London. Before leaving Beatrice, they entered into and executed the first, or principal, contract. Holmes in his testimony, given in his own behalf, states the conversation, and narrates the circumstances which led up to the making of the arrangement by which Hill accompanied Holmes to London, and acted as his attorney in settling up his deceased mother's estate.

These circumstances and conversations are claimed by plaintiffs as undue influence exerted by Hill upon Holmes, whereby he was induced to enter into the contract. The marked difference in the bearing of Hill towards Holmes after his return from Birmingham, together with his assistance in enabling him to return, taking him to his house and family, and keeping him there until his return to London, and accompanying him thither, are pointed to as evidence of such influence.

It is perhaps sufficient to say that the trial court appears not to have seen, nor do we, that evidence of fraud, unfairness, or design on the part of Hill in any of these transactions, nor of surprise, imbecility, or weakness on the part of Holmes, sufficient to avoid the contract between them, or which have characterized the cases where courts of equity have felt warranted in interposing between the strong and the weak.

Nearly all of the cases cited by counsel for the plaintiffs are where persons of advanced age, or whose minds have become enfeebled by sickness, have become the victims of designing relatives, or persons upon whom they had a natural right to look for protection. An exception is furnished in the case of *Moore* v. *Moore*, 56 Cal. 89. In that case the plaintiff was the wife of one William H. Moore, with whom she lived and cohabited when he was killed by being shot. She was shown to have been in delicate health by the fact that she was delivered of a child within four months of the death of her husband. The sudden killing of her husband caused her a great shock and prostration of mind and body, and unfitted her for the transaction of business.

On the second day after the burial of her deceased husband, and before she had recovered from the shock which his death had occasioned, she was waited upon by two brothers and two brothers-in-law of her late husband, who were accompanied by an attorney and notary. They presented to her, and requested her to sign, the instruments which the action was afterwards brought to avoid. She was told by one of the brothers of her late husband that it was his wish that she should sign them; and thereupon, without reading or knowing the contents of them, and without any negotiation as to the price to be paid, or any agreement or understanding in relation to any consideration for her doing so, she signed three instruments, by which she transferred to the surviving children of her late husband her entire interest in his estate. The estate transferred was of the value of $47,000. The court overruled a demurrer to the petition setting out the above facts; stating the salient facts of the case to be "that the transfer was made without negotiation, explanation, or any conceivable adequate motive. The time selected for the transaction, in view of her then recent bereavement, and the shock which such an event would naturally inflict upon her, was, at least, *mal apropos*. She alleged that she was suffering at the time from the effects of the shock which she had sustained by her late husband's death; she also alleges that she did not read, and was not informed of the contents of the instruments which she signed." In the above case the court went further than in any other to which my attention has been directed, but it falls far short of that which is contended for here.

I come to the conclusion that neither on account of inherent unfairness or inequality in the terms of the contract itself, of mental imbecility, immaturity, or unsoundness on the part of Holmes, or of undue influence by reason of the personal relations of the parties, is the first or principal contract successfully attacked; and the opinion and decree of the district court in upholding the same must be affirmed.

The findings and decree of the district court upon the remaining and minor questions involved in the case are mainly in favor of the plaintiff, and, as the defendant did not perfect his appeal, they will not be examined.

The court, however, found and decreed in favor of the validity of the deed of trust executed by Holmes and wife to Hill, trustee, under date of February 23, 1885, in so far as the same is in furtherance of the original contract, but not in so far as the same sought to create other and additional trustees in case of the death of E. M. Hill, trustee. In this I think there was no error. The decree of the district court is affirmed.

(The other judges concur.)

DAKOTA CO. v. CHEENEY.

(*Supreme Court of Nebraska.* November 16, 1887.)

1. DRAINAGE—PROCEEDINGS TO ESTABLISH DRAIN—JURISDICTIONAL REQUISITES.
   In a proceeding to establish a drain or ditch, under chapter 89, Comp. St., the jurisdictional facts are—*first*, a petition signed by one or more owners of land to be affected by the proposed ditch; *second*, a bond provided by statute; *third*, that the proposed improvement is a necessity, and will be conducive to the health, convenience, and welfare of the public; and, *fourth*, the statutory notice.
2. SAME—SIGNERS OF PETITION—OWNERS OF LAND AFFECTED.
   The failure of the county board to find that the signers of the petition are owners of lands to be affected is not jurisdictional.
3. SAME—OBJECTIONS—TIME OF MAKING.
   A party objecting to the construction of a proposed ditch should act with reasonable promptness in urging his objections, and should not wait until the completion of the improvement before alleging an entire want of authority to make the same.

(*Syllabus by the Court.*)

Error from district court, Dakota county; CRAWFORD, Judge.

John T. Spencer, *J. B. Barnes*, and *M. C. Jay*, for plaintiff. *D. A. Holmes* and *H. D. Rogers*, for defendant.

MAXWELL, C. J. This is a proceeding in error from the judgment of the district court of Dakota county reversing the order of the board of county commissioners of that county in establishing and constructing a ditch in pursuance of statutory authority. The record shows that on the seventh day of October, 1884, a petition was presented to the county commissioners of that county, as follows:

"*To the County Board of Dakota County:* The undersigned, owners of land lying and being in that part of Dakota county known as the 'Swamp,' would respectfully represent to your honorable board that all lands situated in said swamp are at present of small value to the owners thereof, and would further represent that a drain commencing at or near the south-east corner of the N. W. ¼ of N. W. ¼ of section 12–28–7; thence in a south-easterly direction along the lowest ground, to a point about one hundred rods east of the quarter corner of east side of section 13–28–7; thence south-easterly along and through the lowest ground, to the head of Wm. Taylor's ditch, or some point in or along said ditch, as found necessary,—with side or lateral ditches, when necessary, would render all the lands so situated of much greater value to the owners, and would be of vast benefit to the people of said county, and for public good. And would respectfully ask that your honorable board take such steps as will be necessary, under the laws of Nebraska, to open out a drain, commencing at or near a point suggested above, and thence along the route indicated, as near as may be practicable, to or near the head of Wm. Taylor's ditch, or some point in or along said ditch, with side or lateral ditches, as shall be found necessary to carry off said surplus of water and drain off said lands. And your petitioners will ever pray.

"JOHN HARTNETT.	JOHN COLLINS.
"J. F. DUGGAN.	FRANK HEENEY.
"JOHN DUGGAN.	MIKE MALONEY.
"JOHN HEFFERMAN.	DANIEL HARTNETT.
"MICHAEL CAIN.	DANIEL DUGGAN.
"P. REELEY.	JOHN HOWARD.
"A. LAHEY.	P. W. BRIDENBAUGH.
"JAS. HOGAN.	JOHN ROONEY.
"P. KEEFE.	JAS. DUGGAN.
"JAS. LAHEY.	KELLEY W. FRAZIER."

The commissioners thereupon entered the following on the record: "In compliance with the prayer of the petition of John Hartnett and others for the location of a ditch from the south-east corner of the N. W. ¼ of the N. W. ¼ of section 12–28–7; thence in a south-easterly direction along the lowest ground, to a point about one hundred rods east of the quarter corner of the east side of section 13–28–7; thence south-easterly along the lowest ground, to the bed of William Taylor's ditch, or some point in said ditch,—with side or lateral ditches where necessary, the undersigned, on the twenty-fourth day of September, 1884, proceeded to view the line of said proposed improvement, and, upon actual view of the premises along and in the vicinity thereof, we find that said improvement is necessary, and will be conducive to the public health and welfare, and also find that the line described in said petition is the best route for said ditch, except that we find that the starting point of said ditch should be the half section line, running east and west, of section 12–28–7. We therefore hereby order the clerk of said county to enter this finding upon the commissioners' journal. We therefore direct the county surveyor to go upon said line described in said petition, and survey and level the same, and set stakes at every one hundred feet, numbering down stream, and note the intersection of section lines, road crossings, boundary lines, precinct and

county lines; and make a report, profile, and plat of the same, and estimate the number of cubic yards for each working section of said drain, and to make and return a schedule of all lots, lands, public or corporate roads or railroads, that will be benefited by the proposed improvement, and proportion the line, in feet and cubic yards, to each lot, tract of land, road, or railroad, according to the benefit that will result to each from the improvement, and make an estimate of the costs of location and construction to each, and a specification of the manner in which the improvement shall be made and completed."

At an adjourned meeting of the county commissioners, held at Dakota city, Nebraska, March 19, 1885, the following proceedings were had: "And now, at this time, to-wit, March 19, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska. In the matter of draining the swamp in said county, which has been before them heretofore, it is considered and ordered by said commissioners, upon actual view, that the drain be made fourteen feet on the top of said ditch, and ten feet at the base of the same, and estimates be made on that basis."

And at a meeting held March 31, 1885, the following proceedings: "Now, at this time, to-wit, March 31, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska: Whereas, it appears that at the last meeting of said board, to-wit, the nineteenth day of March, 1885, the said board having under consideration at that time the dimensions of the ditch petitioned for in said county, it was then ordered that the same be fourteen feet wide on the top, and eight feet on base; and whereas, it appears that a mistake was made in the entry of said order; it is now ordered that said entry be changed to read as follows: Width of ditch on top, fourteen feet, and width of ditch at base, ten feet, as entered in the order of March 19, 1885."

At a meeting of said board held April 7, 1885, the following proceedings: "And now, at this time, to-wit, the seventh day of April, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska: In the matter of the swamp improvement in said county, it appearing to said board that a mistake was made in the order of September 25, 1884, establishing the route of said ditch, in this: that the starting point of said ditch is described as on the half section line, running east and west, of section 12, township 28, range 7 east, whereas the order was intended to locate the starting point of said ditch where the channel of Elk creek crosses said line; and whereas, the engineer of said improvement, after the survey of said ditch, finds that the starting point as so intended by said board, was ten chains and six links north and two chains east from the south-west quarter of section 12, township 28, range 7,—and it is hereby ordered by said board that the records be corrected to show that the starting point of said ditch be north of said line ten chains and sixty links, and two chains east from the south-west corner of the south-east quarter of the north-west quarter of section 12, township 28, range 7 east, as shown by the survey of said engineer now on file in the office of the clerk of said county. Now, at this time, to-wit, the seventh day of April, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska: In the matter of the swamp improvement of said county, it appearing to said board that the report and plat of the engineer of said improvement has been duly filed in the office of the county clerk of said county, and that the same was filed within thirty days after the survey of said route of said improvement was made, it is hereby ordered and considered that the county clerk of Dakota county proceed at once to notify the owners of all the lands affected by said improvement, residents, and non-residents, in the manner provided by law, to appear before the said county board on the fourteenth day of May, 1885, or to file within that time all objections to the location of the same, or for damages,

in any way they may feel aggrieved to make the same known within said time. Adjourned to meet May 14, 1885."

On that date the following among other proceedings were had: "Now, at this time, to-wit, May 14, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska: In the matter of the Dakota county ditch, this being the day fixed by the county clerk of said county for the hearing of the report of the engineer, heretofore filed in the matter, the commissioners now in session do find from the evidence, and proof of publication of notice in said county, relating to the lands and roads therein, and returns made by the sheriff on said notice served in Dakota county, that due and legal notice has been given, according to law, to the resident and non-resident parties who are the owners of lots and lands taken or affected by said proposed improvement, or by the apportionment and report of the engineer, situated in said Dakota county, as well as the authorities and municipal and private corporations whose lands or roads are affected by said proposed improvement. And now, from the affidavit of the publisher of the North Nebraska Eagle, a newspaper published in Dakota county, the commissioners do find that due and legal notice has been given all non-resident lot or land owners whose lands or property are affected by said improvement. And now, on the same day, to-wit, May 14, 1885, the said board of county commissioners of said county, after finding that due and legal notice had been made of the hearing of the report of the engineer in said ditch matter, to all lot and land owners, resident and non-resident, whose lands are affected by said ditch improvement, in all respects in accordance with law, the said board of commissioners do now proceed to hear the evidence in favor of, and to examine all exceptions filed in said matter to, the apportionment of the engineer, and to claims filed, as well as to hear and examine all claims for compensation or damages filed herein."

The board thereupon proceeded to examine the claims and objections of various land-owners affected by the construction of the ditch. Then follows a statement of the several claims considered, but, as such parties are not complaining, it is unnecessary to set out the proceedings in this case. Cheeney, the defendant in error, also filed claims and objections, which are set out in the record as follows:

"*State of Nebraska, Dakota County—ss.*

"*To the Honorable Board of Commissioners of Dakota County, Nebraska:* In the matter of a certain ditch or drain proposed to be made in the said county of Dakota, your petitioner, William Cheeney, most respectfully enters the following objections: (1) That the said improvement or ditch is not for the public benefit, and the statute under which the proceedings for the construction of said ditch was instituted is unconstitutional and void; (2) that the assessments on the lands to be drained by said ditch are not in proportion with the benefits derived by the construction of said ditch; (3) that the ditch or drain proposed to be built is larger than required for the draining of the lands to be benefited, and does not drain all the lands assessed; (4) that the land owned by your petitioner, to-wit: the S. E. ¼ of the N. W. ¼, and N. E. ¼ of the S. W ¼, and N E. ¼ of the S. E. ¼, and the N. W. ¼ of the S. E. ¼, and S. W. ¼ of the S. E. ¼, of section 22, town 28, range 8 east, is now in pasture, and does not require to be drained, and such a drain or ditch would be a damage to said land. WILLIAM CHEENEY.

"*Filed May* 13, 1885."

His objections were overruled, and the ditch completed.

On the twelfth day of May, 1886, Cheeney filed his petition in error in the district court of Dakota county to reverse the aforesaid order in regard to said ditch by the county board, in which he made 13 assignments of error. On the hearing of the cause the court found "that there is error in said judgment and proceedings in this: because said board of commissioners had no

jurisdiction of the subject-matter in controversy, and no authority to make the order therein made, or the judgment therein rendered." The court thereupon entered judgment reversing the order of the board. The county brings the cause into this court by a petition in error. The only question before this court is whether or not the county board had jurisdiction of the subject-matter.

Section 4, art. 1, c. 89, Comp. St., provides that "a petition for any such improvement shall be made to the board of commissioners of the county, signed by one or more owners of lots or lands which shall be benefited thereby, which said petition shall be filed with the county clerk, and shall set forth the necessity of the proposed improvement, and describe the route and *termini* thereof with reasonable certainty, and shall be accompanied by a good and sufficient bond, signed by two or more sureties, to be approved by the county clerk, conditioned for the payment of all costs that may occur in case said board of county commissioners find against such improvement."

Section 5 provides that "the county clerk shall deliver a copy of said petition to the board of county commissioners at their next meeting, who shall thereupon take to their assistance a competent surveyor or engineer, if in their opinion his services are necessary, and at once proceed to view the line of the proposed improvement, and determine, by actual view of the premises along and in the vicinity thereof, whether the improvement is necessary, or will be conducive to the public health, convenience, or welfare, and whether the line described is the best route, and they shall report their finding in writing, and order the clerk to enter the same on their journal."

"Sec. 6. If the commissioners, upon actual view, find that the route proposed is not such as to best effect the object sought, they shall change the same, and establish the route and determine the dimensions of the proposed improvements; provided any change so made shall not, in any case, exceed one hundred and sixty rods from the route described in the petition.

"Sec. 7. If the board of commissioners find for the improvement, they shall cause to be entered on their journal an order directing the county surveyor, or an engineer, to go upon the line described in said petition, or as changed by them in accordance with section six, and survey and level the same, and set a stake at every hundred feet, numbering down stream; note the intersection of section lines, road crossings, boundary lines, precinct and county lines, and make a report, profile, and plat of the same, and estimate the number of cubic yards for each working section as hereinafter provided.

"Sec. 8. The commissioners shall also, by their order, direct the surveyor or engineer to make and return a schedule of all lots, lands, public or corporate roads or railroads, that will be benefited by the proposed improvement, whether the same are abutting upon the line of the proposed improvement or not, and an apportionment of a number of lineal feet and cubic yards to each lot, tract of land, road, or railroad, according to the benefits which will result to each from the improvement, and an estimate of the cost of location and construction to each, and a specification of the manner in which the improvement shall be made and completed."

There are other provisions of the statute to which it is unnecessary to refer.

The bond required by the statute was given, and duly approved and is set out in the record. The principal objection made by the defendant in error is that the board did not find that the petitioners were owners of land to be affected by the proposed ditch. This fact, however, may be gathered from the petition, and the statute does not make a finding of that kind jurisdictional. If the petitioners were not owners of land affected by the ditch, the defendant in error should have made his objections to the board, and thereby call their attention to the fact that they were proceeding without jurisdiction. His failure to make such objection to the board is strong evidence that he could not

truthfully so allege. The jurisdictional facts are—*First*, the petition signed by one or more land-owners to be affected by the proposed ditch; *second*, the undertaking required by the statute; *third*, that the proposed improvement is necessary, and will be conducive to the health, convenience, and welfare of the public; and, *fourth*, the statutory notice. All these facts sufficiently appear in the record of the county board, and were sufficient to give them jurisdiction. If errors occur in the proceedings, they may be corrected in the mode pointed out by the statute. A party, however, who objects to the construction of a proposed ditch upon the ground of want of jurisdiction of the board, should proceed with reasonable promptness in asserting his objections. He should not wait until the ditch is completed, and be enabled to receive all the benefits to be derived therefrom, before asserting such want of authority.

The district court erred in reversing the order of the county commissioners, and its judgment is reversed, the order of the board reinstated, and the cause remanded for further proceedings. Judgment accordingly.

(The other judges concur.)

WOOLMAN *v.* WIRTSBAUGH.

(*Supreme Court of Nebraska.* November 23, 1887.)

1. DAMAGES—MEASURE—FRAUD IN SALE OF LAND—DUTY OF COURT TO INSTRUCT.
   In an action by a purchaser against a seller for falsely representing that the boundaries of land offered for sale included certain level land pointed out by the seller, it is the duty of the court to instruct the jury as to what constitutes the particular damages claimed in that case, and a general instruction that, if the jury find the plaintiff has sustained damages, they may find a verdict in his favor, is calculated to mislead.
2. SAME—MEASURE OF DAMAGES.
   Where real estate is purchased on the personal representations of the seller, and such representations are false as to the location of the property, the measure of damages is the difference in value between the property as represented and as it actually is.

(*Syllabus by the Court.*)

Error from district court, York county; NORVAL, Judge.

France & Harlan, for plaintiff. *Scott & Gilbert* and *J. F. Hale*, for defendant.

MAXWELL, C. J. The defendant in error brought this action in the court below to recover of the plaintiff the sum of $500 damages, which he alleged he sustained by reason of false representations made in the sale of 80 acres of land in York county. The plaintiff was agent for one Elom G. Fay, who was the owner of the land so sold and conveyed to defendant; the sale being made in November, 1883. It is alleged in the petition that plaintiff in error represented that said 80-acre tract contained a strip of land, which, in reality, is situated on the west side of said land, and which strip of land contained 24 acres, and is a smooth and level piece of land, worth at least $500, and damages in that sum are claimed. The answer is a general denial. On the trial of the cause, a verdict was returned in favor of Wirtsbaugh for the sum of $200, upon which judgment was rendered.

The testimony of Wirtsbaugh tends to show that Woolman pointed out the boundaries of the land in question to him, and that the western line so pointed out included 20 to 24 acres of smooth land, which was afterwards found not to be included in said 80-acre tract; while the testimony of Woolman is that he did not know the exact boundaries of the land, and so informed Wirtsbaugh, and that he pointed out what he supposed to be approximately the western boundary; that they had found the north-east corner of the land, and drove, as they supposed, to about the west line of the land, without knowing definitely where it was located; and that he so informed Wirtsbaugh.

The court instructed the jury that "if you find from the evidence that the defendant Woolman, at or prior to the time of the sale of the land in question, told the plaintiff, Wirtsbaugh, he knew where the boundaries of said land were, and then represented to the plaintiff where the western boundary line of said land was, and that said representation was false, and that the plaintiff then relied upon said representation, and was induced thereby to make the purchase of said land, and has sustained damages by means thereof, then you should find for the plaintiff." This instruction is entirely too general in its statements, and left the jury without any guide as to the character of the alleged damages, if they found such to exist, for which they might award damages. *Wasson* v. *Palmer*, 13 Neb. 378, 14 N. W. Rep. 171; *Ballard* v. *State*, 19 Neb. 619, 28 N. W. Rep. 271. The court therefore erred in giving the instruction.

The court also gave the following instruction: "If you find for the plaintiff, the measure of damages would be the difference, if any, between actual market value of the 80 acres of land conveyed at the time of the sale, and the actual market value at that time and place of a like quantity (80 acres) of the average quality of the 104 3-4 acres." This instruction is clearly erroneous, and calculated to mislead the jury, as it left them at liberty to make the comparison of values upon an entirely different tract of land. In no event could the measure of damages exceed the difference in the value of the land as alleged to have been represented, and as it actually is.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

(The other judges concur.)

WALGAMOOD v. RANDOLPH.

(*Supreme Court of Nebraska.* November 23, 1887.)

1. PARTNERSHIP—ACTION BY—PROOF OF PARTNERSHIP.
   Where a promissory note payable to order is indorsed by the payee, and transferred to two persons, who bring an action thereon as "H. & A. F. Randolph, partners," etc., *held*—*First*, that the testimony tended to sustain the allegations of partnership: *second*, that H. & A. F. Randolph, being the lawful holders of the note, if not partners, could in their individual names maintain an action thereon as "H. & A. F. Randolph."
2. ACTION—NAMES OF PLAINTIFFS—INITIALS.
   Where an action is brought by parties by the initials of their Christian names, instead of the names, the remedy of the adverse party is by motion to require the full Christian names to be set out in the pleading, and, unless such objection is made, it will be waived.

(*Syllabus by the Court.*)

Error from district court, Fillmore county; MORRIS, Judge.

J. W. Eller and *John Barsby*, for plaintiff. *G. D. Mathewson*, for defendant.

MAXWELL, C. J. This action was brought by H. & A. F. Randolph, before a justice of the peace in Fillmore county, on a promissory note of which the following is a copy:

"No. 478. FAIRMONT, FILLMORE CO., NEB., July 17, 1876.

"On or before the first day of October, 1878, I promise to pay Palmer, Stewart & Co. or order one hundred dollars, payable at Fairmont, Neb., for value received, with interest at the rate of 10 per cent. per annum from date. * * * CHRIS WALGAMOOD."

A contract is attached to said note that is not involved in this case, and need not be set out.

Walgamood filed a motion before the justice to dismiss the action—*First*, because no legal service of summons had been made on him; *second*, that no

legal summons had issued in said cause,—which motion the justice sustained, and dismissed the action, at the cost of plaintiff below. The case was taken on error to the district court, where the judgment of the justice was reversed, and the case retained for trial. After the reversal of the judgment, and while the cause was pending for trial in the district court, a motion was filed to substitute Ella Randolph in place of H. & A. F. Randolph as plaintiff, and order of substitution was made, by consent of parties, and on the trial of the cause a verdict was returned in favor of Ella Randolph for the sum of $198.56, upon which judgment was rendered.

The only defense to the action was that, H. & A. F. Randolph having brought the action as partners, the testimony fails to establish the partnership. It is sufficient to say that there is some testimony tending to show such partnership, and none whatever tending to disprove that fact. The jury, therefore, were warranted in finding, as they seem to have done, that such partnership existed. But, if there had been a failure to prove that H. & A. F. Randolph were partners, it would not be fatal to a recovery, the action being brought in their individual names. It is true that their Christian names are not given, but merely initials thereof; and while the defendant below, by motion, might have required the plaintiffs below to amend the petition by setting out their Christian names, the failure to do so will be held to be a waiver of that right.

These parties were, so far as it appears, the lawful holders of the note. It had been indorsed by the payee, and was thereafter transferable by delivery; and a judgment on the note in favor of such parties would protect the defendant below, upon paying the same, from further liability on the note. Therefore he could not be injured by such judgment, and, the transfer having been made to Ella Randolph before judgment was rendered, she is entitled to recover.

No valid defense has been shown to the action, and the judgment is clearly right, and it is affirmed.

(The other judges concur.)

SMITH *v.* BORDEN.

(*Supreme Court of Nebraska.* November 23, 1887.)

1. APPEAL—FROM JUSTICE'S COURT—APPEARANCE.
   A party who has appeared in an action before a justice of the peace, and entered into an agreement continuing the cause, may appeal from the judgment rendered against him before such justice. *Cleghorn* v. *Waterman*, 16 Neb. 230, 20 N. W. Rep. 636, 877; *Crippen* v. *Church*, 17 Neb. 306, 22 N. W. Rep. 567.
2. SAME—TIME OF FILING TRANSCRIPT.
   Under section 1008 of the Code as it existed in 1885, a party appealing from the judgment of a justice of the peace had until the second day of the succeeding term of the district court in which to file the transcript, and the plaintiff had 20 days thereafter in which to file his petition. Therefore, where an appeal has been properly taken by a defendant, a motion made by him on the first day of such term to dismiss the cause for want of prosecution was premature, and should have been overruled.

(*Syllabus by the Court.*)

Error from district court, Harlan county; GASLIN, Judge.

John Dawson, for plaintiff. *F. B. Beall* and *J. E. Bush*, for defendant.

MAXWELL, C. J. In April, 1885, the plaintiff filed his bill of particulars before one Henry Wilcox, a justice of the peace in Harlan county, claiming from defendant the sum of $12.90, with interest from October 13, 1884, for goods sold and delivered to said defendant by David Bros. & Co., which account was assigned to plaintiff. The cause coming on for trial on the twenty-seventh day of April, the parties appeared by their respective attorneys, and the case was continued by consent to the twenty-seventh day of May. On

that day, defendant failing to appear, and plaintiff appearing by his attorney, judgment by default was taken against defendant in the sum of $13.25, and costs, taxed at $4.70. The defendant then took the case to the district court of said county on appeal. Plaintiff thereupon filed a motion in said court to quash the appeal, for the reason that the defendant did not appear at the trial of the cause in the court below. The motion was overruled, to which plaintiff excepted, and on the first day of the next term the defendant filed a motion in said court to dismiss the action for want of prosecution. The motion was sustained, and judgment rendered against the plaintiff for costs,—to all of which the plaintiff excepted, and now brings the cause into this court by petition in error.

The motion to quash the appeal was properly overruled. In *Clendenning* v. *Crawford*, 7 Neb. 474, it was held that, to entitle a party to appeal, he must have appeared before the justice, and tried the cause upon the merits. This decision was followed in a number of cases. The opinion in the case cited was written by Judge GANNT, and concurred in by the entire court. In *Cleghorn* v. *Waterman*, 16 Neb. 230, 20 N. W. Rep. 636, 877, and *Crippen* v. *Church*, 17 Neb. 306, 22 N. W. Rep. 567, however, it was held by a majority of the court that a party who had appeared on the trial might appeal although he had not tried the case on the merits. These later decisions practically overrule that of *Clendenning* v. *Crawford*, and are to be followed. The court did not err, therefore, in overruling the motion to quash the appeal.

The court erred in sustaining the motion to dismiss the action. Section 1008, Code 1885, provided that "the said justice shall make out a certified transcript of his proceedings, including the undertaking taken for such appeal, and shall, on demand, deliver the same to the appellant or his agent, who shall deliver the same to the clerk of the court to which such appeal may be taken, within thirty days next following the rendition of such judgment; and such justice shall also deliver or transmit the bill or bills of particulars, the depositions, and all other original papers, if any, used on the trial before him, to such clerk, on or before the second day of such term; and all other proceedings before the justice of the peace in that case shall cease and be stayed from the time of entering into such undertaking." Under this statute the appellant had until the second day of the succeeding term to file his transcript, (*Roesink* v. *Barnett*, 8 Neb. 149; *Monell* v. *Terwilliger*, 8 Neb. 363, 1 N. W. Rep. 246; *Rich* v. *Stretch*, 4 Neb. 188,) and the plaintiff had 20 days thereafter in which to file a petition. The plaintiff not being in default, the court erred in sustaining the motion to dismiss.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings.

(The other judges concur.)

STATE v. SNEFF.

(*Supreme Court of Nebraska.* November 23, 1887.)

1. BURGLARY—PRIOR KNOWLEDGE BY OWNER.
Where the proprietor of a building hears of an intended burglary to be committed by breaking into such building, and does not prevent it, but puts a force in the building to capture the burglar, and does not effect his capture, this does not affect the guilt of the burglar.

2. SAME—DECLARATIONS OF DEFENDANT.
A person to whom one, intending to commit burglary, confides such intention, and procures such person to promise to act as accomplice, is a competent witness to prove the declarations and acts of the party committing the offense; the credibility of such witness being a question for the jury.

3. SAME—EVIDENCE—DIRECTING VERDICT.
Where there is testimony from which the jury would be warranted in finding that a person indicted for burglary committed the offense, it is error for the court to direct the jury to acquit.

(*Syllabus by the Court.*)

Exceptions from district court, Richardson county; BRODY, Judge.
Edwin Falloon, for plaintiff. No appearance *contra*.

MAXWELL, C. J. The defendant was indicted by the grand jury of Richardson county of the crime of burglary by breaking into the B. & M. Railroad station at Humboldt.

On the trial of the cause, the court instructed the jury as follows:

"*Gentlemen of the Jury:* You are directed to return a verdict of acquittal in this cause, for the reason that the evidence is too clear that this man Bayliss was under the direction of the railroad company's agent, when he was pretending to be in collusion with this defendant, and going with him to commit this crime. He was under their direction to further the perpetration of the act, and present giving encouragement at the time it was done; which in law, I think, shows a consent on the part of the owner of the property. And there is not enough evidence to the contrary to submit the question of fact to the jury. The law being, if the owner of the property consent, it is not a crime for which he can put a party in the penitentiary; to make it a crime the act must be without the consent of the owner. Such methods are very useful, and generally used, for ferreting out past offenses, but cannot be used in this way. They may be used for the purpose of aiding in investigating and ascertaining the perpetrator of past offenses, but are not useful for the purpose of making new offenses, or the punishment of new offenses; for the policy of the law is to stop crime, and not to permit one to commit a crime when he otherwise would not do it."

The district attorney excepted to the instruction. The jury rendered a verdict of acquittal, and the defendant was discharged. The prosecuting attorney, for the purpose of settling the law, brings the cause into this court on error.

One James Bayliss, called as a witness by the state, testified:

"Do you know the defendant, James Sneff? I saw him once or twice, I believe.

"How long have you known him? Well, since last fall; I cannot just state the time.

"Ever since last fall? Since he came to Humboldt; I don't just exactly know the month and day.

"Were you in company with Sneff on the night of the thirteenth of November, 1886, in Humboldt, Nebraska? I cannot say about the date, but it was about that time.

"What proposition did he make to you? He made a proposal that he would get into the depot, and get some money, if I would watch for him.

"About what time was that? I could not swear to the day; I paid no attention to it.

"Can you state the month? No, sir; I cannot tell.

"Was it in 1886? Yes.

"Was it in the fall? It was.

"Was it in October or November? I could not say for certain.

"What proposition did he make to you? Tell about it, and what he did. Well, the first time I ever spoke to the man he walked up to me as I was standing on that corner of the depot, and he asked to borrow two dollars of me, and told me he could make two hundred out of it between that time and to-

morrow. I says 'I have no money to loan; but if you are busted, and want work, I will tell you where you can get it.' I told him he could get work of Feagle out in the country shucking corn; he said he would not work. He turned around and went into the depot, and I came back and walked along, and he was fumbling with the money-box. That was between 12 and 1 o'clock, day-time.

"What other proposition did he make to you? He made the proposal, if I would watch, he would get some money out of the money-drawer in the station-house at Humboldt.

"In this county and state? Yes.

"What did you say to him? I told him I was not in that kind of business.

"Who did you communicate this information to? As soon as he and I went up town I came back and told Aiken, the station agent at Humboldt.

"Then what did you do? I went back up town. Aiken told me to aid and watch him, and, if he wanted to do it, to watch, and they would catch him in the act; and that between five and six, when the freight trains come down, he was to break in, and I was out on the road watching for him, and he and some more men were in the station house watching for him too. He said they didn't leave the waiting-room door open as they had done, and he would not break in. So he came back, and we went up town; he went to town, and I went home.

"What time was that? Between six and seven o'clock in the evening, and I went over to a house in sight of the depot, and Cooper and some more men came over, and I says to them, I says, 'Cooper, I am going to let that fellow go.' 'No,' Cooper says, 'you go up town, and, if he comes around you again, let him go ahead.' I went up town, and he came to me in a few minutes, and spoke to me again, saying that he knew the agents were both gone.

"What did you do then? I stayed around with him until some time the fore part of the night, and we went to the depot together, and he broke in.

"Did he raise the window, or did you? He did; I didn't have my hands on the window.

"How was it fastened? With a nail on the inside of the window.

"How did he raise it? He raised it with a railroad spike.

"Then what did he do? He went into the office.

"How was the window fastened with a nail? I cannot say positively how it was fastened, but the window was nailed down, and the nail was broken, and laying on the outside.

"Where was it driven on the inside? I don't know where it was driven; it looked as if it was driven into where the catch was.

"It fastened the lower sash down, did it? Yes.

"Tell what Sneff did then. He went in, and when he went in I went back to the corner, and then they came upon him, and he jumped out of the window, and they took him.

"Did you make an examination of the station-house after they caught Sneff? Not until the next morning.

"Did you make an examination of everything he did in there? I didn't see anything he did, except where he tried to open one drawer. I don't know what was in it,—a drawer where they kept something.

"Where was that? In the station-room.

"Whereabouts in the station-room? About the second box, I think, from the ticket window.

"A money drawer, was it? I don't know what they kept in it.

"Was there any marks upon it? Yes, there were marks of a spike where he tried to pry it open.

"Did you ever talk to Sneff after the action was committed? Yes.

"What did he tell you? He said he believed it was a put-up job.

"What did he say he went in for? For money; that was his purpose.

"What did he say afterwards? He didn't say anything about it afterwards, much.

"What time of night was this? I think between 11 and 12, the fore part of the night."

The other testimony in the case tends to corroborate this, and there is no testimony to the contrary. So far as appears, there was no consent on the part of any one having charge of the station to the defendant breaking into the same. The fact that those in charge of a building hear of an intended burglary, to be committed by breaking into the same, do not prevent it, but put a force in the building to capture the burglar, and he is so captured, does not affect the guilt of such burglar. *Thompson* v. *State*, 18 Ind. 386. Whatever may be thought of the course of the witness Bayliss in professing to be a friend of the accused, while conspiring to betray him, and however despicable this conduct may appear, these matters merely affect his credibility before the jury. He is a competent witness to testify as to any matter that transpired between the accused and himself, provided such matter is competent. But the degree of reliance to be placed upon his testimony is a question for the jury.

In *State* v. *Jansen*, 22 Kan. 498, which is similar in some respects to the one under consideration, where an alleged detective assisted the accused to commit the offense, it was held that the question whether the proprietor consented to the entry of the defendant was for the jury to determine, from the testimony in the case.

In our view, the court should have submitted to the jury the question whether or not the railroad company consented to the defendant's entering the building in question, and erred in directing the jury to acquit the accused. Judgment accordingly.

(The other judges concur.)

OMAHA MEDICAL COLLEGE *v.* RUSH and another.

(*Supreme Court of Nebraska.* November 16, 1887.)

1. TAXATION—EXEMPTION—MEANING OF WORD "SCHOOL."
   The word "school," in section 2, art. 1, c. 77, Comp. St., means an institution of learning, and is not limited to the lower grades of schools.
2. SAME—WHAT PROPERTY EXEMPT.
   Property used exclusively as an institution of learning is not subject to taxation while thus used.

(*Syllabus by the Court.*)

Appeal from district court, Douglas county; WAKELEY, Judge.

Savage, Morris & Davis, for plaintiff. *J. C. Cowin* and *J. L. Webster*, for defendants.

MAXWELL, C. J. This is an action to enjoin the collection of certain taxes levied upon the property of the plaintiff in 1882. On the trial of the cause in the court below, judgment was rendered in favor of defendants. The plaintiff appeals.

The plaintiff alleges in his petition that it "is a corporation, duly incorporated under the laws of the state of Nebraska for the purpose of organizing and maintaining a school for the teaching of the science of medicine and surgery; that for the purpose of the better promotion of the objects for which it was incorporated, it secured the title, on or about the twenty-eighth day of June, 1881, and now owns and occupies, lots 1 and 2 in block 230 in the city of Omaha, as surveyed and lithographed, and erected thereon for the exclusive use of said school, and for the promotion of the objects thereof, a large building, and the necessary adjuncts thereto; that the said building is located and built upon both of said lots, and that the said lots are no more than is necessary and required for said purposes; that since the erection of said building upon said

lots the same have been occupied and used exclusively for the purposes of said school; that the said building was erected on said lots, and completed ready for use on or about the month of September, 1881, and has ever since that time been devoted solely and exclusively to the use of said school; that in the year 1882 the said lots, with the said buildings thereon, were placed by the commissioners of said county, or under their direction, upon the tax-list of said county, and that they levied thereon state, school, and county taxes to the amount of $41.40 for the said year of 1882, and that the city authorities of said city caused said lots to be entered upon the tax-lists of the city of Omaha for said year, and levied thereon taxes to the amount of $54 for city purposes of said city of Omaha for said year of 1882; that the said John Rush is county treasurer of said county of Douglas, duly elected and qualified, and that the said Truman Buck is the city treasurer of said city of Omaha, duly elected and qualified; that the said taxes so levied as aforesaid for city purposes for the year 1882 not having been paid, and the same having become delinquent, the said defendant Truman Buck, as city treasurer as aforesaid, returned the said lots above described in the delinquent list which he was by law required to make out and return to the county treasurer of said county, for the purpose of enforcing said city taxes, together with the state, county, and school taxes so levied as aforesaid, by the sale of said lots, and the said defendant John Rush, as county treasurer as aforesaid, now holds said delinquent list, and threatens to sell the said lots for said delinquent city taxes for said year 1882, and also threatens to sell said lots for the delinquent state, county, and school taxes so levied as aforesaid for said year 1882, the said state, county, and school taxes not having been paid, but having become delinquent, and plaintiff fears that the said defendant John Rush, as such county treasurer, will, unless restrained by the injunction of this court, sell said real estate for said delinquent taxes, and thereby cast a cloud upon the title of the plaintiff thereto; that the said lots are exempt from taxation under the constitution and laws of this state," etc. There are other allegations in the petition to which it is unnecessary to refer.

The defendants in their answer deny that said premises are occupied as a school for the purpose of teaching the science of medicine and surgery, and allege that it is incorporated as a joint-stock company for the purpose of establishing a medical college, and has issued shares of stock, and that the property is used for the purpose of a medical college and other purposes, and that all students pay a certain amount each term for their instruction.

On the trial of the cause one Dr. R. C. Moore testified: "I am a physician and surgeon. Am president of the board of trustees of the Omaha Medical College. The college owns the property described in the petition, on which is the college building. It is used for a medical college for instruction in medicine; for nothing else. The company owns the property. It is not occupied for anything more than the necessary services or usages to which a medical college is usually put."

On cross-examination he testified: "The admission, tuition, and instruction of the students are regulated by the board of trustees by resolution; also the ordinary transaction of business, the fees, the announcements, etc. We issue an announcement every year. Do not know whether I have one for the year these taxes were levied or not; think I have one at my office. It was the same as in 1883. It was then used as a medical college. In conducting the medical college we take any man who is the proper age, and has the proper educational qualifications, as a student. They pay a matriculation fee of $5; that is the entrance fee. Then we have lecture fees,—$35 per term. The term usually commences about the first of October, and closes in March. From March until October the building was not used at all. Some years we have a person to live there merely to look after the property, but it is not rented. It has never been rented for any purpose. Virtually, it lies idle

from March until October. From October until March it is used for medical instruction. That has been our way ever since the institution was opened. We have two lecture rooms. They are for lectures for the students only. We have a chemical laboratory. Then we have a museum room and the janitor's room, the faculty's room, and the dissecting room for the professor to prepare his subject, and a general dissecting room for the students. The dissecting rooms are not used for the private benefit of the medical fraternity; they are used only for the benefit of the students. It requires three years to graduate. The matriculation fee is paid but once; the other fees annually. The student also pays $10 for a dissecting ticket, and $5 for a hospital ticket. That gives him the privilege of clinics in St. Joseph's hospital, and goes to the hospital. We furnish the material for dissection. We furnish it at cost to the students. We get a body, and keep an account of what it costs, and each student pays his share for what we expend on the subject. The whole institution is used for these purposes. Each professor furnishes his time; we get no pay for it. The instruction, in a general way, consists of teaching the science of medicine and surgery in all its branches. The fees are used for paying the expenses of the institution, the janitor, fuel, and running expenses of the college; the professors receive no part of them. When we first opened we had to bring here a professor of chemistry, and had to pay him a salary for lecturing. That was paid out of the proceeds of the college. He is the only man that has ever been paid. No professor ever had an office in the building. We have chairs in our amphitheater for about eighty students, and in our dissecting room could accommodate about forty or fifty. The average attendance has been about thirty. We never have paid any dividends on stock; none of the money received from the students has been used to pay a dividend to the stockholders."

This is all the testimony in the case, except the articles of incorporation.

Section 2, art. 1, *c.* 77, Comp. St., provides that "the following property shall be exempt from taxation in this state: *First*, the property of the state, counties, and municipal corporations, both real and personal. *Second*, such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes."

The sole question for determination is, was the property in question, at the time the tax was levied, used exclusively for school purposes? The first definition of the word "school" given by Webster is: "A place for learned intercourse and instruction; an institution for learning; an educational establishment; a place for acquiring knowledge and mental training." The defendants contend, with considerable earnestness, that the "school purposes" mentioned in the statute apply only to the lower grade of institutions of learning, and do not include higher institutions like colleges. We can see no good reason for thus limiting the meaning of the word "school." An examination of any work in which the subject is fully discussed, will show that the word, in its broad sense, is applied to any institution of learning; and it evidently is used in that sense in the statute. The exemption, therefore, applies to any institution of learning used exclusively for school purposes. The exemption is expressly declared in the statute, and the court should not, without good reason, limit or restrict the right. The property in question, therefore, was exempt from taxation for the year named, and the injunction should have been granted.

The judgment of the district court is reversed, and judgment in favor of the plaintiff will be entered in this court. Judgment accordingly.

(The other judges concur.)

STATE *ex rel.* SOCIETY FOR SAVINGS, etc., *v.* DAKOTA CO.

(*Supreme Court of Nebraska.* November 16, 1887.)

COUNTIES—BONDS—COMPROMISE—REISSUE—ESTOPPEL.

On January 1, 1876, the county of D. issued and delivered to the C. C. & B. H. Ry. Co. its negotiable 10 per cent. coupon bonds for the sum of $95,000; that being more than 10 per cent. of the assessed valuation of the county. These bonds were duly registered and certified by the county clerk of D. county, and by the secretary and auditor of state; afterwards the county refused to pay the interest, and an action was instituted against it in the circuit court of the United States, for the purpose of collecting the interest due on the coupons. The defense of the illegality of the bonds, owing to the excessive issue, was interposed, but the bonds were held valid in the hands of a *bona fide* purchaser for value, and judgment was rendered against the county. No proceedings in error or appeal were then taken for the purpose of obtaining a review of that judgment. The county board then agreed with the holders of the bonds to execute to them 20-year 6 per cent. refunding bonds, to be substituted for the bonds of 1876, under the provision of the act of February 28, 1883. The refunding bonds were executed, and certified by the county clerk, but the secretary and auditor of the state refused to register them, or to certify that they were lawfully issued; alleging that such was not the fact. The county then applied to the supreme court for a *mandamus* to compel action by the state officers, and judgment was obtained in favor of the county, awarding the writ, and compelling the certification and registry. After they were certified and registered by the state auditor, the county exchanged them for the original bonds of 1876, and the interest accrued thereon, and destroyed the original bonds. In an action to enforce the payment of the interest accrued on the refunding bonds, *held*, that the county was estopped to deny their validity in the hands of a *bona fide* holder for value; following *State* v. *Wilkinson*, 31 N. W. Rep. 376.

Mandamus.

J. M. Woolworth, for relator. *Poppleton & Thurston*, for respondent.

MAXWELL, C. J. This is an application for a writ of *mandamus*, to compel the defendants to pay certain coupons of the refunding bonds of Dakota county. On motion of the respondents, a proper petition and bond having been filed, the cause was removed to the United States circuit court of this state, and by that court remanded to this court, for want of jurisdiction. The questions involved are identical with those decided by this court in *State* v. *Wilkinson*, 20 Neb. 610, 31 N. W. Rep. 376; and as, in our view, that decision states the law correctly, it will be adhered to. A peremptory writ will issue, as prayed for in the petition, commanding the payment of the amount due on the unpaid coupons. Judgment accordingly.

(The other judges concur.)

EBY *v.* RYAN.

(*Supreme Court of Nebraska.* November 23, 1887.)

1. MORTGAGES—FORECLOSURE—EXTENSION OF TIME.

E. executed to R. a real-estate mortgage to secure the payment of a promissory note at maturity. Subsequent thereto, upon a sufficient consideration, R. extended the time of payment to five years from the time of the maturity of the note. Prior to the expiration of the extended term, R. brought suit for the foreclosure of the mortgage, but in his petition made no reference to the agreement for extension, nor alleged any default thereunder. T. & C. D. R., subsequent purchasers who were made defendants, answered, setting up the extension, and their purchase on the faith thereof. R. demurred to these answers as not containing facts sufficient to constitute a defense. *Held*, that the averments of the answers were sufficient to constitute a defense.

2. SAME—EFFECT OF EXTENSION.

A new agreement upon a sufficient consideration, extending the time of the payment of a note and mortgage to a day certain, has the effect in equity of modifying the original condition of the mortgage to the same extent as if the terms of the new agreement were incorporated into the condition, and where it is claimed

that a default has occurred after the extension, by which the mortgagor would be entitled to foreclosure, such default should be alleged in the petition, in order to state a cause of action.

(*Syllabus by the Court.*)

Error from district court, Dakota county; CRAWFORD, Judge.

M. C. Jay and *W. E. Gautt*, for plaintiff. *Joy, Wright & Hudson*, for defendant.

REESE, J. This action was commenced in the district court by defendant in error for the foreclosure of a real-estate mortgage given by James B., M. A., and Louis R. Eby to secure the payment of their joint promissory note for the sum of $2,000. The note was executed on the eighteenth day of November, 1881, due five years after its date, with interest at 10 per cent. per annum, payable annually. The mortgage is in the usual form, and contains a provision that if the interest "is not paid when the same is due, then and in that case the whole of said sum and interest shall, and by this indenture does, immediately become due and payable."

The action was instituted on the twenty-fourth day of January, 1887. It is alleged in the petition that no part of the note has been paid, except the interest thereon up to the eighteenth of November, 1884. A decree is prayed for the amount due upon the note. The other defendants are made parties to the suit, as having acquired an interest in the property subsequent to the execution of the mortgage, and a foreclosure of such interest is also demanded.

Defendant Horatio R. Taylor filed his separate answer, admitting the execution and delivery of said note and mortgage, and that nothing but interest to November 18, 1884, had been paid on said note, and for further answer alleges "that on or about the second day of November, 1885, James B. Eby and Louis R. Eby, defendants herein, and Horatio R. Taylor, this defendant, entered into an agreement in writing concerning the sale of the milling property described in the plaintiff's petition. That said agreement was filed in the office of the clerk of Dakota county, Nebraska, and recorded in Book A, page 302, of ———, and a copy of said agreement, marked 'Exhibit A,' is hereunto attached, and made a part of this answer. By the conditions of said agreement, the above-named James B. Eby and Louis R. Eby, for and in consideration of certain things hereinafter mentioned to be performed by this defendant, agreed to assume as their own debt the mortgage now held by John Ryan against the milling property aforesaid; and if they cannot pay the mortgage off, and have the same canceled on the records, they agree to get an extension of the mortgage for five years. That in pursuance of said agreement the said James B. Eby and Louis R. Eby procured and obtained from John Ryan, plaintiff herein, an extension in the words and figures following, to-wit:

"'I agree to extend the time on a mortgage and note I hold against the Eby Bros.' mill property for three years from the time it is due, providing certain improvements that are now on record on the county records between Eby Bros. and Horatio R. Taylor, are done on said mill property.

"'JOHN RYAN.'

"That this defendant has performed the conditions on his part to be performed, as required by said article of agreement, to-wit: To put in the mill on said property above described three double sets of rollers, and machinery necessary in addition, to put the mill in such condition that it will make and manufacture a good grade of flour, and that the said H. R. Taylor shall place the mill in a condition that it will manufacture a good grade of flour within six months from the date of this contract. That in pursuance of the said article of agreement, the deed held in escrow (according to contract between Eby Bros. and H. R. Taylor) was delivered to this defendant, and filed for record on the nineteenth day of April, 1886, and recorded in Deed Book

O, page 285. That after the conveyance of the undivided one-half interest in the mill property aforesaid, by a deed of general warranty from James B. Eby, M. A. Eby, and Louis R. Eby to Horatio R. Taylor, this defendant, the defendants James B. Eby, M. A. Eby, and Louis R. Eby conveyed to Joseph M. Brannan and Cornelius D. Ryan all their right, title, and interest in and to the above-described property, by a deed of general warranty bearing date September 10, 1886, and recorded in the office of the clerk of Dakota county in Book O, page 412."

And on February 28, 1887, Cornelius D. Ryan filed his separate answer, setting up the same defense, and also alleging that he and Joseph Brannan purchased by warranty deed all the right of said James B. Eby, M. A. Eby, and Lewis R. Eby to the said real estate, and that their purchase was made in good faith, and on the strength of the agreement of plaintiff to extend the time of the payment of said note and mortgage.

The answers of defendants Hedges relate to a mistake in the description of the property in the mortgage, and have no further connection with this case.

May 9, 1887, plaintiff filed a general demurrer to the answers of H. R. Taylor and C. D. Ryan, which the court sustained, and, on proofs adduced, rendered a decree of foreclosure for the sum of $2,520.88. The defendant brings this case to this court by proceedings in error, and alleges that the court erred —*First*, in sustaining the demurrer to the answers of C. D. Ryan and Horatio R. Taylor; *second*, the court erred in its findings in said cause, for the reason that no facts are set forth in said petition on which to base the same; and, *third*, the court erred in rendering judgment for plaintiff, and against defendant.

The petition filed by defendant in error was in the usual form for declaring upon a matured note and mortgage. No reference is made to the agreement to extend the time of payment, and hence no reference to a failure on the part of plaintiffs in error to comply with the terms of the contract by which the time of payment was extended. The answers presented this issue. By them the contract of extension is pleaded, their reliance thereon at the time of their purchase, and that by the terms thereof the note has not matured. These allegations are admitted by the demurrer. The question then is: Do they present a defense to the case presented by the petition of defendant in error?

It is not contended, nor could it be, that there was not sufficient consideration to sustain the agreement to extend the time of the maturity of the note and mortgage. The time of payment being extended, the right to foreclose is suspended until the expiration of the extended term, unless default be thereafter made. The extension of the time of payment has the effect in equity of modifying the original condition of the mortgage to the same extent as if the terms of the new agreement were incorporated into the condition. *Insurance Co.* v. *Bonnell*, 35 Ohio St. 365. It follows that, if defendant in error had the right to foreclose the mortgage, it existed by virtue of some default occurring subsequent to the agreement for extension. This being true, the default should have been alleged in the petition. 2 Jones, Mort. § 1452. But this was not done. The answers set up the fact of the extension of time, and this was admitted by the demurrer. Therefore, on the face of the pleadings, there was no default, and hence no cause of action. The demurrer should therefore have been overruled.

The judgment of the district court is reversed, the demurrer overruled, and the cause remanded, with leave to defendant in error, in case the interest is not paid, to file an amended petition, upon payment of all costs. Reversed and remanded.

(The other judges concur.)

STATE *ex rel.* SIMERAL *v.* SEAVEY.

(*Supreme Court of Nebraska.* November 23, 1887.)

1. MUNICIPAL CORPORATIONS—CHIEF OF POLICE—APPOINTMENT.
The appointment of the respondent as chief of police of the city of Omaha by the board of fire and police commissioners appointed by the governor under section 145 of an act entitled "An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers, and government," approved March 30, 1887, under the facts and circumstances as set out in the answer, *held* a legal appointment within the scope and meaning of the said act.
2. SAME—CONSTITUTIONAL LAW—APPOINTMENT OF POLICE COMMISSIONERS BY GOVERNOR.
The provision of the above-mentioned act, whereby it is made the duty of the governor to appoint a board of fire and police commissioners for each city of the metropolitan class, *held* not to be repugnant to the constitution.

(*Syllabus by the Court.*)

Quo warranto.

E. W. Simeral, G. W. Ambrose, and *I. C. Cowin*, for relator. *George B. Lake*, for respondent.

COBB, J. This is an original proceeding in this court by Edward W. Simeral, county attorney of Douglas county, relator, against Webber S. Seavey, respondent. The complaint is, in substance, an information in the nature of a *quo warranto;* its general object, to obtain a judgment against the respondent upon his right to execute the office of chief of police of the city of Omaha. It alleges that the city of Omaha is a city of the metropolitan class; that, under and by virtue of the laws governing cities of the metropolitan class, there was appointed by the governor a fire and police commission, consisting of four persons; that the members of said board of fire and police commissioners, at and before the time thereinafter set forth, neglected and refused to enter into a good and sufficient bond for the faithful performance of their duties, as the ordinances of said city required, and long before any bond was approved by the authorities of said city said commissioners pretended to and did proceed to make appointments of firemen and policemen; that at the times thereinafter set forth no rules and regulations governing said board of fire and police commissioners had been prescribed by ordinance by the mayor and council of said city; that on the nineteenth day of May, 1887, said defendant was by said board of fire and police commissioners appointed chief of police of said city of Omaha, but that at the time of said appointment the bonds of said commissioners had not been approved by said city council, nor had any rules and regulations by ordinance been adopted by said council governing the removal and appointment of chief of police; and that said commissioners, without law or authority, removed Thomas Cummings, who at that time was acting as chief of police, and appointed in his stead said defendant, who, petitioner alleges, is now, and has been ever since his pretended appointment, wrongfully and unlawfully exercising and usurping the functions of said office; and that said council has never approved or confirmed the said appointment of said defendant as by law required.

By way of amendment, said relation also alleges that before the passage of the act entitled "An act to incorporate metropolitan cities," etc., approved March 30, 1887, the city of Omaha was a city of the first class, under the laws of the state of Nebraska then in force with respect thereto; that when said act relating to metropolitan cities took effect the city of Omaha had a police force and city marshal, as then provided by act with respect to cities of the first class, and ordinances of the city of Omaha thereunder; that the legislature adjourned *sine die* on the first day of April, 1887, and said legislature had not been in session since; that the said appointments made by the governor, as aforesaid, were made after the adjournment of said legislature, and the appointments were not made with the advice and consent of the sen-

ate; that the said appointments were therefore unconstitutional and void: that the offices to which said appointments were pretended to be made were original offices and original appointments, and not a vacancy or appointment to fill a vacancy; that the said pretended board of fire and police have appointed a large number of police for said city; that at the time of the pretended appointment and reappointment of said defendant herein, the said Cummings was acting as chief of police, and all other policemen continued in their office; and at the time of the pretended appointment and reappointment of said defendant, and the appointment of said policemen, there were no funds whatever provided by the mayor and council to pay the salary of said defendant, or the salary of said other policemen, and at no time since the passage of the act with respect to metropolitan cities have there been any funds whatever provided by the mayor and council to pay the salary of said defendant, or the salaries of said policemen; and that at the time of the appointment of the defendant, and of the other policemen, by said board, the mayor and council of said city, under the law, could not provide any funds to pay such salaries, as the full extent of their authority, when exercised in behalf of raising a police fund, realized only a sufficient amount to pay the salaries of the policemen then in office, and the number appointed by said board far exceeded the amount of funds for salaries which it is possible for the mayor and city council to provide under the law, etc.

The respondent entered a voluntary appearance and answered. I quote from the answer as the foundation of respondent's claim to the said office:

"*First.* He admits that, under and by virtue of the law of the state of Nebraska governing metropolitan cities, there was duly appointed by the governor of said state a fire and police commission, consisting of four persons, viz., L. M. Bennett, Christian Hartman, George I. Gilbert, and Howard B. Smith; and in this behalf the defendant alleges that under said law the mayor of the city of Omaha became and is *ex officio* a member and the chairman of said board; that shortly after their said appointment to said board, on the tenth day of May, 1887, the said Bennett, Hartman, Gilbert, and Smith, each took and subscribed an oath to support the constitution of the United States, the constitution of the state of Nebraska, and faithfully and impartially perform the duties of the office of commissioner of fire and police according to law, and to the best of his ability; and also that he would, to the best of his ability, discharge his duties as a member of the board of fire and police of the city of Omaha, and that in making appointments, considering promotions or removals, he would not be guided or actuated by political motives or influences, but would consider only the interests of the city, and the success and effectiveness of said departments of fire and police; that said oaths were filed with the city clerk of said city, May 10, 1887, whereupon said Bennett, Hartman, Gilbert, and Smith, together with the mayor of said city, organized said board, and entered upon the duties thereof, which they have ever since continued to perform.

"*Second.* That at the time of the appointment and qualification, as aforesaid, of the members of said board, there was no law or ordinance of said city requiring of them official bonds; that the first requirement of this kind was by ordinance of said city approved June 15, 1887; that immediately after the passage and approval of said ordinance, requiring such bonds, all of the said commissioners appointed as aforesaid gave good and sufficient bonds in exact compliance with the requirements of said ordinance; that the bonds of said Bennett and Hartman were approved by said city council on or about the ninth day of August, 1887, while those of said Gilbert and Smith were rejected for the sole reason that the names of the sureties who had signed the bonds, respectively, did not also appear in the body of those instruments as well; that, immediately upon the rejection of the bonds of said Gilbert and Smith for this technical reason, they each filed new bonds obviating said ob-

jection, and in all respects complying with the requirements of said ordinance in this regard; that notwithstanding these new bonds were duly presented to said city council, August 30, 1887, that body has failed, up to the present time, either to approve or reject them.

"*Third.* That while it is true, as relator alleges, that no rules and regulations for the government of said board of fire and police commissioners have been prescribed by an ordinance of said city, yet it is true that the said board of fire and police commissioners did, on the sixteenth day of May, 1887, prepare and adopt certain rules and regulations for the guidance of the officers and men of the fire and police department of said city, and for the appointment, promotion, removal, trial, and discipline of said officers and men, and such as said board considered proper and necessary; which said rules and regulations were by said board duly submitted to said city council for its action on the seventeenth day of May, 1887, but respecting which the said city council has, as yet, taken no action, either of approval or rejection.

"*Fourth.* That defendant was appointed chief of police of said city by said board, at or about the time alleged in the petition, and before the members of said board had given their bonds as aforesaid; that at the time he was so appointed he alleges there was no law requiring, as a requisite of qualification, that they should give bonds; nor was there any ordinance of said city to that effect till long after said appointment of defendant was made. And defendant also admits that the said city council has never appointed, or confirmed the appointment of, said defendant to said office of chief of police of said city, the duties of which he is now exercising under and by virtue of the appointment as aforesaid,"—with a general denial of all the other allegations of the petition.

There was no other pleading filed in the case, but the cause was argued at the bar as upon demurrer to the answer.

A general demurrer to the answer presents the following question: Was the appointment of the respondent by the board of fire and police commissioners of the city of Omaha to the office of chief of police of said city, under the facts and circumstances of the case, as set up in the answer, legal?

In discussing this question I will premise by saying that at the time of the passage and approval of the act entitled "An act incorporating metropolitan cities, and defining, regulating, and prescribing their powers and government," Omaha was a city of the first class, organized and existing under, and having for its charter, an act entitled "An act to incorporate cities of the first class, and regulating their powers, duties, and government," approved March 1, 1881, together with certain amendments thereto,—all constituting chapter 13, Comp. St. 1885.

The act first above referred to was not an amendment, but an independent statute, designed to be perfect in itself, and by its 173d section repealed the act last above referred to, and all acts amendatory thereof, as well as all acts and parts of acts in conflict therewith. It contains an emergency clause, and therefore took effect and became of force immediately upon its passage. By the terms of the first section, the said act is made to apply to all cities of the state now having a population of 60,000 inhabitants or more, as shown by the state census of 1885, and all cities which shall hereafter have attained a population of 60,000 inhabitants or upwards. The second section provides in what manner such cities as shall hereafter have attained the necessary number of inhabitants shall be brought within the operation of said act. There is no provision of said act in terms continuing any officer or policeman, appointed under the former charter, in office, under the new one; but they would doubtless so continue on general principles of law, and by necessity, until the election or appointment of their successors under the new charter. But with this qualification, it is clearly the intent and within the scope of the act to establish a government for the class of cities thereby established.

Section 145 is devoted to the establishment of a department of fire and police for the new class of metropolitan cities, and is in the following words: "In each city of the metropolitan class there shall be a board of fire and police, to consist of the mayor (who shall be *ex officio* chairman of said board) and four electors of said city to be appointed by the governor. The governor shall appoint, as the commissioners above, four citizens, not more than *two* of whom shall be of the same political party. Two of them, of different political party faith and allegiance, shall be designated in their appointment to serve for two years, and the other two, also of different political party faith, shall be designated to serve for four years; and thereafter, at the expiration of said term, and each period of two years, the governor shall appoint two members of said board. For official misconduct the governor may remove any of said commissioners; and all vacancies in said board by death, resignation, or removal shall be filled by the governor for the unexpired term; and all vacancies, from whatsoever cause, shall be so filled that not more than two of the members of said board shall be of the same political party, or so reputed. All powers and duties connected with and incident to the appointment, removal, government, and discipline of the officers and members of the fire and police departments of the city, under such rules and regulations as may be prescribed by ordinance, shall be vested in and exercised by said board. A majority of said board shall constitute a quorum for the transaction of business, and in the absence of the commissioner of fire and police the mayor shall act as chairman. Before entering upon their duties, each of said officers shall take and subscribe an oath, to be filed with the city clerk, faithfully, impartially, honestly, and to the best of his ability to discharge his duties as a member of said board; and that in making appointments, or considering promotions or removals, he will not be guided or actuated by political motives or influences, but will consider only the interests of the city, and the success and effectiveness of said departments. The board of fire and police shall have power, and it shall be the duty of said board, to appoint a chief of the fire department, an assistant chief of the fire department, and such other officers of the fire department as may be deemed necessary for its proper direction, management, and regulation, and under such rules and regulations as may be prescribed by ordinance. Said board may remove such officers, or any of them, whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service, of said department. The board of fire and police shall also employ such fireman and assistants, or may authorize the chief of the fire department so to do, as may be proper and necessary for the effective service of said department to the extent and limit that the funds provided by the mayor and council for that purpose will allow. The board of fire and police shall have power, and it shall be the duty of said board, to appoint a chief of police, and such other officers and policemen, to the extent that funds may be provided by the mayor and council to pay their salaries, as may be necessary for the proper protection and efficient police of the city, and as may be necessary to protect citizens and property, and maintain peace and good order. The chief of police, and all other police officers and policemen, shall be subject to removal by the board of fire and police, under such rules and regulations as may be prescribed by ordinance, whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service, of the police department. It shall be the duty of said board of fire and police to adopt such rules and regulations for the guidance of the officers and men of said departments, and for the appointment, promotion, removal, trial, or discipline of said officers and men, as said board shall consider proper and necessary, and when said rules and regulations shall be approved by the mayor and council they shall have the same force and effect as ordinances, and can only be changed by and with the con-

sent of the mayor and council. The said board of fire and police shall have such further powers, and perform such other duties, as may be authorized or defined by ordinance."

There can be no doubt of the object, meaning, and intent of this section. While it is true that the act contains provisions outside of it, under which the mayor and council could find authority for the establishment of a system of police, and the appointment of police officers, yet it by no means follows that this section can be neglected in construing the act; nor can it be done with due regard to sound rules of construction. Our object is to arrive at the real intent and meaning of the legislature in drafting and enacting the statute. In reading it for that purpose, we are not at liberty to reject any of its words, if a meaning can be attached to them consistent with the general scope and purpose of the act. But we find provisions somewhat conflicting with each other. We have seen that section 145 makes it the duty of the governor to appoint four commissioners, who, together with the mayor, shall constitute a board of fire and police, and it is made the duty of said board to appoint a chief of police for such city, and generally vests in said board all powers and duties connected with and incident to the appointment, removal, government, and discipline of the officers and members of the police department. We also find section 53 in the following language:

"Sec. 53. The mayor and council shall have power to establish, regulate, and support night watch and police, and to define the duties thereof, except as otherwise herein specially provided."

Now, this is a general provision, which, it is suggested, would furnish authority for a police establishment for any city of the metropolitan class, were section 145 expunged from the statute. This, I think, would be so; and yet it by no means follows that, with both sections in the act, 145 does not contain by far the more studied, elaborate, and perfect expression of the will of the legislature. Moreover, it is believed to be a sound rule of construction, in law and logic, that general provisions will give way to the force of special enactment, when the latter is broad and clear enough to cover the whole ground, and express the undoubted intention of the legislature.

It is urged that the appointment of fire and police commissioners, and they, acting together with the mayor, appointing a chief of police for the city, is the imposition, by the state upon the city, of taxes for corporate purposes, and hence in violation of the latter clause of section 7, art. 9, Const., which reads: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

Section 79 of the act, among other things, empowers the mayor and council "to levy and collect on all such property, for the sole and exclusive purpose of maintaining and paying the police department of any such city, not to exceed five mills on the dollar valuation in any one year; taxes levied for such purpose to constitute a special fund for said purpose." And it was stated by counsel at the argument, and not denied, that the mayor and council of the city of Omaha have acted under such authority, and levied a tax for the current half year sufficient to provide ample funds for the support of the police department. Section 167 fixes the salaries of officers in cities of the metropolitan class, including the chief of police. These funds will doubtless be appropriated and disbursed, and the same rate of salary paid to a chief of police, whether the respondent or any other appointee of the board of fire and police commissioners continues to fill the office, or gives way to the appointee of the mayor and council. So far as the current half year is concerned, the tax has already been imposed by the city authorities, acting under the provisions of the law,—a line of action which does not seem to have been rendered either more or less necessary by reason of the peculiar provisions of section 145, or the action of the state, or of any of its officers or appointees thereunder.

Section 145 also provides that, before entering upon their official duties, the

said commissioners of fire and police shall take, subscribe, and file with the city clerk a certain and peculiar official oath therein prescribed. The section does not provide that they shall give an official bond. In the answer it is alleged that, at the time of the appointment of respondent by the said board, there was no ordinance of said city requiring the members of said board to give bonds. This allegation, standing as on demurrer, is taken as true.

It is contended by counsel for the relator that the appointment of the members of the board of fire and police commissioners by the governor is void, for the reason that such appointment was not made by and with the advice and consent of the senate; and to this point section 10, art. 5, Const., is cited. Said section is as follows:

"Sec. 10. The governor shall nominate, and by and with the advice and consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays) appoint, all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature."

The language of the act is, "The governor shall appoint," etc., without the qualification that such appointment shall be dependent upon the advice and consent of the senate. These offices are created by law, but their appointment is by law otherwise provided for than in the mode pointed out in the section of the constitution quoted. The contention is that it would be competent for the statute to have designated some other officer or person to make these appointments, in which case the advice and consent of the senate would not be required, but that it is incompetent for a statute to clothe the governor with power to make appointment of any officer without such qualification and restriction. I know of no reason, nor has any been suggested, for this distinction; and, while the argument *de convenance* may not be admissible in discussing a constitutional question, some consideration is due to the general understanding and practice in this state, where it will not be denied that throughout its history not a session of the legislature has passed without the passage of laws in terms similar to the one now under consideration, and their execution by the governor without submitting his appointments to the senate. I need only instance the cases of notaries public, the officers of the military staff, and the several district judges whose appointment has become necessary to supply the new judicial districts, and the additional judges to old ones, as from time to time provided by law.

It is further objected that the legislature has no power to make party affiliation a qualification for office. Speaking for myself alone, I am quite inclined to agree with counsel in this objection; and yet I think that the language of the act out of which this objection springs must be regarded as directory merely; that it spent its entire force upon the governor; and that the appointments made by him, under the provisions of the section where such language occurs, are neither more nor less legal, to whatever party or no party such appointees, or either of them, belong.

In the case of *People* v. *Hurlbut*, 24 Mich. 93, cited by counsel for the relator, Judge COOLEY, in delivering his opinion, speaking upon a branch of said case involving a question almost identical with the one we are now considering, said: "Nor can the whole act be void because of the provision that the appointees under it shall be members of two certain political parties. That provision, so far as it was designed to control appointments for the future, is simply nugatory, because the legislature, on general principles, have no power to make party affiliation a qualification for office. But so far as the provision can be regarded as a declaration that the appointees named have been selected because they sustained the specified party relations, we need only say that, where a right of choice exists, an election cannot be held void because of the reasons assigned for the choice made," etc.

I therefore come to the conclusion that the above question, as raised by the demurrer, must be answered in the affirmative.

Counsel for relator also raise certain constitutional questions to the right of the respondent to the said office, which may be resolved into the following proposition: Is the provision of the act in question making it the duty of the governor to appoint the commissioners of fire and police for metropolitan cities repugnant to the constitution?

On this point, counsel in the brief say: "It is contrary to the general policy of the constitution with regard to municipal corporations,—a constitution that has so guarded their interests that it has inhibited the legislature from authorizing the construction of a street railway upon their streets, without the consent of the corporation."

This citation from the constitution, taken together with the fact that they make no other therefrom, would indicate, even had they not so stated at the bar, that this point is predicated upon the spirit of the constitution, and not upon the letter of any specific provision. It is no doubt the general spirit of our constitution and institutions, and in accord with the habits and traditions of our people, that the inhabitants of every subdivision of the state shall have an equal share and responsibility in public affairs, so far as the same shall have been found conducive to the public safety, the preservation of the public peace, and the conservation of the public morals; and in every case of doubt in construing a statute, where such construction might turn upon the recognition and fostering of such spirit, no court would be blind to its duty in that behalf. And yet it is the boast of the American people in every state that they live under a written constitution, and do not look for a guaranty of their rights or liberty to any intangible code of traditions, or the opinions or constructions of any man or set of men. Municipal corporations, in the sense of cities, are several times mentioned in the constitution. An article (the twelfth) is devoted to them, but only to prohibit them from becoming subscribers to or owners of stock in any railroad or private corporation. Again, by section 6 of article 9, the legislature is limited in its power to vest them with the power to make local improvements, etc.; and in the section cited by counsel, they are guarantied the right to vote upon the subject of street railways running through their respective streets. But in none of these provisions, nor in any other which the limited time at my command has enabled me to find, is there any indication of the mind of the framers of the constitution, or the people who ratified it, to guaranty to the voters of cities of any class the right to a voice in choosing their municipal officers.

Section 7, art. 13, Const., provides for the time of holding the general election for each year, except the one at which said constitution was to be submitted for ratification, and that at such election all state, district, county, precinct, and township officers by the constitution or laws made elective by the people, except school-district officers and municipal officers in cities, villages, and towns, "shall be elected at a general election to be held as aforesaid." This provision recognizes the fact that all municipal officers which were elective were made so by the legislature, and, in my view, is to some extent a recognition by the framers of the constitution of the plenary power of the legislature over the subject.

But to return to the subject of the general spirit of the constitution, and of our institutions, I have above stated that it was the general spirit of our constitution and institutions, and in accord with the habits and traditions of our people, that the inhabitants of every subdivision of the state should have an equal share and responsibility in public affairs, so far as the same shall have been found conducive to the public safety, the preservation of the public peace, and the conservation of public morals. It is doubtless the duty of the courts in all proper cases to give full weight and due consideration to the above sources of construction; but courts cannot take judicial notice of the

condition of the public safety, or the public morals, in any class of cities or other locality of the state. These are political matters for the consideration of the legislative and executive departments. The state is the unit of political power, and responsible, through its legislature and executive, for the preservation of the peace, morals, education, and general welfare of the people; and in the discharge of the duties necessary for these purposes they are limited only by the supreme constitution of the government, the laws passed pursuant thereto, and our own constitution and laws.

I therefore reach the conclusion that the provision of the said act making it the duty of the governor to appoint a board of fire and police commissioners for cities of the metropolitan class is not repugnant to the constitution. The application is therefore denied, and the cause dismissed. Judgment accordingly.

(The other judges concur.)

STATE *ex rel.* SIMERAL *v.* BENNETT and others.

(*Supreme Court of Nebraska.* November 23, 1887.)

Quo warranto.

E. W. Simeral, *G. W. Ambrose*, and *J. C. Cowin*, for relator. *George B. Lake*, for respondents.

BY THE COURT. The questions presented in this case are identical with those involved in the case of *State* v. *Seavey*, *ante*, 228, (disposed of at the present term,) and its decision will follow that case. The application is therefore denied, and the cause dismissed. Judgment accordingly.

OMAHA, N. & B. H. R. CO. *v.* O'DONNELL.

(*Supreme Court of Nebraska.* November 23, 1887.)

1. TRIAL—VERDICT—DAMAGES.
   Where a cause is tried to a jury, and their verdict is set aside and a new trial granted, and the second trial results in substantially the same verdict, upon which a judgment is rendered by the trial court, and for the reversal of which proceedings in error are prosecuted in the supreme court, a petition in error being also filed by the defendant in error, by which he seeks to have judgment rendered on the first verdict, the action of the district court will not be disturbed, it being apparent that the last verdict was sufficient to cover the damage done on either trial.
2. RAILROAD COMPANIES—SIGNALS AT CROSSING.
   The failure of servants of a railroad company to give the statutory signals at a crossing, when running at a high rate of speed, and not upon the regular time for the train, is to be considered in deciding whether such company was guilty of negligence, and whether a person injured at the crossing used due care in attempting to cross.[1]
3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.
   The question as to whether a person injured by a passing train at a railroad crossing was guilty of negligence in attempting to cross, is usually a question of fact to be decided upon all the circumstances of the case as shown by the evidence.
4. APPEAL—INSTRUCTIONS—OBJECTIONS NOT RAISED ON MOTION FOR NEW TRIAL.
   Where no objections were made to the instructions in the motion for a new trial, they cannot be considered by the supreme court. *Schreckengast* v. *Ealy*, 16 Neb. 510, 20 N. W. Rep. 510.

(*Syllabus by the Court.*)

[1] It is negligence on the part of a railroad company to run an irregular train at an unusual time, at a high rate of speed across a public highway, without signaling its approach by bell or whistle. Robert's Adm'r v. Railroad Co., (Va.) 2 S. E. Rep. 518. As to the duties of railroad companies at crossings, see Purinton v. Railroad Co., (Me.) 7 Atl. Rep. 707; Berry v. Railroad Co., (N. J.) 4 Atl. Rep. 303, and note; Railroad Co. v. Coon, (Pa.) 3 Atl. Rep. 241, and note; Railroad Co. v. Horst, (Pa.) 1 Atl. Rep. 217, and note; Donohue v. Railway Co., (Mo.) 2 S. W. Rep. 424. See, also, Railroad Co. v. Henry, (Kan.) 14 Pac. Rep. 1; Railroad Co. v. Hutchinson, (Ill.) 11 N. E. Rep. 855; Guggenheim v. Railroad Co., (Mich.) 33 N. W. Rep. 161.

Error from district court, Platte county; POST, Judge.

A. J. Poppleton, J. S. Shropshire, and *W. R. Kelly,* for plaintiff. *McAllister Bros.,* for defendant.

REESE, J. This action was instituted in the district court of Platte county, for damages sustained by plaintiff resulting from personal injury, and the destruction of his team, harness, and wagon at a railroad crossing at the town of St. Edwards, on the line of the railroad of plaintiff in error. The cause was tried to a jury, who returned a verdict in favor of defendant in error for $5,500. This verdict was set aside by the district court and a new trial granted. On the second trial a verdict was returned in favor of defendant in error for $5,000. A motion for a new trial was filed, assigning two grounds therefor: *First,* "the verdict is not sustained by the evidence, and is contrary to law. *Second,* for errors of law occurring at the trial and duly excepted to by defendant." This motion was overruled and judgment rendered on the verdict. Plaintiff in error brings the cause into this court by proceedings in error. Defendant in error alleges error in the action of the district court in setting aside the first verdict, and asks that that order be set aside, and judgment rendered thereon.

It is conceded that the first verdict was set aside for the sole reason that the evidence was not sufficient to sustain it, and that the evidence upon that trial was substantially the same as on the last. We do not think it necessary to enter into a discussion of the testimony adduced upon the first trial, for the reason that the result of the second one was substantially the same, and for the further reason that it could not be said that there was an abuse of discretion in the action of the court. To this may be added the further reason that it is apparent that the last verdict was sufficiently large to cover the damage proven on either trial. The sole question presented by this record is as to whether the verdict is sustained by the evidence.

The testimony upon the trial shows substantially the following uncontroverted facts. Plaintiff's railroad is constructed through the village of St. Edwards upon a straight line and a level surface. Defendant resides about one-half mile north of the village and on the east side of the railroad track, the direction of which is from south-east to north-west, and perhaps about one-half mile from the track. That part of the village in which the post-office, stores, etc., are situated, is on the west side of the track, or across the same from the residence of defendant in error. The crossing is at the section line on the north boundary of the village, and about one-half mile south-west from defendant's house. On the day on which the accident occurred, defendant in error was in the village with his team and wagon, and at about 7 o'clock in the evening started to go home. The point from which he started was about four blocks north-west of the depot and perhaps about the distance of one block from the track of plaintiff's road. His first direction was one and a half blocks west, thence four blocks north, which again brought him near the track parallel with the track to the north-west along the right of way for about 180 yards to the section line crossing, where, by a short turn to the right, he sought to cross the railroad track. As he was in the act of crossing the track, plaintiff's train, coming from the south-east, struck his team and wagon, killing both horses, breaking the wagon and harness, and injuring him. The regular time for the train was 5:30 o'clock. It was, therefore, about one and a half hours late. Of this fact defendant in error had knowledge, for he had seen the train standing near the depot about three-quarters of a mile south-east from the place of the accident, some little time before he started home, but he testifies that he had been informed, by what he considered reliable authority, that the train had gone before he started. His informant, however, was in no way connected with the railroad. It was quite cold and the wind was blowing strongly from the north-west. There

was but one train per day running each way; the return train going south in the morning.

In the examination of the question presented—the contributory negligence of defendant in error—it must not be forgotten that all questions of fact were for the jury to determine, and that where the testimony was conflicting, it was for them to decide as to which of the witnesses were entitled to belief. In addition to the foregoing statement of facts, there was sufficient evidence to support the finding that the train was running at an unusually high rate of speed, and that no signals were given of its approach to the crossing; that when defendant in error approached the track, before turning parallel with it, he looked along the track and saw no train, and that he again looked when about half way from there to the crossing, with the same results; that the road upon which he was driving was very rough and frozen hard, so that he could not or did not hear the approach of the train as it came up in his rear, no other noise being made by it than the exhaust of steam and that caused by the running of the train, neither bell nor whistle being used, and that he had no knowledge of its presence until he was on the track and saw it not more than 50 feet away bearing down upon him at what some of the witnesses testified to be double its usual rate of speed. There is no question as to the fact of the accident. One of the horses was thrown upon the right, the other to the left, side of the engine. The wagon was thrown from the track with great force, and the sound of the collision was heard a half mile away, yet the engineer testified that he neither saw nor heard anything of the accident, and knew nothing of it until the next day.

If it be true that the train was running at the rate of speed described by the witnesses through the village, and that no signal of any kind was given, the train being one hour and a half later than its usual and regular time, these facts would be proper to be considered by the jury in ascertaining whether the employes of plaintiff in error were negligent or not, the law requiring the signals to be given. Comp. St. 1885, p. 203, § 104. Upon the other hand, if the jury found that defendant in error had sufficient reason to believe the train had gone, that when he approached the railroad track he looked down the track and saw no train, and that this was repeated before trying to cross, with the same result, and that under all the circumstances he exercised that degree of care usually exercised by, and required of, reasonably prudent men, they would be justified in finding that he was guilty of no such negligence as would defeat his recovery. These questions of negligence were for the jury to decide, and we cannot conceive how, as matter of law, it can be said either that plaintiff in error was not, nor that defendant in error was, negligent. The first duty was upon plaintiff in error; a part of this was the compliance with a plain mandatory statute. Defendant in error had the right to expect this duty to be observed in case a train should pass at that time. Not that a failure to perform it would exonerate any fault of his, nor release him from the exercise of proper care, but that he might have the opportunity of knowing of the approach of the train. It is true that plaintiff in error had the right to expect due care of any one who might be near its track with a design to cross, but that would not justify it in running at the reckless rate of speed described by the witnesses against a high wind, and in violation of law. The degree of care required of a person who is about to cross a railroad track is such care as could be reasonably expected of an ordinarily prudent person under like circumstances, and this was a question for the jury to determine under all the circumstances of the case. This case seems to us to be peculiarly within the rule stated by the supreme court of the United States in *Railroad Co.* v. *Stout*, 17 Wall. 657, and approved in *Railroad Co.* v. *Bailey*, 11 Neb. 332, 9 N. W. Rep. 50, and in *City of Lincoln* v. *Gillilan*, 18 Neb. 115, 24 N. W. Rep. 444. See, also, upon this part of the case, *Railway Co.* v. *Hutchinson*, 11 N. E. Rep. 855; *Railroad Co.* v. *Rudel*, 100 Ill. 603;

Railroad Co. v. *Troutman*, 6 Amer. & Eng. Ry. Cas. 117; *Smedis* v. *Railroad Co.*, 88 N. Y. 13; *Railway Co.* v. *McLin*, 82 Ind. 435, 452; *Sherry* v. *Railroad Co.*, 10 N. E. Rep. 128. The verdict cannot, therefore, be molested as not being sustained by the evidence.

Objection is made to instruction numbered 10 given to the jury by the trial court, but as the question of its correctness was not presented to that court in the motion for a new trial, it cannot be considered here. *Schreckengast* v. *Ealy*, 16 Neb. 510, 20 N. W. Rep. 510; *Railroad Co.* v. *Walker*, 17 Neb. 432, 23 N. W. Rep. 348.

The judgment of the district court is affirmed.

(The other judges concur.)

ILLINOIS CENT. R. Co. *v.* HAMILTON Co. and others.

(*Supreme Court of Iowa.* December 6, 1887.)

1. TAXATION—RAILROAD PROPERTY—WITHIN CITY LIMITS—LOCAL TAXES.
   Code Iowa, §§ 1317-1322, provides for the valuation of railroad property by the executive council, and makes it the duty of such council to transmit to the county auditor of each county a statement showing the length of track in each county, etc., and the rate per mile of assessment. It is then made the duty of the board of supervisors to determine the length of the main track, and the assessed value of such railway lying in each city, township, or lesser taxing district in their county. Section 1322 provides that all such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, etc. Chapter 10, tit. 4, § 4, provides that agricultural lands within city limits shall not be taxed for city or town purposes. *Held*, that the boards of supervisors do not assess the railroad property lying within their respective districts, but fix the proportion of the aggregate assessment made by the counsel which shall be subject to the local taxes of those districts, and the provisions of chapter 10, tit. 4, § 4, do not apply to property of this character.
2. SAME—ROAD TAX IN ADDITION TO GENERAL TAX.
   Acts 19th Gen. Assem. Iowa, c. 158, provides that property in a city not subject to taxes for general municipal purposes shall be liable to a road tax not exceeding five mills on the dollar. Code Iowa, § 496, provides that for general municipal purposes the tax shall not exceed 10 mills on the dollar. A railroad company was taxed at the rate of seven mills on the dollar, for general purposes, and five mills on the dollar for road tax. *Held*, that as the road was liable for a general tax, the road tax was improperly levied.

Appeal from district court, Hamilton county.

Action in equity to restrain the collection of certain taxes levied on plaintiff's property by the authorities of Webster City. The district court sustained a demurrer to the petition, and plaintiff electing to stand on the demurrer, judgment was entered dismissing the petition. Plaintiff appealed.

John F. Duncombe, for appellant. *N. B. Hyatt*, for appellee.

REED, J. There is included within the corporate limits of Webster City a large amount of agricultural lands which are not subject to taxation for general city purposes. Plaintiff's railroad extends through the corporate limits of the city for about five miles. Only about one mile of the main track, however, lies within that portion of the territory which is subdivided into blocks and lots. Plaintiff was taxed for general city purposes on a valuation which was determined by multiplying the valuation per mile, as fixed by the executive council, upon the main track by the number of miles of track within the corporate limits. It denied that it was subject to taxation for city purposes in that portion of the track which is outside of the subdivided territory, and it paid a part of the tax which bears the same proportion to the whole amount thereof as the portion of the track within the subdivided territory bears to the number of miles within the corporate limits, and brought this action to restrain the collection of the remainder.

1. The provisions of statute governing the assessment of railroad property

for purposes of taxation and the levy of taxes thereon are contained in sections 1317–1322 of the Code. It is provided that the right of way, road-bed, bridges, culverts, rolling stock, station grounds, shops, buildings, and all other real and personal property exclusively used in the operation of the railway is to be included in the assessment, which is made by the executive council. The valuation, however, is to be fixed at so much per mile of the main track, the amount being arrived at by dividing the sum of the values of all the items included in the assessment by the number of miles in the main track; and it is made the duty of the executive council to transmit to the county auditor of each county through which any railroad runs a statement showing the number of miles of track within his county, and the rate per mile at which the same is assessed. Section 1321 is as follows: "At the first meeting of the board of supervisors held after said statement is received by the county auditor, they shall make, and cause to be entered in the proper record, an order, stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, or lesser taxing district in their county through which said railway runs, as fixed by the executive council, which shall constitute the taxable value of said property for taxable purposes, and the taxes on said property when collected by the county treasurer shall be paid over to the persons or corporations entitled thereto as other taxes, and the county auditor shall transmit a copy of said order to the city council or trustees of such city, incorporated town, or township." And section 1322 provides that "such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, and lesser taxing districts."

The effect of these provisions is plain. By them the valuation upon which the railroad company is to be taxed within any city or other corporation or taxing district is to be determined from the number of miles of main track within the corporation or district, as determined by the order of the board of supervisors, and the valuation per mile, as fixed by the executive council. No other basis is provided for determining the valuation of the property for purposes of taxation. The scheme or plan of the statute is to treat the property, although it may consist of many distinct parcels or tracts of real estate, and many articles of personalty, as an entirety, and assess it as such; and as the owner is subject to taxation for local purposes, the values upon which such taxes shall be levied are arrived at by taking for those purposes a proportion of the aggregate valuation corresponding with that which the property lying within the corporation or taxing district bears to the whole property assessed. The order of the board of supervisors determining the number of miles of track within the cities, incorporated towns, and taxing districts is not in any sense an assessment or valuation of those portions of the property; but its officers are to fix the proportion of the aggregate assessment or valuation made by the executive council, which shall be subject to the local taxes levied by the corporations or districts. The provisions of the statute exempting agricultural and horticultural lands lying within the limits of incorporated towns and cities from taxation for city purposes, have no application to property of this character. Nor does the case involve the grounds upon which it has been held that lands so situated could not be subjected to such taxation, which are that the lands are in no manner benefited or protected by the city government. See *Morford* v. *Unger*, 8 Iowa, 82. For, as we have seen, the statute does not provide for the assessment of outside property for taxation within the city, but establishes merely a rule by which may be determined the proportion of the aggregate assessment upon which the company shall be taxed for local purposes.

2. The tax levy amounted to 12 mills on the dollar, seven mills being levied for general city purposes, and five mills as a road or highway tax. The city, while it has power to levy a road tax upon property within its limits which is

not subject to taxation for general municipal purposes, (chapter 158, Acts 19th Gen. Assem.,) has no power to levy such tax upon property which is subject to taxation for general purposes, and 10 mills is the extent to which it may tax, for general purposes. Code, § 496. As plaintiff is subject to taxation for general purposes on the whole valuation, it is not liable for the road tax. The demurrer should therefore have been overruled as to the paragraphs of the petition in which relief is demanded against said road tax, and the judgment as to that tax will be reversed; but as to the tax for general purposes, it will be affirmed. The case will be remanded for a final judgment in the district court, or, if defendant so elects, it may answer as to the road tax. Reversed.

CALLENDER v. DRABELLE.

(*Supreme Court of Iowa.* December 6, 1887.)

1. SET-OFF AND COUNTER-CLAIM—BURDEN OF PROOF.
   Defendant being sued on a note alleged payment and counter-claim. *Held*, that the burden of proof was on him to show all the facts necessary to determine the amount due on the counter-claim and a judgment for a greater amount than his proof shows must be reversed.
2. EVIDENCE—PAROL—TO SHOW ASSIGNMENT OF JUDGMENT—COLLATERAL SECURITY.
   Parol evidence is admissible to show that an assignment of a judgment, absolute in form, was intended merely as collateral security.

Appeal from district court, Des Moines county; CHAS. H. PHELPS, Judge.

Action upon a promissory note. The cause was tried without a jury and judgment was rendered for defendant upon a counter-claim pleaded by him. Plaintiff now appeals.

Kelley & Cooper, for appellant. *C. S. Poor*, for appellee.

BECK, J. 1. The defendant in his answer admits the execution of the note, but as showing payment thereof, which he alleges, and as a counter-claim, he avers that in February, 1879, he was owner of a judgment against one Switzer for $290, which he assigned to one Lee to secure an indebtedness of defendant to him. The answer proceeds to state the defense pleaded therein, in the following language as set out in defendant's amended abstract: "About the date of the note in suit, and for the purpose of securing its payment, defendant gave plaintiff an order on Lee to be paid out of the proceeds of said judgment when the same should be collected, and Lee's claim satisfied, plaintiff well knowing that said judgment was assigned to said Lee only as security for said debt, and it was ample to secure both of said claims; that on or about the second day of February, 1883, plaintiff paid to said Lee the full amount of this defendant's debt to him, being one hundred and sixty-one dollars and sixty-five ($161.65) cents; the said Lee then assigned said judgment to plaintiff; that on or about the second day of March, 1883, plaintiff collected the entire balance of said judgment, being two hundred and eighty-seven dollars and five ($287.05) cents, which not only paid the debts owing by defendant to Lee and the plaintiff, and discharged their liens on and interests in said judgment, but left a balance in the hands of plaintiff belonging to defendant of fifty-five ($55) dollars, which is defendant's property which plaintiff neglects and refuses to pay." The evidence shows that the Switzer judgment was rendered January 8, 1879, and drew interest at 10 per centum per annum, and that the note sued on was for $52.70 with 10 per centum interest and attorney's fees. It was executed May 28, 1879.

2. The defendant introduced evidence tending to show declarations or admissions of Lee, who at the time of the trial was dead, tending to show that he held the judgment under the assignment to him as collateral security for the sum owed to him by defendant. The evidence was objected to on the ground that it was not competent under Code, § 3639, being a personal trans-

action with a deceased person, contemplated by that section. The evidence was admitted subject to decision upon the objection afterwards. The abstracts do not clearly show the rulings upon the objections, and it is not affirmatively shown that the evidence was considered in the decision of the case. We find it unnecessary to determine the question of the competency of the evidence for the reason that our conclusions are based upon matters not affected by this evidence.

3. The defendant insists that parol evidence was not competent to show that the assignment of the judgment to Lee, which was absolute in form, was intended as collateral security. But it is always competent to show by parol the precise interest which a person holds in property to which he has the absolute paper title. A deed may be shown by parol to be intended as a mortgage.

4. It may be assumed, without so deciding, that the evidence establishes that the judgment was held by Lee as collateral security. It is shown that it was assigned by Lee to plaintiff who paid $161.65 for it. He afterwards collected on the judgment $287.05, less attorney's fees, which probably could not have been less than $25. The evidence authorizes the conclusion that the sum paid by the plaintiff for the judgment was the sum which defendant owed Lee. Now if it be in a like manner assumed that the difference in these sums, $100.40, should be accounted for to defendant, it appears beyond a doubt that the judgment of the district court is largely excessive, and is for such excess wholly without the support of any evidence. Defendant received the money March 7, 1883; the judgment in this case was entered February 25, 1887. Interest added to the excess would swell it to about $124. Defendant's note with interest at the date of the judgment amounted to not less than $98, leaving due defendant $26 instead of $64.65 as determined by the judgment of the district court. This conclusion is based upon facts which are established by the evidence beyond dispute except the amount paid by plaintiff to the attorney who recovered the judgment in question. It is shown that these fees were deducted from the sum collected on the judgment, $287. The attorneys held a lien therefor and had authority to deduct their fees from the sum collected by them. The burden was on defendant to show the amount due from plaintiff he was seeking to recover, and he was required to show the amount of money held by plaintiff to which he was entitled. He was required to make proof of all facts necessary to be considered in order to determine the amount which he was entitled to recover.

We determine no question in this case except that if defendant be entitled to recover at all the judgment is excessive, and for that reason it should be reversed.

STATE v. ARCHER.

(*Supreme Court of Iowa.* December 6, 1887.)

1. HOMICIDE—KILLING ADMITTED—INSTRUCTIONS.
   In a trial for murder the witnesses, of whom defendant was one, concurred in the statement that he killed the deceased. The court in its charge said the killing was conceded. *Held*, that it was not error.

2. CRIMINAL PRACTICE—REFUSAL OF WITNESS TO TESTIFY AS TO EVIDENCE ON FORMER TRIAL—STRIKING OUT TESTIMONY.
   Thirty-four questions were propounded to a witness on cross-examination, as to her testimony in a former trial, which she refused to answer. The court refused to strike out her testimony, but instructed the jury that her demeanor on the stand should be considered. *Held*, it was not error, as her former contradictory testimony could have been proven, or the court asked to compel her to testify.

3. SAME—IMPEACHMENT OF WITNESS—GENERAL REPUTATION FOR TRUTH.
   The state introduced testimony showing that defendant and his wife had made statements contradictory to their evidence. The defendant offered to prove their general reputation for truth. *Held*, that the offer was properly refused.

Appeal from district court, Appanoose county; C. W. LEGGETT, Judge.

The defendant was convicted of the crime of manslaughter in the killing of one George Woods. He was sentenced to imprisonment in the penitentiary for the period of four years, and he appeals.

Tannehill & Fee, for appellant. *A. J. Baker*, Atty. Gen., for the State.

ROTHROCK, J. 1. The indictment charged the defendant with the crime of murder in the first degree. A former trial of the case resulted in a conviction for manslaughter. An appeal was taken to this court, and the judgment was reversed for what we regarded as error in the instructions given by the court to the jury upon the law of self-defense as applicable to the evidence in the case. See 69 Iowa, 420, 29 N. W. Rep. 333. A like verdict and judgment resulted on the second trial. The defendant claims that numerous errors of law occurred upon the last trial, which alleged errors we will proceed to consider. It is not denied that the defendant took the life of George Woods by shooting him with a shot-gun. We say this fact is not denied. It is true the defendant pleaded not guilty, and it was necessary for the state to prove the homicide as charged. But the tragedy took place in the presence of several witnesses, and the defendant was a witness in his own behalf, and all concurred in the statement that the defendant killed Woods. The court instructed the jury that the killing was conceded. Counsel for the defendant claim that this instruction was erroneous. We think otherwise. The whole record shows that there was no contest nor dispute as to the fact of the killing, and it is always proper for the court to instruct the jury as to the effect of every fact about which there is no controversy.

2. The facts attending the killing were quite fully set forth on the former appeal. It is unnecessary to repeat them here. It is enough to say that two daughters of the deceased were eye-witnesses of the homicide. One of these daughters was at that time about 11 years of age. The last trial occurred in January, 1887, at which time she stated that she was 13 years old. In her examination in chief she stated that she saw the defendant shoot her father. She detailed the acts of her father and the defendant immediately preceding the fatal shot. She did not detail any of the facts which led to the altercation between the parties. The fact is, however, as will be seen by an examination of the former opinion of this court in this case, the killing arose out of an attempt by the defendant to go through an inclosed pasture belonging to the deceased. On the cross-examination of the witness, she stated that her sister told Archer, the defendant, to stay out of the pasture. Counsel then propounded several questions to the witness, by which it was sought to be shown that she had testified on the former trial that her sister did not forbid the defendant from going into the pasture, and that witness did not know where her sister was when the defendant entered the pasture. The witness gave no answer to these questions, and it is stated in the abstract that the witness refused to answer some 34 other questions propounded to her in relation to her testimony on the former trial, said questions being for the purpose of laying the foundation to impeach her. Thereupon, counsel for the defendant moved the court to strike out the testimony of the witness because she refused to answer these questions, upon cross-examination. The motion was overruled, and complaint is made of this ruling. The witness had stated that her sister did order the defendant not to go into the pasture. The object of the cross-examination was to give the witness an opportunity to admit and explain, or deny any contradictory statement she may have made in her testimony on the former trial. The rule is for the benefit of the witness. The witness had the opportunity given to explain, and having refused or declined to do so, the court was not authorized or required to withdraw her testimony from the jury. It would probably have been the right of the defendant, having called the attention of the witness to her former testimony, to prove the contradictory

statements. He either should have made this offer, or, instead of moving to exclude the testimony, he should have insisted that the court require the witness to answer the questions. Besides, the court instructed the jury that the demeanor and conduct of this witness on the stand was proper to be considered by them. We think the court did not err in refusing to withdraw the testimony of the witness from the jury.

3. A number of objections are made to rulings of the court upon the admission and exclusion of evidence—such as that certain evidence was not properly rebutting evidence, that other evidence was not competent, and that the court refused to allow the defendant to re-examine a witness for the state with a view to laying the foundation for impeachment. We have carefully examined all these rulings, and our conclusion is that none of them are erroneous. They were either a proper exercise of the discretion of the court, or the admission of proper or the exclusion of improper evidence.

4. The wife of the defendant was a witness for him, and he was a witness in his own behalf. The state, after laying the proper foundation, introduced evidence tending to prove that said witnesses had made previous statements of fact contradictory to those detailed by them as witnesses. The defendant, for the purpose of sustaining the testimony of said witnesses, offered to prove that their general moral character, and their general reputation for truth was good in the neighborhood where they lived. The court, on the objection of the state, excluded the evidence, and the ruling is complained of as erroneous. We believe the practice in this state has been to limit such testimony to cases where the general character or reputation of the witness has been attacked by the party against whom he testifies. Whether such evidence is allowable where it is claimed the witness has made contradictory statements, has never been directly determined by this court. There appears to be a conflict of authority upon the question. In 1 Greenl. Ev. § 469, the rule is thus stated: "Where evidence of contradictory statements by a witness, or of other particular facts, is offered by way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for the truth." The learned author cites Phillips on Evidence, 944, and *Rex* v. *Clarke*, 2 Starkie, 241. This was followed in *Harris* v. *State*, 30 Ind. 131, and other cases in that state, and in *Paine* v. *Tilden*, 20 Vt. 554, and in other states. On the other hand, the cases of *Russell* v. *Coffin*, 8 Pick. 143; *Brown* v. *Mooers*, 6 Gray, 451; *Stamper* v. *Griffin*, 12 Ga. 450; and *Wertz* v. *May*, 21 Pa. St. 274, hold that such evidence is not admissible. The case of *Rex* v. *Clarke*, to which reference is made in the above quotation from Greenl. Ev., does not determine the question. It is said in *Brown* v. *Mooers*, *supra*, that "the statement in 1 Greenl. Ev. § 469, is not sustained by the cases the author cites, and is not law." It seems to us that the rule allowing general evidence of the good character and reputation of a witness, where his general reputation has not been attacked, ought not to be adopted. As is said in *Russell* v. *Coffin*, *supra*: "If this were the practice, great delay and confusion would arise, and as almost all cases are tried on controverted evidence, each witness must bring his compurgators to support him when he is contradicted, and indeed it would be a trial of witnesses and not of the action." The ruling of the court in excluding the evidence was not erroneous.

5. Exceptions were taken to some of the instructions given by the court to the jury, and to the refusal to give certain instructions requested by defendant. We have carefully examined these alleged errors, and we deem it sufficient to say, without elaboration, that we discover no reason for holding that there was any error in the charge of the court, nor in the ruling made upon the defendant's instructions. Our conclusion is that the judgment of the district court must be affirmed.

DAVIS and others v. TOWN OF ANITA and others.

(*Supreme Court of Iowa.* December 6, 1887.)

1. MUNICIPAL CORPORATIONS—POWER TO ERECT SCALES AND REGULATE WEIGHING.
Code Iowa, § 456, provides that towns may establish markets and provide for the weighing of coal, hay, or any other article for sale. *Held*, that a town had the power to erect scales, appoint a weigh-master, and regulate their use by reasonable ordinances.

2. SAME—REASONABLENESS OF ORDINANCE.
A town of 500 inhabitants provided scales and a weigh-master, and passed an ordinance that all commodities, sold by weight, exceeding 1,000 pounds, should be weighed on the town scales. *Held*, this was a just and reasonable exercise of municipal authority.

Appeal from district court, Cass county; C. F. LOOFBOUROW, Judge.

Action to enjoin the defendants from enforcing an ordinance of the incorporated town of Anita. A temporary injunction was granted, and the defendants appeal.

James Bruce and *Willard & Fletcher*, for appellants. *John W. Scott*, for appellee.

SEEVERS, J. The incorporated town of Anita enacted an ordinance declaring certain scales in said town to be "city scales," and providing for the appointment of a suitable person as weigh-master, whose term of office and compensation should be such as might be provided by a resolution of the town council; and further providing that it should be "unlawful for any person * * * to sell within the town of Anita any grain, hay, coal, cattle, hogs, sheep, or other commodity sold by weight when the quantity of the article exceeds one thousand pounds, without procuring a draft of such article or commodity to be made upon the city scales. * * *" And "any person found guilty of the violation of this ordinance shall, for the first offense, be fined in any sum not less than one dollar, and not more than ten dollars." The court granted an injunction restraining the defendants from enforcing this ordinance.

1. It is contended by the appellees that the town did not have the power to pass the ordinance. It is provided by statute that cities and towns have the power "to establish and regulate markets; to provide for the measuring or weighing of hay, coal, or any other article for sale." Code, § 456. This statute expressly confers on cities and towns the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation; subject, however, to the general rule that the ordinance must be reasonable. The power given, in substance, is to regulate, and this implies that the corporation is impowered to do all things essential to the proper exercise of the power expressly conferred. The privilege conferred should not be confined within narrow bounds, but the discretion reposed in the corporation must be fairly exercised, so as to not unduly infringe upon the rights of the citizen, on the one hand, and yet, on the other, so that the express and necessarily implied object of the statute shall not be unduly limited. The subject under consideration, or, rather, the power to establish markets, was considered by this court in *City of Davenport* v. *Kelly*, 7 Iowa, 102. See, also, the cases referred to in the cited case, and *Yates* v. *City of Milwaukee*, 12 Wis. 753; *Taylor* v. *Pine Buff*, 34 Ark. 603; *Vanderbilt* v. *Adams*, 7 Cow. 394; 2 Dill. Mun. Corp. 3391. In some of these cases the controversy was in relation to weighing hay, grain, coal, and other articles, and the power to pass an ordinance regulating the same by establishing scales was affirmed. The authorities cited by counsel for appellee have all been examined, but they are distinguishable. In some it was found the power to pass the ordinance had not been conferred; in others it conflicted with the general statutes and

policy of the state; and in none of them, we think, was the question presented as to the power to establish scales, and regulate the weighing of coal, hay, etc. Several cases in our own reports are cited by counsel for the appellee, but none of them have much, if any, bearing on the question in this case.

2. It is conceded the ordinance must be reasonable. Dill. Mun. Corp. § 319. An ordinance like the one in question, it is possible, would be unreasonable if enacted by a large city, for the reason it might deprive the citizens of proper and sufficient facilities for doing the business of such a place. One scale or place of weighing would probably be insufficient; but the town of Anita only contains about 500 or 600 inhabitants; and therefore its trade and commerce cannot be presumed to be so large as to require more than one such place. If the only power conferred by statute, as counsel for appellee contend, is to establish a scale, it would be a barren power, unless the necessary implication is that it was intended the power expressly granted could be made effective by compelling persons to weigh on the established scales. When this is required, then, and only then, would the ordinance amount to a regulation. This was substantially held in *City of Davenport* v. *Kelly*, before cited. The statute evidently confers on cities and towns power to provide scales, a competent weigh-master, correct weights or balances, so that the seller may have a guaranty that what he sells has been correctly weighed, and also so that the purchaser may, with confidence, believe he is getting what he pays for. This, it seems to us, is a reasonable and proper exercise of municipal authority.

The judgment of the district court is reversed.

KRYGER v. ANDREWS.

(*Supreme Court of Michigan.* April 14, 1887.)

DECEIT—FALSE REPRESENTATIONS IN SALE OF CORPORATE STOCK—EVIDENCE.

Defendant sold plaintiff 28 shares of stock in a manufacturing company, and represented to him that the capital stock was all paid up. It appeared in evidence that when the company was formed only 60 per cent. was paid in on the stock, and that afterwards, before plaintiff purchased his shares, profits which the company had made, amounting to 40 per cent. on the capital stock, were allowed to remain in the business as undivided profits, which thus made the shares worth their full face value. Defendant admitted that he made the representation, and claimed that it was true. The jury found a verdict of $400 damages for plaintiff. *Held*, that there was testimony in the case sufficient to warrant the submission of the case to the jury, and to support the verdict.

Error to circuit court, Kent county.

Action for false representations in the sale of shares of stock.

D. E. Corbitt, for defendant and appellant. *Frank L. Carpenter*, for appellee.

MORSE, J. The plaintiff brought suit in the Kent circuit court in an action of trespass on the case, claiming that the defendant, in September, 1883, sold to him 28 shares in a corporation known as the "Valley City Manufacturing Company," for the sum of $700, and that, to bring about such sale, he falsely and fraudulently represented to the plaintiff that the capital stock of said corporation was $12,000, and was fully paid up; that the liabilities of the company did not exceed $7,000; and that its available assets were sufficient to pay its capital stock, and all indebtedness owing by it, and leave a surplus of $1,500 and upwards. Also that for the year 1882 the company had paid an annual dividend of 22 per cent. Relying upon such false statements, the plaintiff made the purchase. All of said representations he alleges to be false, and made for the purpose of defrauding him, and that he has been greatly damaged thereby. Defendant pleaded the general issue. Upon a

trial upon the issue joined, the jury found a verdict for the plaintiff in the sum of $400, and judgment was rendered accordingly.

It is contended by defendant's counsel that there was no evidence tending to support the allegations in plaintiff's declaration, and that verdict should have been directed in favor of defendant. We do not consider it necessary to enter into any discussion of the evidence. The defendant admitted that he made the representations substantially as alleged and proven by the plaintiff. It also appears that at the outset, in the formation of the company, the stockholders did not fully pay up for the shares issued to them, most of them taking $1,000 stock, paying in $600 or $700 therefor. About 40 per cent. of the capital stock was not paid up. It was claimed that afterwards, and before the purchase by plaintiff, this 40 per cent. was paid in by stock dividends, or by adding the profits of the business to the capital stock, thus increasing it to its full face value. The question as to this increase of stock, and the consequent paying up of the capital in full, was fairly submitted to the jury, and they found against the defendant. We think there was testimony in the case sufficient to warrant the submission of the case to the jury, and to support the verdict.

The defendant's counsel maintains that the evidence shows to a moral certainty that the representations made by the defendant were true, and that the jury were not authorized upon any testimony in the case to find differently. It will serve no useful purpose to here argue a mere question of the weight or sufficiency of the evidence, as such argument could not be of any general interest or benefit. No question of law is involved, and we need only say that we find no error in the proceedings.

The judgment will therefore be affirmed, with costs.

(The other justices concurred.)

BOSTWICK *v.* LOSEY, Survivor, etc.

(*Supreme Court of Michigan.* November 10, 1887.)

1. LANDLORD AND TENANT—COVENANT BY LESSOR TO REPAIR—FAILURE—LESSEE MAY ABANDON.
   The lessor of a saw-mill covenanted to repair the flume of the water-power, and make other repairs on the mill. In consequence of his failure to do this the mill became useless, and the lessees abandoned it. The lessor sued for the rent for the balance of the term. *Held*, that the defendants were not bound to repair the mill and deduct the costs thereof from the rent, and that they were justified in abandoning it.
2. SAME—DAMAGES TO LESSEE BY FAILURE TO REPAIR—MEASURE OF.
   The lessor of a mill covenanted to repair the flume of the water-power, and make other repairs. In consequence of his failure to do this the lessees were unable to use the water-power, and finally abandoned the mill. *Held*, that the lessees could recover damages for the failure of the lessor to repair the flume, the measure of such damages being the value of the use of the water-power.
3. APPEAL—EVIDENCE NOT ALL CONTAINED IN RECORD—REVIEW OF RULING.
   Where the record on error showed that but a very small portion of the evidence taken upon the trial was contained in the bill of exceptions, and the bill nowhere averred that all the testimony was set forth in the record upon any given point, *held*, that the rulings of the court upon questions of evidence would not be disturbed.

Appeal from circuit court, Branch county: RUSSELL R. PEALER, Judge.

George Styles, for appellant. *Barlow & Loveridge*, for appellee.

MORSE, J. The plaintiff rented to the defendants Losey & Barton, for a period of five years from and after January 1, 1880, a certain saw-mill in Union City at the rate of $500 per year. If the average of the logs in the mill-yard did not reach 300,000 feet each year, then the rent was to diminish as the $500 was to 300,000, (for example, if there were 200,000 feet only, the rent

was to be $333.33.) Plaintiff agreed to "new-roof the mill, and repair the flume, when necessary, doing the work expeditiously, so as to not interfere with the running of the mill longer than was necessary." He was also "to repair the foundation of the mill, should it give way, not including, however, the temporary underpinning of the machinery below, or that under the slab-pile outside, or the board-way." Defendants were to leave the machinery belonging to plaintiff in good repair at the end of five years, allowance being made for natural wear and tear, and keep the mill and machinery in order at their own expense. Defendants occupied the mill under this agreement until May 15, 1884, when they quit and abandoned the premises, claiming that plaintiff had not kept his covenants as to repairs. At the end of the first two years there was a settlement between the parties, and all accounts in relation to the mill closed and determined for that time.

The plaintiff brought suit for the amount of the rent due according to the terms of the contract, claiming $1,500 for such rent. He also averred negligence of the defendants in running the mill, and their failure to care for and keep the same, and its machinery, in repair, and claimed damages in this respect of $1,000. Also $200 damages by reason of the defendants failing to give him proper accommodations for sawing his lumber, lath, and other timber according to the agreement which provided that defendants should saw all logs for plaintiff, hauled from his lands, at certain specified prices. The defendants pleaded the general issue, and gave notice that the amount of the logs in the yard did not reach 300,000 feet in any year; that the plaintiff failed to keep his contract, in that he neglected and refused to put a new roof on the mill, to repair the flumes, or the foundation of the mill. By reason of this neglect and refusal the mill became utterly worthless and useless to defendants, and the water-power was lost, to their damage of $8,000. That the foundation of a portion of the mill gave way, by which they also sustained damage. Upon a trial before Hon. RUSSELL R. PEALER, with a jury, in the circuit court for the county of Branch, the defendants recovered judgment in the sum of $771.81. The plaintiff brings error.

It is evident from the record that but a very small portion of the evidence taken upon such trial is contained in the bill of exceptions; nor does said bill anywhere aver that all the testimony is set forth in the record upon any given point. This fact of itself disposes of some of the errors alleged. For instance, it is claimed that the court erred in admitting the testimony of two witnesses, Clark and Kerr, as to the value of water-power at Union City, when they lived at Coldwater, and substantially admitted that they knew nothing of the value of water-power at Union City, where this mill was located, and had never seen the water-power in question. One testified that the use was worth $5 per day, and the other that it would be worth from $4.50 to $5.

We find in the charge of the circuit judge the following: "In considering the question you have the value of the use of the water-power. This is a matter for you to determine from the evidence. You have the testimony of the plaintiff and defendant themselves, that it is worth from $6 to $7, and the testimony of other witnesses fixing a different range." The record does not purport to give all the testimony of the plaintiff. On the contrary, it plainly appears that only a small portion of his evidence is contained therein. It must therefore be presumed, considering this charge of the judge, which is not excepted to or questioned, that the plaintiff himself testified that the water-power was worth from six to seven dollars a day. If so, he cannot complain because Clark and Kerr were permitted to swear it was worth less. Nor, if he testified on his own behalf upon his direct examination that it was worth this amount, can he complain that the defendant was permitted to testify as to its value. From the record we cannot tell when the plaintiff testified to the value of the use of this water-power, and as we cannot presume

error, we must hold that the objection to the defendant Losey's evidence of such value was properly overruled.

The main allegations of error are based upon the instructions of the court to the jury, and his refusal to give certain requests asked by plaintiff's counsel. The contention is that the defendants had no right to abandon the premises because of the plaintiff's neglect to repair, and that they could not recover for the damages sustained by them while in the use of the mill, because of such neglect; that it was their duty, in case plaintiff did not new-roof the mill, and repair the flume and foundation, to repair the same themselves, and charge the expense thereof up to the plaintiff in reduction of the stipulated rent; also that the value of the use of the water-power was not the proper measure of the damages suffered by the defendant.

Upon the trial it was conceded that there were 300,000 feet of logs in the mill-yard each year, and the issue in that respect is not here. It appears beyond question that the flume was defective. The plaintiff testified that, when they settled for the first two years, an allowance was made to defendants for the damages resulting from the defects in the flume. He also admitted that in the fall of 1882 defendant Losey asked that the mill be repaired, but that he failed to repair it. The testimony on the behalf of the defendants tended to show that they lost the use of the water-power for a large number of days, by the plaintiff's not making repairs upon the flume, and that the water had become perfectly useless, and that, if the plaintiff had repaired the flume so that defendants could have had the full benefit of the water-power, the use of it would have been worth $600 or $700 per year; that they had to put in steam-power in order to run the mill. The question to be determined on their theory is, what were the defendants' rights and duties in the premises? Had they the right to abandon the premises because, without the repairs covenanted by the plaintiff, the water-power was useless, and to recover damages for the difference in the value of its use between what it would have been if the repairs had been seasonably made, and what it was without the repairs, as the circuit judge instructed the jury; or was it their duty, when the plaintiff refused to make the repairs, to go on and repair the flumes themselves, and charge the expense thereof, and the value of the time the mill remained idle, while the work was going on, to the plaintiff?

What the defendants contracted for was the use of the saw-mill, and the saw-mill was dependent in its use upon the water-power which propelled it. The plaintiff covenanted to keep the flumes, through which the water passed to the mill, in repair. If he neglected or refused to do this when notified, and on account of such neglect the water-power was destroyed, and the mill thereby rendered useless to the defendants, the consideration of the agreement or lease failed, and the defendants were justified in abandoning the premises, and the stipulated rent could not be recovered after such failure of consideration. *Tyler* v. *Disbrow*, 40 Mich. 415; Wood, Landl. & Ten. § 377; *Hinckley* v. *Beckwith*, 13 Wis. 34. Nor were the defendants bound to make the repairs themselves. It was the duty of plaintiff, under the agreement, to make these repairs, without which the premises were of but little or no value for the use defendants required, and to which they were entitled under the contract. The defendants had the right to hold the plaintiff to the ordinary responsibility of a party failing to perform his agreement, to-wit, to pay the damages caused by such failure. We can see no difference in this respect between this and any other contract. *Hinckley* v. *Beckwith*, 13 Wis. 31, 17 Wis. 426; *Myers* v. *Burns*, 35 N. Y. 269; *Hexter* v. *Knox*, 63 N. Y. 561.

The rule of damages was properly laid down by the court. The failure of the water-power was the grievance complained of. The defendants were entitled to the use of it, as it would have been had the flumes been kept in repair, for saw-mill purposes. The value of the use of such water-power for such purposes was shown by witnesses. We do not consider that such value was

speculative or uncertain, or that showing such value and allowing it as the basis of damages was in effect permitting the profits of the saw-mill to be computed in estimating the damages. The contract or lease itself shows that this water-power had a rental value, and we can see no serious difficulty in the way of ascertaining to a tolerable and sufficient certainty the value of this use to which the defendants were entitled by their agreement. It was also conceded on the trial that there were logs in the mill-yard ready to be sawed, so that work was at hand for the mill, if the water-power was available.

The judgment is affirmed, with costs.

SHERWOOD and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

PENDILL, Guardian, etc., and others v. NEUBERGER.

(*Supreme Court of Michigan.* November 10, 1887.)

1. WITNESS—TRANSACTIONS WITH DECEASED.
In a suit for rent upon a verbal lease, the defendant introduced himself as a witness, and his counsel asked this question: "What conversation took place between you and James P. Pendill in the rear of his store, some time in the latter part of February, 1885, relative to renting a store from him?" *Held* that, on an objection that it was incompetent, because James P. Pendill was dead, it was properly excluded. Affirming 31 N. W. Rep. 177.

2. CONTRACTS—MEETING OF MINDS—VERBAL LEASE.
In a suit for rent upon a verbal lease, the court charged that if the jury should find that defendant said to P., "Very well, I will take it for a year," and that P. replied, "Very well," that "that made a contract between them; in law their minds met, and made a good and binding contract." *Held*, that such charge was proper and correct.

3. LANDLORD AND TENANT—VERBAL LEASE—POSSESSION—PAYMENT OF RENT.
In a suit for rent upon a verbal lease, the court charged the jury that in determining the question "when this lease was to commence," they had "a right to take into account and consider the time when the defendant went into possession, the time from which he paid the rent, and all other circumstances thereon which throw any light upon the question of when the lease was to commence." *Held*, that such charge was correct and proper.

4. SAME.
In a suit for rent on a verbal lease defendant asked the court to charge the jury "that the payment of rent for the month of February, which was paid on the twenty-eighth of February, is not, of itself, any evidence as to the time when the contract, alleged to have been entered into on or about the twenty-eighth of February, was to commence." The court refused to so charge, and instructed the jury that they had a right to infer from the payment of two months' rent monthly, that such payments were made under the alleged agreement of February 28th. *Held*, that such charge was proper and correct.

CHAMPLIN, J. This action is *assumpsit* for rent claimed to be due upon a lease. The plaintiffs are the heirs at law of James P. Pendill, deceased. On February 1, 1885, defendant occupied a store and carried on business as a clothier in the National Bank building in the city of Marquette, Michigan. On the night of the day last named the bank building was destroyed by fire, and defendant was obliged to remove his stock of goods. On the next day he moved into the store of James P. Pendill, without, at the time, making any agreement as to occupancy or rent. The main controversy in the case is whether the plaintiffs proved a contract of renting for a year, at the rate of $800, payable monthly.

The testimony is all returned in the bill of exceptions, and may be summarized as follows: James Pendill testified that his father died March 9, 1885; that he is acquainted with defendant, Neuberger; that he rented the store in a block of buildings on Superior street of his father; that he went

into the occupation of it February 2, 1885; that his father at that time was engaged in general merchandising in his store on Superior street; that the store had a dry-goods and grocery department in separate rooms connected by an arch; that he was in his father's employ, and had charge of his business, and was also his book-keeper; that Mr. Neuberger and his father had a conversation in his store, about renting the store occupied by Neuberger, about the second week after he went in, but he could recollect nothing as to what was said between them in regard to the store at that time; that afterwards, and between the twentieth and twenty-eighth days of February, 1885, Neuberger came into the store and told his father he had come to see about the renting; that his father told him that he didn't believe he wanted to rent the store to him. Neuberger wanted to know why, and his father said he didn't believe he wanted to keep it open; told him that he didn't think he cared about renting the store to him; that Mr. Neuberger said he did expect to keep it open; that he expected to put his brother Louis in there to sell the goods he had, the ready-made clothing, and he himself expected to occupy the Dwyer corner of Front and Superior streets with his tailoring department. They said nothing further that referred to the renting of the store, any more than these objections, his father still insisting upon his objection, and Neuberger that he wanted the store; that his father got up, and then started and went into the back part of the store into the dry-goods department. The conversation there he did not hear. After being there some time, they came up the store and appeared to be still disputing, and Mr. Neuberger stepped to the grocery door, and partly opened it, and waited for his father to say something, and he said he would not do it, and Neuberger, as he opened the door, said, "Very well, I'll take it for a year," and witness' father said, "Very well," and turned around and started back; that he kept his father's accounts of rents collected, and did the same thing for the heirs after his father's death; that Neuberger paid rent on the store; that he thinks the first payment was on the twenty-eighth day of February, when he gave a check for $66.67; that his father was present at the time; that Mr. Neuberger made further payment by check dated April 4, 1885, $66.67, for which he gave him a receipt as follows: "MARQUETTE, MICH., April 4, 1885.

"Received of I. Neuberger, sixty-six 67-100 dollars for 1 mo. rent to April 2d.

"$66.67. J. P. PENDILL, per JAMES."

—That the defendant has never paid any more rent.

On cross-examination the witness testified as follows: "I did not overhear the conversation between Neuberger and my father when they were in the back part of the store. If they made any agreement at that time with regard to the renting of the store I do not know anything about its terms. All I know about any agreement of any kind is what I have now stated with regard to the conversation about a lease, when Mr. Neuberger first came in, and what he said when he opened the door, and was about to go out. Mr. Neuberger vacated the store, I think, the fourth or fifth of April. I think he was moving out of the store, taking things out, at the time he gave me the check, on the fourth of April. He made an attempt to deliver up the key of the store to me several days after he had taken everything out. He came there to the store, and said he came to give me the key, but I refused to receive it. Afterwards a clerk in his store brought over a key, and I ordered him to take it back, and he took it. I was told that he came there after that, and left some keys. I don't know whether the keys of that door or not; I suppose so; I suppose it was the key to the store which he had left, and have never ascertained to the contrary, and still have the same supposition." On redirect examination he testified: "I refused to receive the key. This took place in the same store that the agreement was made in. I had charge of the store for the estate at that time. John Mullally, a clerk for Mr. Neuberger,

brought in the key when I sent it back. I never consented to the key being left."

James Dwyer testified: "The defendant rented a store of me shortly after the burning of the National Bank building. When he was renting the store from me I asked him what he was going to do with Pendill's store, and he said he was going to keep that store to dispose of the damaged goods, and put nothing into the store that I rented him, only the new goods from outside. I am not positive, but should think it was the latter part of March, 1885, when this conversation took place."

August Machts testified: "Was in the employ of James P. Pendill, deceased, in the spring and winter of 1885, as a clerk in the store. I am acquainted with the defendant. I heard a conversation between James P. Pendill and the defendant in the month of February, with regard to the renting the store that Neuberger was then occupying. I was right close by Neuberger when I heard the conversation. Neuberger and Pendill had been talking about renting the store, and I overheard Mr. Pendill say: 'Neuberger, I don't think I want to rent you that store; I want to rent that store to somebody for a length of time, for a year, and I want it kept open, too.' Neuberger replied: 'I am sorry you don't think more of my word than that; I want it for a year, and I'm going to keep it open, too. I place my brother in there, and I do my tailoring over on the Dwyer corner—the other store,' he said. After that they went away from where they stood, and went in the back part of the dry-goods side. I did not hear any conversation that was had by them in the back part of the store. I was employed on the other side,—grocery side. I heard no other conversation between them that day. I was out on the sidewalk as Neuberger was going away; he came out of the grocery store, and stepped up to me and says: 'Well, I have rented the store, but expected to get it for less; I expected to get it for $600 a year, but he charged me $800 a year.' He also repeated the same words about keeping it open outside. He says: 'My brother is going to stay here, and I am going over there.'"

The foregoing constitutes all the testimony introduced on the part of the plaintiff relative to the contract of hiring.

The defendant introduced himself as a witness in his own behalf, and his counsel asked this question: "*Question.* What was the conversation that took place between you and James P. Pendill in the rear of his store, some time in the latter part of February, 1885, relative to renting a store of him?" To which counsel for plaintiff interposed an objection that it was incompetent, for the reason that it appears that James P. Pendill is deceased, and testimony known equally to a living person. The court excluded it as inadmissible under the statute. The same ruling was alleged as error when this case was before us on a former occasion, (*Pendill* v. *Neuberger*, 31 N. W. Rep. 177, 179,) and we then held that the ruling was correct. We see no reason to change the decision we then made upon this point. *Downey* v. *Andrus*, 43 Mich. 65, 4 N. W. Rep. 628.

The witness Neuberger then testified that the time he came out of the store, as testified to by James Pendill, he did not tell James P. Pendill, deceased, that he would rent his store for a year, nor did he rent his store for a year.

Under the testimony as above recited the circuit judge charged the jury as follows:

"The plaintiffs in this case have brought suit to recover for four months' rent, under an alleged lease which they have set out in their declaration, claiming rent at the rate of $66.67 a month, for the months of April, May, June, and July, or from April 2 until August 2, 1885. The plaintiffs have set forth their claim in a special count, as we call it, in their declaration; no recovery can be had under their other counts. The special count sets forth

that the contract was made between this defendant and Mr. Pendill, in his life-time, for the rent of the store described in the declaration, for one year, commencing February 2, 1885. It is conceded by counsel for both sides that, in order to maintain their case, the plaintiffs must prove four things: (1) That the contract was to rent the property for a year; (2) that the rent was to commence February 2, 1885; (3) that the amount of rent was $800 a year; and (4) that the rent was payable monthly.

"There was a lease of some kind between these parties, that is clear, because it appears undisputed that the defendant paid two months' rent. Now, the contract that the plaintiffs have set forth must be proved by them as they have set it forth, and if they have failed to prove any one of the four things I have just spoken of, then the plaintiffs have failed to make out their case.

"The length of the contract must be determined from the testimony principally, if not entirely, of the witnesses James Pendill and Mr. Machts, on the part of the plaintiffs. Mr. Pendill, who made the contract, is dead. The contract was a verbal one; there was no writing about it; therefore, any statements that were made by Mr. Pendill in his life-time, not in the presence of Neuberger, cannot be introduced in evidence; neither can Neuberger testify to any conversations between him and the deceased, Pendill. The law shuts out all those conversations. You are therefore left to determine what the contract was between these parties, from the evidence or conversation they had in the presence of other parties. It is claimed by the plaintiffs that the witness James Pendill was in the store when the defendant, Neuberger, came in to see his father in regard to it. After talking awhile near the stove, they went into the back part of the store. We know nothing of what took place between Pendill and Neuberger at that time. It is claimed that when they came out, after that conversation, while the defendant was in or near the door, that he said to Mr. Pendill, 'Very well, I will take it for a year.' And that Mr. Pendill, now deceased, replied, 'Very well.' Now, gentlemen, if you should find, from the evidence in this case, that that conversation took place between these two parties, that made a contract between them; in law, their minds met, and made a good and binding contract.

"Now, as bearing upon that, you will take into account all the other testimony in the case; the testimony of the witness Machts, as to what he heard, and as to what Neuberger told him. First, determine what Machts said, or what Neuberger said to Machts; determine whether he said to him, 'I have rented it for a year at $800,' or, 'I have rented it for $800 a year,' or, 'I have rented it at the rate of $800 a year.' If you find from the evidence that the witness said, 'I have rented the store at the rate of $800 a year,' that would not be evidence that he had rented it for the period of a year, but simply evidence of the rate at which he had rented it. So you will determine what the testimony was, what Neuberger said to Machts, as bearing upon what the arrangement was between the parties. The defendant denies that he made such statements to Mr. Pendill in the presence of the witness James Pendill, or to Mr. Machts; so you will have to determine largely whether or not this contract was for a year between these parties, from the testimony of these witnesses, taking into account all the conversation there was in regard to it, and the surrounding circumstances, if any, that will throw any light upon the controversy. The fact that the defendant paid two months' rent is no evidence of the length of time this contract was to run; it is just as consistent with the idea that it was a contract from month to month, as a contract for a longer period; so that circumstance throws no light upon the question of the length of this contract for rent. If, however, you find that there was a contract for a year, under the instructions I have given you, then, in determining when the contract commenced, you would have a right to take into account the time at which the defendant went into the store, and the time for which he paid rent; that would be competent evidence for you to examine

and consider in determining the period at which the rent commenced. It is not claimed that there was an express contract made between these parties, at the time Mr. Neuberger took possession of the store, which is conceded, I believe, to be the second of February. It is claimed that the contract was made towards the latter part of February, at the time these conversations were had with the defendant. Now, it is for you to determine, if you find there was a conversation between them at that time, and a contract made,—it is for you to determine, from the evidence, whether or not that contract referred back to the time at which the defendant went into the possession of the store, and for which it appears on or about that time he paid the rent.

"Now as to the payment. If you find from the evidence that the defendant paid the rent monthly for two months, you would have the right to infer from that, that that was the period for which the payments were made. It is to be presumed that the defendant made payments in accordance with the terms of the contract, and if, therefore, he paid the rent for two months monthly, it is a fair deduction to be made that that was the agreement, and the time at which it was to be made. So, as to the amount, if you find, as I have said, that this contract was made between the parties for a year, then you would have a right to determine the amount that was paid each month, which would make it $800 a year. There is no other evidence, except the testimony of Mr. Machts, as to what the rent was, aside from that.

"The plaintiffs, gentlemen, must predominate. This is a civil case, and the plaintiffs, in order to entitle them to recover, must have a preponderance of evidence in their favor, it makes no difference how slight; if, when you have weighed all the testimony, you find it equally balanced, that you should give as much credit to the testimony of the defendant as of the plaintiffs, they cannot recover; but if you find there is a preponderance in favor of the plaintiffs, however slight, that gives them the right to recover; otherwise not."

Defendant's counsel then made the following statement and request: "I understood the court to charge the jury that the fact of the payment of rent from the second day of February would be of itself some evidence tending to show when the term was to commence under the contract which was made the last of February. I ask the court to charge the jury that the payment of rent for the month of February, which was paid on the twenty-eighth of February, is not of itself any evidence as to the time when the contract, alleged to have been entered into on or about the twenty-eighth of February, was to commence." *The Court.* "I refuse that request, Mr. Hanscom, and leave it under the instructions I have given them." To which last refusal to charge the jury defendant's counsel did then and there except.

The court, further, upon his own motion, then and there charged the jury as follows: "Understand me, gentlemen, I have said to you that in determining when this lease was to commence, you have a right to take into account and consider the time when the defendant went into possession, the time from which he paid the rent, and all other circumstances there are, which throw any light upon the question of when the lease was to commence."

We have inserted the charge of the court in full, because nine of the twelve assignments of error are directed against the charge of the court. We have duly considered these assignments of error, and are unable to agree with counsel for defendant that it contains any error, or that it does not plainly, properly, and correctly state the law of the case to the jury. It does not seem to us to be open to the criticism made by defendant's counsel, and urged upon us in the argument with great earnestness and plausibility. It covered all that was necessary to be said in order to present the law to the jury, and there was no error in refusing to give the instructions asked to be given by defendant's counsel, and which were refused by the court. The issues presented by the pleadings were exclusively questions of fact. The testimony was conflicting; but, if the jury believed the testimony introduced by the plaintiffs, there

was sufficient of it, together with proper and legitimate inferences to be drawn from the facts which the testimony established, to authorize the jury to find the issue submitted to them in favor of the plaintiffs.

The judgment of the circuit court is affirmed.

SHERWOOD and MORSE, JJ., concurred. CAMPBELL, C. J., did not sit.

NUGENT *v.* TEACHOUT.

(*Supreme Court of Michigan.* November 10, 1887.)

1. ASSUMPSIT—COMMON COUNTS—ORAL DECLARATION—BILL OF PARTICULARS—LAND SOLD AND CONVEYED.
   Plaintiff sold defendant certain land, and defendant agreed orally to convey a house and lot in payment, but after obtaining a deed to the land, refused to convey. Plaintiff sued him for the balance of the purchase money before a justice of the peace, declaring orally upon "all the common counts" in *assumpsit*, and filed a bill of particulars, setting out as an item the balance of the purchase price of land sold to defendant. *Held*, that the bill of particulars was explanatory, and an exemplification of the declaration, and notified defendant that the claim was for the unpaid balance of the land sold, and that plaintiff claimed the recovery of it on the declaration under "all the common counts." *Also held*, that the "*indebitatus* count" included a count for real property sold, and was used by plaintiff to recover the value of the estate sold.

2. SAME—ORAL AGREEMENT TO CONVEY—IMPLIED CONTRACT—INDEBITATUS COUNT FOR LAND SOLD.
   Plaintiff deeded certain land to defendant, who agreed orally to convey to him a house and lot in part payment, but afterwards refused to do so, and sold to a third party. Plaintiff sued him before a justice, declaring orally on all the common counts. *Held* that, as defendant could not be compelled to convey the house and lot on an oral contract, his refusal to convey rescinded the contract, and raised an implied promise on his part to pay for the land he had received from plaintiff on the contract, and the value of it can be recovered under the *indebitatus* count for real property sold.

3. SAME—AMOUNT OF RECOVERY.
   Plaintiff deeded to defendant a piece of land upon which was a $700 mortgage which defendant was to assume, and a $50 mortgage, which plaintiff was to pay. Plaintiff sued for balance due him. *Held*, that he was entitled to recover the difference between the price of the land and the $700 mortgage, principal and interest, less whatever defendant had paid on the $50 mortgage.

Error to circuit court, Mecosta county; C. C. FULLER, Judge.

Action in *assumpsit* for the price of real estate.

Palmer & Palmer, for defendant and appellant. *Jennings & Mann*, for appellee.

MORSE, J. It appears from the evidence on behalf of the plaintiff in this case that, on the eighteenth day of December, 1884, James Nugent and wife deeded to the defendant 40 acres of land in the township of Barton in Newaygo county. The expressed and actual consideration for this deed was $1,000. It was to be paid for as follows: Defendant was to pay a mortgage upon the premises of $700, and to convey to plaintiff an acre of land, upon which there was a house, in Cadillac. There was another mortgage of $50 upon the land deeded to defendant by Nugent, and also $40 back upon the Cadillac property, both of which sums plaintiff was to pay and satisfy. At the time of the trade the house at Cadillac was rented. The rent was to be applied on the $40. Teachout not only refused to deed the Cadillac property to Nugent but sold it to a third party. Thereupon plaintiff commenced suit to recover the balance of the purchase price of the 40 acres from defendant before a justice of the peace in the city of Big Rapids. He declared orally upon "all of the common counts" in *assumpsit*, and filed a bill of particulars as follows:

1884. Dec. 1. Balance of the purchase price of S. E. ¼ of S. E. ¼ of section 25, town 16 north, of range 11 west, sold by plaintiff to defendant,	$250 00
1885. Feb. 1. To money had and received,	10 00
1885. March 1. To money had and received,	10 00
	$270 00

Defendant filed items of set-off as follows:

Dec. 1884. To interest on mortgage,	$24 00
To money loaned,	2 00

The two items of $10 each in plaintiff's bill were for moneys paid by him to Teachout towards the $40 on the lot at Cadillac. Plaintiff also paid $15.50 on the $50 mortgage.

The plaintiff had judgment in the justice's court for $261.50. Defendant appealed to the Mecosta county circuit court. Upon the trial in that court, before a jury, the plaintiff recovered a judgment for $224.95. The testimony in favor of the plaintiff was all taken under objection, and the contention of the defendant in that court and this is that the plaintiff under his own showing could not recover upon the common counts. It is insisted that he should have declared specially upon the contract for the exchange of the lands, and alleged the breach of such contract, and the damages arising from such breach. The counsel for plaintiff claim that under the common counts they are entitled to recover, because the contract was expressly rescinded by the defendant when he deeded the Cadillac property to another. The plaintiff was then at liberty to acquiesce in this rescission, and sue the defendant for the value of the land conveyed to him by plaintiff. They also claim that "all the common counts" include a count for "lands sold and conveyed." See 1 Chit. Pl. 340, 343, 344.

It has not generally been understood in this state that the common counts as used in our practice and pleading include a count for real property sold and conveyed. All the blanks in use, and the precedents given in the works on practice in this state, do not contain any such count as one of the "common counts." Upon an oral declaration in justice's court upon all the "common counts," the defendant would not naturally be apprised that the recovery was intended upon such a count. In this case, however, the bill of particulars notified defendant fully of the nature of the plaintiff's claim. Pleadings in justice's court have always been liberally construed, and substance rather than form has been regarded in passing upon them. The chief object of a declaration is to plainly apprise the opposite party of the cause of action and claim of the plaintiff. When this is clearly done, and a cause of action is stated, the pleading is sufficient. The bill of particulars is explanatory of the declaration, and an amplification of it. In this case the bill of particulars notified defendant that the plaintiff claimed the unpaid balance upon the land sold and conveyed to the defendant, and also informed him that the recovery of it was claimed under the declaration upon "all of the common counts" in *assumpsit*.

If, therefore, the count for lands sold and conveyed can be regarded as one of the common counts, the plaintiff could maintain his action under his pleadings, provided his claim was one that did not require a special count. According to Chitty the common counts were of four descriptions—*First*, the *indebitatus* count; *secondly*, the *quantum meruit; thirdly*, the *quantum valebat;* and, *fourthly*, the account stated. The *indebitatus* count includes a count for real property sold, and such count was used to recover the price or value of an estate sold by the plaintiff to the defendant. See 1 Chit. Pl. (16th Amer. Ed.) 351, 352, 354; *Siltzell* v. *Michael*, 3 Watts & S. 329. And it has been held in many cases that where the agreement to pay the price of the land was to pay the same in money, such price could be recovered under a general

count for lands sold and conveyed. *Nelson* v. *Swan*, 13 Johns. 483; *Bowen* v. *Bell*, 20 Johns. 338; *Whitbeck* v. *Whitbeck*, 9 Cow. 266; *Goodwin* v. *Gilbert*, 9 Mass. 510; *Felch* v. *Taylor*, 13 Pick. 133; *Pike* v. *Brown*, 7 Cush. 133; *Bosford* v. *Pearson*, 9 Allen, 387; *Elder* v. *Hood*, 38 Ill. 533.

We are of the opinion that the plaintiff could proceed under his declaration and bill of particulars in this case, the same as if he had specifically named a count for lands sold and conveyed as one of the common counts, or as if he had counted generally for lands sold and conveyed.

But it is insisted that the contract in this case was not to pay any money for the land, but to exchange other property, to-wit, the house and lot at Cadillac, for the same, and that in such case the contract and the breach of the same must be specially averred. The general rule is as claimed by defendant's counsel. When property, some specific thing or things, is to be delivered in payment of the lands, the agreement to so deliver, and the breach of the same, must be specially alleged. When a special contract has been wholly performed by one of the parties to it, and the other party can only perform his part by the payment of money, the money thus due can be recovered upon the common counts in *assumpsit*. But when the contract on the part of the defendant is not to pay money, but to deliver to the plaintiff specified articles of property, the right of the plaintiff to recover the money arises, not from the performance of the contract on his part, but from the failure of the defendant to deliver the property; consequently such failure must be specially pleaded. *Phippen* v. *Morehouse*, 50 Mich. at page 540, 15 N. W. Rep. 895; *King* v. *Kerr*, 4 Chand. (Wis.) 159; *Bradley* v. *Levy*, 5 Wis. 400.

It is claimed by defendant's counsel that in this case the plaintiff was not entitled to recover by simply showing that he had performed his part of the contract. The obligation of the defendant to pay money for the land did not spring out of the performance of the plaintiff, but because the defendant refused to deliver the deed of the Cadillac property. Therefore the plaintiff should have declared specially, and cannot recover on the money counts. But it must be remembered that this promise, on the part of the defendant, to convey the Cadillac property in part payment of the lands received by him, was an oral one, and therefore within the statute of frauds, and one that he could not be obliged to perform.

What, then, are the rights, and what is the remedy, of the plaintiff? He has conveyed the 40 acres to the defendant, and the defendant has received it, and accepted the benefit of it. Does he not, in equity and good conscience, owe the plaintiff the balance of the price or value of the land in money? Is there not an implied promise on the part of the defendant to pay the plaintiff the price or value of the land conveyed? We think there is. Although he was not obliged to convey the Cadillac property, because his promise to do so was void under the statute of frauds, yet his refusal to convey had the effect to rescind the contract, and raised an implied promise to pay for what he had received upon it. *Gray* v. *Hill*, Ryan & M. 420; *Bosford* v. *Pearson*, 9 Allen, 387, 392.

The case was properly submitted to the jury upon the theory that, if the plaintiff's version of the transaction was right, he was entitled to recover the difference between the price of the land and the amount of the $700 mortgage, principal and interest, less what plaintiff had not paid upon the $50 mortgage, which defendant had paid in full.

The judgment is affirmed, with costs.

CHAMPLIN, J., concurred; SHERWOOD, J., in the result. CAMPBELL, C. J., did not sit.

FOLLANSBEE *v.* BOARD OF SUP'RS OF ST. CLAIR CO.

(*Supreme Court of Michigan.* November 10, 1887.)

1. COUNTIES—LIABILITIES FOR EXPENSE OF SECURING FUGITIVE.
How. St. Mich. § 9620, authorizes the governor to appoint agents to demand from the authorities of other states fugitives from Michigan, and provides for the payment of their accounts by the state treasurer, but there is no provision for the payment of such accounts by a county. Where an agent to serve a requisition was appointed by the governor upon the express condition that the state should not be liable for his expenses, *held*, that this stipulation could not cast upon the county in which a fugitive so brought back was tried, any liability for the expenses incurred by the agent.

2. SHERIFF—FEES—SERVICES NOT IN CAPACITY OF SHERIFF.
How. St. Mich. § 9055, giving to the sheriff for services not otherwise provided for such sums as the board of supervisors may allow, does not apply to services performed by the sheriff, but not in the capacity of sheriff.

Application for *mandamus*.

Avery Bros., for relator. *B. C. Farrand*, (*E. E. Stevenson*, of counsel,) for respondents.

SHERWOOD, J. This proceeding is an application to this court for a *mandamus* to the board of supervisors of St. Clair county to audit and allow an account of the relator, amounting to the sum of $693.80, as compensation for services and disbursements in making service of a requisition in the state of Texas, and bringing two fugitives from that state to Port Huron, in St. Clair county, and of which county the relator was sheriff at the time. The record consists of the petition of relator, and the return made to the order of this court to show cause. From these it appears that the fugitives were charged with the crime of forgery, in the county of St. Clair, that the prosecution of the alleged criminals, and the procuring of the requisition from the governor to obtain their return, and the disposition made of the case after the fugitives were brought back, was at the instance of private parties residing out of the state, and who were creditors of the fugitives, and without the knowledge or consent of the prosecuting attorney of the county, or of the respondent. When the relator was appointed agent of the state, to serve the requisition, and receive from the authorities of the state of Texas the fugitives, by the governor, he was appointed only as an individual, and not as sheriff, and the governor took care to expressly state in the appointment of the agent that "the state to be held liable for no expenses incurred in the pursuit and arrest of said fugitives." It further appears by the return, after the fugitives were brought back, some settlement was effected, and the prisoners were discharged. Also that the relator, as respondents are informed and believe, received $300 for the services for which he seeks payment from those who instituted the proceedings, under an agreement to return the same when his bill was audited and paid by the respondents. It also further appears that the relator has twice presented his said account for allowance to the respondents, and each time allowance has been refused.

If the county is under any obligation to pay the account of the relator in this or in any other case, the liability must arise from statutory provision requiring such payment to be made; and whether claimed by the relator in a private or official capacity, the right must be based upon statute, and the amount restricted to the allowances therein stated. *Burk* v. *Webb*, 32 Mich. 182; *Clark* v. *Board Sup'rs*, 38 Mich. 658; *Peck* v. *Bank*, 51 Mich. 353; 16 N. W. Rep. 681; *Vincent* v. *Mecosta Sup'rs*, 52 Mich. 340, 17 N. W. Rep. 938.

The statutory provisions relating to requisitions for fugitives from justice, and the expenses incurred, are found in sections 5278, 5279, Rev. St. U. S., and 9620, How. Comp. St. Mich. The former provide that the costs and expenses incurred in the apprehending, securing, and transmitting fugitives

to the state or territory making demand for them shall be paid by such state or territory. The latter authorizes, in cases like the present, the appointment by the governor of agents to demand of the authorities of other states fugitives from Michigan, and provides that the accounts of the agents shall, unless otherwise directed by the governor, be audited by the auditor general, and paid out of the state treasury. As we have said, in this instance the governor appointed the relator the agent of the state upon the express condition that the state was not to be liable for the expenses. This stipulation of the governor, however, could not cast any liability upon the respondents, unless such liability otherwise existed. The foregoing comprise all the statutory provisions upon the subject of requisitions relating to compensation and the payment of the expenses incurred in serving them. The relator can certainly find nothing in them upon which to base a claim against the county of St. Clair.

Section 9055, How. St., giving to the sheriff for services not otherwise provided for such sums as the board of supervisors might allow, does not apply to this case, for the reason the relator was not acting in the capacity of sheriff in performing the services and incurring the expenses for which he claims. Neither were the services rendered, or expenses incurred, at the request of St. Clair county, or of its legal adviser.

The writ must be denied, with costs to respondents.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

FRENCH *v.* FITCH.

(*Supreme Court of Michigan.* November 10, 1887.)

1. FRAUDS, STATUTE OF—REPRESENTATIONS CONCERNING CHARACTER, ABILITY, ETC.—SALE OF STOCK.

   How. St. Mich. § 6188, provides that "no action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing," etc. Plaintiff brought an action to recover damages for fraud and deceit practiced by defendant in making sale to him of 46 shares of the capital stock and a mortgage bond of a corporation. *Held*, that the statute did not apply to such a case.

2. FRAUD—SALE OF STOCK—EVIDENCE—REMOTENESS.

   In an action for fraud in selling stock and a bond of a corporation, plaintiff and his witnesses were permitted to testify in regard to the value of the real estate, and what it sold for, upon the foreclosure of a mortgage three years after plaintiff purchased his stock. *Held*, that the testimony was too remote, and should have been excluded.

3. SAME—ERRONEOUS ADMISSION OF EVIDENCE NOT CURED BY INSTRUCTION.

   In an action for fraud in selling stock of a corporation, the court admitted irrelevant and immaterial evidence of the value of the real estate three years after the sale of the stock, and then charged the jury that "the price which the property brought at public sale in the spring of 1886, when the company had suspended, is not the true criterion as to the value at that time, [meaning the time when the plaintiff purchased his stock.] The fact may be considered in connection with the evidence, but allowance should be made for the changed condition." *Held*, that the charge was objectionable, and did not cure the error in admitting the evidence.

4. SAME—WHAT AMOUNTS TO FRAUD.

   Plaintiff claimed to recover damages for the sale to him by fraud and deceit of stock in a corporation, and also a $1,000 bond of the corporation, which was secured by a real-estate mortgage. The representations alleged to be false were that "the business of the company was a good, safe, reliable business; that said business paid big the then previous year, and that there was no reason why said business would not pay better the then next year; that the said business paid a dividend of sixteen per cent. the then previous year, and that it would pay better than that the then next year; that everything was cut down low to get the said dividend of sixteen per cent. for the then previous year; that the only reasons why he wanted to sell said stock and bond was that he was getting old, his health was failing, and

that he wanted to go west, to Dakota, where his son was; that the said stock was good, and was worth one hundred cents on the dollar, and was worth twenty-five dollars per share; and that the said bond was just as good as gold, and was just as good as wheat in the bin, and was worth one thousand dollars." The court charged the jury, substantially, that there could be no recovery for the bond. *Held* correct.

Error to circuit court, Kent county; ROBERT M. MONTGOMERY, Judge.

Henry B. Fallass, for defendant and appellant. *Birney Hoyt*, for appellee.

SHERWOOD, J. This suit is an action on the case, to recover damages for fraud and deceit practiced by the defendant in making sale to the plaintiff of 46 shares of the capital stock of a corporation known as the "Sparta Furniture Company," and also a $1,000 mortgage bond made by the same company. The shares of stock were for $25 each. The sale was made in the fall of 1883, and the stock was transferred to the plaintiff by the issue of a new certificate dated November 6, 1883, and the bond was indorsed over to the plaintiff at the same time. The stock was sold at its par value, which was $1,150, and the bond at its face value, and was paid for by the plaintiff, by conveying to the defendant a house and lot in the village of Rockford at $800, and 200 acres of land in Wexford county at $1,400, and the balance the defendant paid in money. The representations alleged to have been made by the defendant, and upon which the plaintiff relied when he purchased the stock and bond, were, in substance, as follows: "That the business of said company was a good, safe, and reliable business; that said business paid big the then previous year, and that there was no reason why said business would not pay better the then next year; that the said business paid a dividend of sixteen per cent. the then previous year, and that it would pay better than that the then next year; that everything was put down low to get the said dividend of sixteen per cent. for the then previous year; that the only reasons why he wanted to sell said stock and bond was that he was getting old, his health was failing, and that he wanted to go west, to Dakota, where his son was; that the said stock was good, and was worth one hundred cents on the dollar, and was worth twenty-five dollars per share; and that the said bond was just as good as gold, and was just as good as wheat in the bin, and was worth one thousand dollars." The falsity of these representations is averred by the plaintiff, and that the said stock was worthless, and the bond was not worth to exceed $500, and that the consideration paid by the plaintiff for them was obtained through said false representations by fraud and deceit. The defendant pleaded the general issue, with notice that he would show, on the trial, that the plaintiff misrepresented to him the value of the house and lot, and the quality and value of the other lands conveyed to him by the plaintiff, and that he would recoup his damages by reason thereof to the amount of $1,000. The cause was tried by jury before Judge MONTGOMERY in the Kent circuit, and the plaintiff recovered a verdict for $1,150, upon which judgment was entered, and for costs. Defendant brings error.

The defendant's first, fourteenth, and seventeenth assignments of error relate to the claim of the defendant that no recovery can be had, because the alleged representations were not in writing, as required by statute, before a defendant can be charged. The statute referred to reads as follows: "No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." How. St. § 6188. The statute was never intended to apply to a case like the present. The representations made were as to the value, then and prospective, of the property of the defendant, and which he was selling to the plaintiff. The fact that the representations made applied as well to the company's property as to the defendant's, cannot affect the defendant's case. *Huntington* v. *Wellington*, 12

Mich. 10; *Lenheim* v. *Fay*, 27 Mich. 70; *Bush* v. *Sprague*, 51 Mich. 41, 16 N. W. Rep. 222; *Taylor* v. *Soper*, 53 Mich. 96, 18 N. W. Rep. 570; *Kryger* v. *Andrews*, *ante*, 245.

We have examined all the testimony objected to by counsel for defendant, and the rulings of the court relating to the same, and exceptions taken, and now especially notice the following:

The plaintiff and one or two of his witnesses were permitted to testify in regard to the value of the real estate, and what it sold for upon the foreclosure of a mortgage three years after the plaintiff purchased his stock and bond, for the purpose of showing its value at that time. This was objected to by defendant's counsel on the grounds that it only proved the amount the property brought at auction, two or three years after claimed representations were made, and a year after the factory had closed, and the property had greatly depreciated; that the testimony was too remote; that it is irrelevant and immaterial; that, under the circumstances, an estimate of its value at the time queried after would be no evidence of its value three years before. This exception was well taken. At the time the plaintiff purchased his stock the establishment was in full operation, and had a value easily ascertained; but, when the business of the company had ceased, its value when the stock was purchased could not be measured by the price it brought at a forced auction sale three years thereafter, and without a going business, and was no evidence tending to show its actual value when the manufacturing was in full operation. Upon this question the circuit judge erred in his ruling to the prejudice of the defendant. No other error appears in taking the testimony for which we would be justified in reversing the judgment.

The charge of the court relating to this portion of the testimony was also erroneous for the same reason. It is as follows: "The price which the property brought at public sale in the spring of 1886, when the company had suspended, is not the true criterion as to the value at that time, [meaning when the plaintiff purchased his stock.] The fact may be considered in connection with the evidence, but allowance should be made for the changed condition." This testimony, in view of all the circumstances, was not admissible in evidence at all, and the court should have rejected it. The charge did not cure the error, but was itself objectionable. Substantially the court charged there could be no recovery for the bond, and this was correct. We find no other error in the refusals to charge or the charge as given by the court, but for the errors noted the judgment must be reversed, and a new trial granted.

CHAMPLIN and MORSE, JJ., concurred.

TRUSTEES OF EAST NORWAY LAKE NORWEGIAN EVANGELICAL LUTHERAN CHURCH and others v. FROISLIE and another.

(*Supreme Court of Minnesota.* November 22, 1887.)

1. LANDLORD AND TENANT—AGREEMENT FOR USE OF PARSONAGE BY PASTOR—TERMINATION BY DEATH.

Where a religious society employs a pastor under an agreement by which he is to receive for his services as such a certain cash salary, and the use of a parsonage as a residence, the contract is one personal to himself, and is terminated by operation of law at his death, and his personal representative has no right to the possession of the parsonage after his decease. His occupancy, being connected with, and in consideration of, his services as pastor, does not create the conventional relation of landlord and tenant.

2. CORPORATIONS DE FACTO—RIGHT TO HOLD PROPERTY—COLLATERAL ATTACK.

A corporation *de facto*, at least where there is a law under which a corporation may be formed for such purposes, is capable of taking and holding property as grantee, and conveyances to it will be valid as to all the world, except the state, in

direct proceedings to inquire into its right to exercise corporate franchises. In an action brought by it to recover such property, no private person will be allowed to attack collaterally the regularity of its organization.[1]

3. SAME—NOTICE OF MEETING—RATIFICATION OF TRUSTEES' ACTS.

The matter of notice of a meeting of a religious society to authorize its trustees to convey its real estate goes not to the power of the society to convey, but to the authority of the trustees as its agents. Hence, if the trustees make conveyance under the authority of a resolution passed at a meeting held without giving the notice required by statute, such conveyance is capable of ratification by the members of the society. When *all* the members of the religious society in whose behalf such conveyance has been made unite with two new religious societies, the organization of the old society being abandoned, and the two new societies bring an action to recover possession of the property, claiming title under such conveyance, *held*, to amount to such a ratification.

(*Syllabus by the Court.*)

Appeal from district court, Kandiyohi county; BROWN, Judge.

Arctander & Arctander, (*James O. Pierce*, of counsel,) for the East Norway Lake Norwegian Evangelical Lutheran Church and others, respondents. *Lomen & Torrison*, for Froislie and another, appellants.

MITCHELL, J. On the trial of this case much irrelevant and immaterial evidence was introduced or offered, and almost all of the evidence offered by either party was objected to by the other. And when the case comes here on appeal, we are confronted with the formidable number of 42 assignments of error. But when this mass of rubbish is removed, the material facts are found to be comparatively simple, and the legal questions involved very few.

The action is ejectment. The common source of title under which both parties claim is a religious society incorporated unter title 4, c. 37, Gen. St., under the name of "The Trustees of the Norwegian Evangelical Lutheran Church of Norway Lake, Kandiyohi county, Minnesota," and called on the trial the "Old Society." This society acquired title of the premises in dispute by deed from Hanson and Heden, and used and occupied them as a parsonage or residence for their pastor. They employed as pastor one Markus, who received for his services as such a certain cash salary, and the use of this parsonage as a residence. He went into possession in October, 1870, and occupied it under this arrangement until the division of the society hereinafter referred to. In 1877 the members of the society having determined to divide, two new societies were organized, or attempted to be organized, under the statute. As appears from their respective certificates of incorporation, the name adopted by one of them was "The Trustees of the East Norway Lake Norwegian Evangelical Lutheran Church of Kandiyohi county, Minnesota," and by the other, "The Trustees of the West Norway Lake Evangelical Lutheran Church of the town of Norway Lake, Kandiyohi county, Minnesota." *All* of the members of the old society went into one or the other of these two, and thereafter the organization of the old society appears to have been abandoned, except for the purpose of closing up their business, and disposing of their property. Both of these new societies have ever since been in the exercise of all the usual powers and functions of religious corporations. They continued, however, to worship together in the old church until as late as June, 1878. At a meeting of the old society held June 28, 1878, it being desired to transfer their property to the two new organizations, but the description of a part of it in their deed from Hanson and Heden being considered not sufficiently definite, it was thought that the best way to correct

[1] The validity of the existence of a corporation can be questioned only in direct proceedings taken by the state. Lumber Co. v. Ward, (W. Va.) 3 S. E. Rep. 227; Stout v. Zulick, (N. J.) 7 Atl. Rep. 862; Bone v. Canal Co., (Pa.) 5 Atl. Rep. 751, and note; Railroad Co. v. Putnam, (Kan.) 12 Pac. Rep. 593; Broadwell v. Merritt, (Mo.) 1 S. W. Rep. 855, and note; Bell v. Railroad Co., (N. J.) 10 Atl. Rep. 741.

this and accomplish the desired object was to reconvey to Hanson and Heden, and have them convey to the new societies. The society thereupon adopted a resolution authorizing their trustees to convey to Hanson and Heden, and requiring the latter then to convey to the two new societies. In pursuance of this the trustees of the old society conveyed to Hanson and Heden, and they in turn to plaintiff. This is plaintiffs' title.

After the division of the old society, Markus continued to be the joint pastor of the two new societies, and as such was allowed to occupy the parsonage "*just as he had before.*" He continued to occupy it until his death, in December, 1885. After his death his administrator, claiming the right of possession, gave defendants the lease under which they now claim. The contention of defendants is that Markus was a tenant from year to year, and that on his death his personal representative was entitled to the possession until the termination of the year ending October, 1886, and thereafter until the tenancy should be terminated by notice to quit. This is clearly untenable. The contract between Markus and the old society first, and the new societies afterwards, as their pastor, was one purely personal to himself, and his occupancy of the parsonage was connected with and in consideration of his services as such, which did not create the conventional relation of landlord and tenant. This contract, being personal to himself, necessarily terminated by operation of law at his death, and his personal representative had no more right to the possession of the premises than any mere intruder, and could give none to defendants, and notice to quit was not necessary.

It seems to be urged, however, that Markus had ceased to be the pastor of these societies before his death, and the fact of his being allowed to remain in possession thereafter somehow changed his occupancy into a tenancy from year to year. Some allusion was incidentally made in the pleadings and during the trial to his being deposed, but we find no proof of it; so far as the record discloses, he remained pastor till his death. But, even if it were otherwise, his occupancy would not, upon his ceasing to be pastor, *eo instante*, become a tenancy from year to year, or even a tenancy at will, creating the conventional relation of landlord and tenant. To have that effect, his occupancy afterwards must have been of such duration, or permitted under such circumstances, as to warrant an inference of consent on part of the societies to a different holding from that which he formerly had. There is not a particle of evidence of any such facts.

Defendants, however, attack plaintiffs' title. They claim that they were never legally organized, and hence were incapable of taking or holding property. The points made in support of this contention are that the meetings at which the organizations were attempted to be made were not held after sufficient notice; that the certificates of incorporation were not properly executed, acknowledged, or recorded, etc.; and that chapter 193, Sp. Laws 1878, purporting to legalize the organizations, is unconstitutional. Under the view we take of the case it is wholly unnecessary to consider any of these questions. The plaintiffs are at least corporations *de facto*. Such a corporation, at least where there is a law under which a corporation might have been legally formed with such power, is capable of taking and holding property as grantee, as well as a corporation *de jure*, and conveyances to it are valid as to all the world, except the state in proceedings in *quo warranto*, or other direct proceedings to inquire into its right to exercise corporate franchises. And in an action by it to recover such property, no private person will be allowed to inquire collaterally into the regularity of its organization. This rule is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization.

Another ground of attack on plaintiffs' title is that the meeting of the old society, which authorized its trustees to convey the premises, was not called upon due notice. There are, in our opinion, two sufficient answers to this: *First.* The evidence does not show any such thing, and every reasonable presumption will be made in favor of the regularity of the meeting. Notice will be presumed until the contrary appears. *Second.* Under the facts of this case it must be presumed, even if proper notice was not given, that the act of the trustees in making this conveyance has been ratified by the only persons interested, or who had a right to complain, viz., the members of the society itself. It will be observed that this question of notice of the meeting goes, not to the power of the corporation to convey, but to the authority of the trustees as their agents to make the conveyance. The statutory provision regarding such notices does not concern the public at large, but is a mere regulation for the benefit of the members of the society themselves. No principle of public policy is at stake. If a conveyance is made by authority of a meeting held without proper notice, no wrong is done to any one except the stockholders, as we may term the members of the society; and, like any other act of an agent performed without authority, it is capable of ratification. In this case neither the old society nor any member of it is raising any objection. On the contrary, all the members of the old society, having joined the new societies, are here, through these societies, as plaintiffs, claiming title under this very conveyance. This amounts to a ratification.

The objections made to the forms of the deeds are clearly not well taken. In the deed from the old society to Hanson and Heden the society by its corporate name is named as grantor. This makes it the deed of the society, although, in executing it, the trustees signed merely their names, without adding the title of their office. The deed from Hanson and Heden runs to A., B., and C., "Trustees of the East Norway Lake Norwegian Evangelical Lutheran Church," and C., D., and C., "Trustees of the West Norway Lake Norwegian Evangelical Lutheran Church of Norway Lake," (which were the corporate names of the societies,) and to their successors in office, "in trust for said Evangelical Lutheran Church." We think this was a conveyance to the societies, and not to the trustees, *eo nomine*, in trust for them. But, even if it were the latter, the trust would, under the statute of uses and trusts, be a "passive" or executed one, and the title would pass directly to the societies.

The by-laws of the societies, and the ecclesiastical constitution of the synod to which they belonged, were clearly immaterial, and were properly excluded by the court. They seem to have been offered for the purpose of showing that the majorities of these societies, and who controlled their legal organizations, had by certain violations of the ecclesiastical polity of the church forfeited their rights to the property of the societies. No such question could be raised or litigated in an action by the societies to recover their property from defendants.

This substantially covers all the assignments of error which we deem of sufficient importance to require any special consideration. We have examined all the others and find no error. Judgment affirmed.

In re Appeal of QUINN v. MARKOE.

(*Supreme Court of Minnesota.* November 22, 1887.)

1. ELECTIONS—VALIDITY—ACTS OF ELECTION OFFICERS DE FACTO.
The acts of election officers *de facto*, being in under color of election or appointment, are valid as to third parties and the public; and it is no ground for the rejection of the vote of an election precinct that some of the judges of election did not possess the qualifications required by law.

2. SAME—BALLOTS—"STICKERS"—VALIDITY.

A "sticker" or "paster" containing the name of a candidate, and attached to the face of a ballot, is not a "cut or device to distinguish one ballot from another," within the meaning of Gen. St. 1878, c. 1, § 82.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county; SIMONS, Judge.

Henry Johns and *M. D. Munn*, for Quinn, contestant and respondent. *C. D. O'Brien* and *I. V. D. Heard*, for Markoe, contestee and appellant.

MITCHELL, J. Appellant's assignments of error may all be reduced to three:

1. That, under the respondent's notice of contest, no evidence was admissible as to the actual vote cast in any election precinct, except the First and Second of the Second ward of St. Paul. It is unnecessary to consider this, for the reason that the recount in the other precincts was more favorable to appellant than the returns of the judges of election. Hence the admission of the evidence, if error, was error without prejudice.

2. That the court erred in receiving the return for the town of New Canada, for the reason that two of the judges of election were disqualified because they could not read the English language. There is no claim that these judges made any mistake, or that the votes cast for appellant in that town were not all counted for him. Assuming, without deciding, that these judges were, for the reason stated, not qualified to act, there is nothing better settled than that the acts of election officers *de facto*, being in under color of election or appointment, are valid as to third parties and the public. The doctrine that electors may be disfranchised because one or more of the judges of election did not possess all the qualifications required by law, finds no support in the decisions of any judicial tribunal. *Taylor* v. *Taylor*, 10 Minn. 107, (Gil. 81.)

3. That the court erred in counting for respondent 108 ballots "having his name printed in blue ink on pasters attached to said ballots on the face thereof," and immediately below the words "For Coroner." The evidence shows that respondent had these "stickers" or "pasters" printed and distributed, so that they might be pasted over the printed name of his opponent, on the tickets of the opposite party. There is no evidence that they were intended or operated as a means of distinguishing one ballot from another. It was simply the common form of "stickers" pasted on the face of the ticket. This is no more a violation of the provisions of Gen. St. c. 1, § 82, than it would be for an elector to erase the printed name of one candidate and write on the face of the ballot the name of another. The prohibition of the statute is against using a ballot containing any cut or device on its face, or any cut or device, or any written or printed matter, on its back, made to distinguish one ballot from another. The purpose is to protect the secrecy of the ballot, so as to secure the voter against intimidation, and not to compel men to vote the "straight ticket." Judgment affirmed.

TOWN OF HAVEN *v.* ORTON.

(*Supreme Court of Minnesota.* November 22, 1887.)

APPEAL—ORDER DETERMINING ACTION—DISMISSAL OF APPEAL FROM ORDER LAYING OUT HIGHWAY.

An order dismissing an appeal from an order of the town supervisors laying out a highway, and from their award of damages, is appealable under Gen. St. 1878, c. 86, § 8, subsec. 5, as "an order which in effect determines an action and prevents a judgment from which an appeal might be taken." If notice of appeal has been actually served upon the chairman of the board of supervisors, the mere fact that proof of such service has not been filed with the clerk of the district court is no ground for dismissing the appeal. Under the "road law," the filing of proof of such service is not a prerequisite to the perfecting of an appeal. Where the notice of appeal from an order laying out a highway describes the order and the highway so

as to fully identify it, and apprise the supervisors beyond the possibility of mistake what is appealed from, it is sufficient although it misstates the exact date of the order.

(Syllabus by the Court.

Appeal from district court, Sherburne county; BAXTER, Judge.

Bruckart & Reynolds, for Orton, appellant. *Taylor & Stewart*, for Town of Haven, respondent.

MITCHELL, J. 1. Appeal from an order of the district court dismissing an appeal from an order of the town supervisors laying out a highway, and from their award of damages. Such an order is appealable under Gen. St. 1878, c. 86, § 8, subsec. 5, as one which, in effect, determines the action, and prevents a judgment from which an appeal might be taken. *Ross* v. *Evans*, 30 Minn. 206, 14 N. W. Rep. 897.

2. If a notice of appeal has been actually served upon the chairman of the board of supervisors, the fact that proof of such service has not been filed with the clerk of the district court would be no ground for dismissing the appeal. Unlike the statute regulating appeals from justice's court, there is nothing in the "road law" requiring proof of service of notice of appeal to be filed within any specified time, or at all. The jurisdictional thing is the fact of service, and not the filing proof of it. If any question is raised as to the fact of service, the appellant would have the right then to furnish the proof.

3. The principal thing urged by respondent as a reason why the appeal was properly dismissed is that there is no such order as the one appealed from. The point is that the order laying out the road is dated September 25th, whereas it is described in the notice of appeal as dated October 25th. But the notice also describes it as an order "laying out a highway which is hereinafter described;" and then follows a description of the road by courses and distances, giving the points of beginning and termination in the exact language of the order itself. There being but one order of the kind, the notice of appeal so fully describes it as to clearly identify it, and to apprise the supervisors, beyond the possibility of mistake, what was appealed from. It therefore fully performed the office of a notice, and was good notwithstanding the mistake as to the date of the order.

Some point seems to be made upon the fact that the appellant in his notice of appeal states that he feels himself aggrieved by the award of damages by which he was awarded only $50 on 120 acres, describing it, whereas in the award of the supervisors he is only credited with being the owner of 80 acres of the land upon which the $50 was allowed; the owner of the other 40 being stated as unknown, and as to which the benefits of the road were adjudged to equal any damages. Inasmuch as the appeal is from the order laying out the road as well as from the award of damages, even if the notice of appeal was insufficient as to the latter, this would be no ground for dismissing the appeal as to the former. We think, however, that the notice was sufficient as to both grounds of appeal. The ownership of the 80 acres alone would give the appellant the right of appeal; and if he owned the other 40 acres, the fact that the supervisors in their award stated the owner as unknown would not affect his right to damages for that also. We fail to discover any reason why the appeal should have been dismissed. Order reversed.

LUKENS v. HAZLETT.

(*Supreme Court of Minnesota.* November 22, 1887.)

1. USURY—RULE OF EVIDENCE—DEVICE TO EVADE USURY LAW.
The rule of evidence in "usury cases" is the same as in any other civil action. All that is required is a fair preponderance of evidence. Where a new contract is substituted for a usurious one the taint of usury will affect the new security. H.,

the payee of an overdue usurious note, pretending to L., the maker, to refuse to renew it, referred him to K., from whom he said he could borrow the money to pay it. L. thereupon applied to K. for the loan, which K. pretended to make to him, taking from him a note running to himself and giving him a check on H.'s bank, which L. indorsed over to H., receiving in exchange therefore merely his old note. In fact the pretended loan by K. was merely colorable, the transaction being a mere device by H. to evade the usury law, K. being his agent, and the new note in fact belonging to H. and being taken in substitution for the first one. *Held*, that L. could recover the value of property taken on a chattel mortgage executed to secure the new note on the ground that it was usurious, although at the time of its execution he was ignorant of the fact, and supposed that it was made to secure an actual loan made to him by K. It is immaterial that there was no intent on the part of L. to pay usury, and no knowledge that the new note was usurious.

2. TRIAL—CROSS-EXAMINATION—DISCRETION OF TRIAL COURT.

The latitude to be allowed in cross-examination is largely within the discretion of the trial court, and this court will not reverse unless there has been a gross and oppressive abuse of such discretion.

(*Syllabus by the Court.*)

Appeal from district court, Wadena county; STEARNS, Judge.

A. G. Broker and *Law & Bullard*, for Lukens, respondent. *Hartshorn & Coppernoll*, for Hazlett, appellant.

MITCHELL, J. This was an action to recover the value of personal property taken under a chattel mortgage executed to secure an alleged usurious note.

The note for $585, executed by plaintiff to defendant, was confessedly usurious. If the $637 note secured by this mortgage had been given directly to defendant in substitution for the first one, it would have been also usurious; for where a new contract is substituted for a usurious one the taint of usury will affect the new security. *Jordan* v. *Humphrey*, 31 Minn. 495, 18 N. W. Rep. 450; Tyler, Usury, 395. The evidence tended to show that when the first note fell due the defendant told plaintiff that he could not renew it, but must have the money, and referred him to one Kelly, from whom he said he thought plaintiff could borrow it; that plaintiff thereupon applied to Kelly for a loan, and that Kelly assumed or pretended to loan him $637, taking as security the note and mortgage referred to, and leaving at defendant's bank a check for that amount payable to plaintiff, which plaintiff indorsed to defendant, receiving in exchange merely the $585 note. In finding a verdict for the plaintiff the jury must, under the instructions of the court, have found that in this matter Kelly was the agent or mere "cat's paw" of defendant; that the whole transaction was a mere device to evade the usury law; that the new note, although in form running to Kelly, in fact belonged to defendant, being a mere renewal of the old one.

Without attempting either to state or discuss the evidence, it is enough to say that we think it was amply sufficient to justify such a conclusion. The rule of evidence in these usury cases is the same as in any other civil action. All that is required is a fair preponderance of evidence. And there is no device or shift on the part of the lender to evade the statute under or behind which the law will not look in order to ascertain the real nature of the transaction. Defendant, however, contends that in order to constitute usury there must be a concurrence of intent of both parties,—on the part of the borrower to pay, as well as on part of the lender to take, usury; that in this case, inasmuch as plaintiff supposed he was borrowing the money from Kelly, and that he was giving the note to him to secure the loan, and did not know that defendant had any connection with the matter, therefore the new note is not infected with usury, because there was, in fact, no intention on part of plaintiff to give it in substitution for or in renewal of the old one. There are some loose statements in the text-books, and perhaps some judicial authority to the effect, that to render a contract usurious both parties must be cognizant

of the fact constituting usury, and must have a common purpose to evade the law. But it seems to us that it would be contrary both to the language and policy of the usury law to hold any such doctrine, as thus broadly stated. These laws are enacted to protect the weak and necessitous from oppression. The borrower is not *particeps criminis* with the lender whatever his knowledge or intention may be. The lender alone is the violator of the law, and against him alone are its penalties enacted. It would be indeed strange if the only party who could violate the law had intentionally done so, and could escape its penalty because by some device or deception he had so deceived the borrower as to conceal from him the fact that he was taking usury.

If this note was in fact obtained by defendant in renewal of the usurious one, and the pretended loan by Kelly was a mere device to evade the law and conceal the fact from plaintiff, we have no doubt he could have defended an action on the note or maintain this action to recover the value of the property taken on the mortgage given to secure it, although at the time he executed it he was ignorant of the facts, and really supposed that he was borrowing the money of Kelly. *Bank* v. *Plankington*, 27 Wis. 177.

2. We think the question put to defendant's witness Law was legitimate cross-examination. The latitude allowable in cross-examination is very largely a matter within the discretion of the trial court, and this court will not interfere, unless this discretion is grossly and oppressively abused. And even if the question was not proper cross-examination, yet, the evidence being material to the issues in the case, its admission would be no ground for reversal, unless it affirmatively appeared that the defendant was unfairly prejudiced. Nothing of this kind appears. If the plaintiff made the witness his own, defendant would have the right to cross-examine him and to introduce evidence in rebuttal. Judgment affirmed.

ERICKSON v. JONES.

(*Supreme Court of Minnesota.* November 25, 1887.)

1. FIXTURES—AS BETWEEN LANDLORD AND TENANT—RIGHT TO REMOVE EXPIRES WITH LEASE.
   As between landlord and tenant the right to remove fixtures expires with the lease unless a subsequent removal is provided for in the lease, or the lease is of such uncertain duration that no reasonable opportunity for a previous removal is offered.[1]
2. SAME—NOTICE TO QUIT—TENANCY AT WILL.
   The statutory notice required in the case of tenants at will renders the time limited for the expiration of the lease sufficiently definite to bring such tenants ordinarily within the operation of the general rule.
3. SAME—EJECTMENT AFTER NOTICE—LOSS OF FIXTURES.
   And where such notice has been duly served upon a tenant at will, and he has been ejected by due process subsequent to the expiration of the time fixed in such notice, his right to remove fixtures is lost.

(*Syllabus by the Court.*)

Appeal from municipal court of Minneapolis; MAHONEY, Judge.

R. L. Penney and *Jordan, Penney & Hammond*, for Erickson, respondent. *Hooker & Nunn*, for Jones, appellant.

VANDERBURGH, J. As between landlord and tenant, unless the right to remove fixtures after the expiration of the term is specially reserved in the lease, the rule is well settled that such fixtures must be removed by the tenant

[1] Concerning the right to fixtures as between landlord and tenant, and the right of the tenant to remove them upon the termination of the lease or afterwards, see Josslyn v. McCabe, (Wis.) 1 N. W. Rep. 174; Smith v. Park, (Minn.) 16 N. W. Rep. 490; Conrad v. Manufacturing Co., (Mich.) 20 N. W. Rep. 39; Bank v. O. E. Merrill Co., (Wis.) 34 N. W. Rep. 514.

before his term expires, or at least while he continues to hold possession as tenant. Where, however, his tenure is uncertain, and such that it may be determined unexpectedly to him, this rule is modified so as to allow a reasonable time for the removal of fixtures after the termination of the lease. *Ornbong* v. *Jones*, 19 N. Y. 238; *Loughran* v. *Ross*, 45 N. Y. 797.

This qualification is usually applied to leases of uncertain duration, as for life, or at will, or until the happening of some event. But where, as in this state, by statute, leases at will can only be terminated after reasonable notice, it would seem that, in ordinary cases, the time limited for the expiration of the term is rendered sufficiently definite to warrant the application of the general rule. In any event, we see no reason why it should not have been applied in the case at bar. Tyler, Fixt. 453.

The plaintiff occupied certain premises of defendant as tenant at will. The building in controversy, which was placed on the land by the plaintiff's assignor, and purchased and occupied by the plaintiff, it is conceded was a fixture as between landlord and tenant, and the latter had a right to remove it if such removal was seasonably effected. Whether he had lost such right by delay is the question to be determined here. He was ejected from the premises after due notice to quit, and for default in the payment of rent due. The character of the tenancy, and this defendant's right to put an end to the lease, and recover possession, were determined in the proceedings for forcible detainer referred to by the court in its findings, the record of which was introduced in evidence, and is made part of the settled case returned here. In that action, which was between the same parties, it was alleged and found that the plaintiff herein was largely in arrears for rent, and that due notice to quit was served on him as tenant at will, and that he was ejected under process served months thereafter; so that he had ample notice and opportunity to remove the building before he was dispossessed. This action for the alleged subsequent conversion of the same by the defendant cannot, therefore, be maintained.

Order reversed, and case remanded.

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WALLACE *v.* MINNEAPOLIS & NORTHERN ELEVATOR CO.

(*Supreme Court of Minnesota.* November 25, 1887.)

1. WAREHOUSEMEN—TENDER OF CHARGES AND GRAIN RECEIPTS—WAIVER.
   It is competent, for a bailee of grain held in store, to waive the formal requisites of a tender of charges and grain receipts provided for by section 15, c. 124, Gen. St. 1878.
2. SAME—REFUSAL TO DELIVER ON OTHER GROUNDS—ESTOPPEL.
   And where such bailee places his refusal to deliver the grain solely on the ground that it is claimed by a third party, he will not be permitted subsequently to change his position, and justify such refusal on the ground that the charges are not paid.

(*Syllabus by the Court.*)

Appeal from district court, Otter Tail county; BAXTER, Judge.

J. W. Mason, for Wallace, respondent. *Cross & Carlton*, for Minneapolis & Northern Elevator Co., appellant.

VANDERBURGH, J. It is found by the trial court, that the wheat in question had been stored in one of defendant's elevators, in the village of Pelican Rapids, in this state; and that, on the ninth day of December, 1885, he had the amount of wheat alleged in the complaint, in such elevator; and that he was then and there entitled to demand and have the same as owner; that he was in possession of "checks" or "tickets" representing the amount thereof; and that, at that date, plaintiff did demand the same of defendant, at the place mentioned, and offered to pay the charges thereon, which were computed by the defendant's agent from the wheat "checks" produced by the plaintiff at

the time, and which he stood ready to deliver up. The defendant's agent thereupon refused to deliver the wheat, solely upon the ground that it belonged to one Plummer; and then informed plaintiff that he had instructions not to deliver the wheat to him, because it belonged to Plummer, but did offer to deliver it to him, provided he would furnish an indemnity bond; and for this reason no further or more formal tender of the charges and tickets was made. The wheat, as the court finds, did not belong to Plummer, but to the plaintiff, and that upon the facts found, the plaintiff was entitled to recover for the value thereof, as upon a conversion. And the court thereupon ordered that, upon producing and surrendering the checks, plaintiff should have judgment.

There can be no question of the propriety of this ruling. It was competent for the defendant to waive the statutory provisions as to the formal tender of the charges and tickets, and the facts found very clearly show there was such waiver. The conduct of the defendant rendered it unnecessary for the plaintiff to do more. The objections he now makes to the sufficiency of the demand and tender, in order to show a conversion of the wheat, might all have been obviated at the time but for his own conduct in denying plaintiffs ownership, and placing his refusal to deliver it upon the ground that it belonged to another. He cannot now be permitted to change his position, and place his refusal upon another and different ground, to defeat this action. *McCarthy* v. *Railway Co.*, 96 U. S. 267; *Holbrook* v. *Wight*, 24 Wend. 169. The defendant's refusal, under the circumstances, must be treated as a conversion, and plaintiff's rights and remedies are as fully preserved as if a strictly formal tender had been made.

Judgment affirmed.

REID v. FRAZER and another.

(*Supreme Court of Minnesota.* November 25, 1887.)

PARTNERSHIP—AS TO THIRD PERSONS.

Evidence held sufficient to support the finding by the jury of the continuance of the partnership relations of the defendants, as to the public and persons dealing with them.

(*Syllabus by the Court.*)

Appeal from district court, Stearns county; COLLINS, Judge.

Taylor & Stewart, for Reid, respondent. *Bruckart & Reynolds*, for Frazer and another, appellants.

VANDERBURGH, J. 1. The plaintiff sues the defendants as copartners upon an account for work and labor, and unites with the cause of action for his own services similar claims in favor of other parties, which are alleged to have been duly assigned to him. The assignments which were offered in evidence were valid transfers of the accounts as between the parties; and sufficient to constitute the plaintiff the real party in interest.

2. The defendant Frazer, who alone appears in the case, insists that the evidence in the case is insufficient to establish a partnership liability as against him. The case made by the plaintiff was not a strong one, but we are of the opinion that there was sufficient evidence to send it to the jury The defendants were engaged in quarrying stone near St. Cloud, and are admitted to have been in partnership till into March, 1886. Plaintiff's services commenced in the same quarry in April, 1886. The defendant Frazer was there and directed the plaintiff as to his boarding place, and showed him where to work. The tools and apparatus of the defendants remained at the quarry unchanged, and there is some evidence tending to show that the business was still carried on in the partnership name, and it does not appear that anything had been done, until after the services in question had been rendered, which would be suffi-

cient to notify the public or third persons that the partnership did not continue.

Order affirmed.

RICHARDSON *v.* ROGERS and others.

(*Supreme Court of Minnesota.* November 25, 1887.)

1. JUDGMENT—RENDITION AND ENTRY—INSERTION OF COSTS.
As respects the lien or validity of a judgment informally entered and docketed without the taxation and insertion of costs therein, the omission is to be treated as an irregularity merely. But for the purposes of an appeal the prevailing party seeking to limit the right of his adversary, is to be held to strict practice, and the judgment is not to be deemed perfected until the costs to which he is entitled are duly taxed and inserted in the judgment.

2. NEW TRIAL—MOTION—BILL OF EXCEPTIONS—AFTER TIME FOR APPEAL HAS EXPIRED.
A party is not entitled to have a case or bill of exceptions settled and allowed as a basis for a motion for a new trial, after the time to appeal from a final judgment duly perfected and entered in the same action, has expired.

3. APPEAL—FROM ORDER DISMISSING APPLICATION TO SETTLE BILL.
An order of the district court dismissing an application for the settlement of a bill of exceptions is not appealable.

(*Syllabus by the Court.*)

Appeal from district court, Le Sueur county; EDSON, Judge.

Townley & Gale, for Richardson, appellant. *M. R. Everett* and *A. C. Brown*, for Rogers and others, respondents.

VANDERBURGH, J. The plaintiff applied to the judge of the district court, upon order to show cause, for an allowance and settlement of the bill of exceptions prepared by him in the case, to which amendments had been duly served by defendant. The application was regular in form, but was denied and the order discharged, and from the order denying such application the plaintiff appeals. The defendants move to dismiss the appeal on the ground that the time to appeal from the judgment has expired and no appeal has been taken, and that it is therefore too late to apply to the court for a settlement of the exceptions. The plaintiff, however, contends that no such final judgment has been entered as to limit the time to appeal, on the ground that the judgment is manifestly incomplete and imperfect, in that the costs to which defendants are entitled by virtue of the decision in their favor, were not inserted in and made a part of the judgment.

It is thereby adjudged "that this action be and is hereby dismissed on the merits, and it is further adjudged and determined that the said defendants recover of said plaintiff the sum of ——— dollars, costs, and disbursements of this action." The costs properly constitute a part of the judgment, and unless they are waived or released by the prevailing party, he is as much entitled to have them included as other relief.

For the purposes of an appeal the cases in New York and in Wisconsin hold, under substantially similar statutory provisions, that a judgment is not perfected until the costs are inserted, and hence the time to appeal does not run against the defeated party until they are properly taxed and included in the judgment. *Andrews* v. *Welch*, 47 Wis. 136, 2 N. W. Rep. 98; *School-District* v. *Kemen*, 32 N. W Rep. 42; *Lentilhon* v. *Mayor*, 3 Sandf. 723; *McMahon* v. *Harrison*, 5 How. Pr. 360; *Sherman* v. *Postley*, 45 Barb. 352; *Champion* v. *Plymouth Soc.*, 42 Barb. 444. While something may be said upon the other side of the question, yet we think this construction establishes the better rule.

As respects the lien or validity of a judgment, the omission to include costs, or an insertion therein of costs taxed without notice, is to be treated as an irregularity merely. *Dix* v. *Palmer*, 5 How. Pr. 236; *Potter* v. *Smith*, 9 How. Pr. 264; *Tracy* v. *Humphrey*, 1 Code R. (N. S.) 198; *Leyde* v. *Martin*,

16 Minn. 38, (Gil. 24.) A party may enter and docket his judgment so as to secure a lien without waiting to give notice of taxation of costs, and upon a retaxation, the record may be amended and if the costs are reduced the amount of such reduction may be indorsed on the execution if previously issued. But as held in *Champion* v. *Plymouth Soc.*, *supra*, a party seeking to avail himself of the statutory limitation of his adversary's right to appeal, should be held to strict practice.

In *McMahan* v. *Harrison*, *supra*, it is suggested that until the costs are taxed it cannot be known in cases where proceedings are to be stayed, in what sum the sureties are to justify, and that it is better that the practice be uniform, whether a stay is had or not. But a stronger reason for the rule is suggested by the practice under which the action of the district court in the adjustment of costs is reviewed in this court. Errors in the taxation of costs can only be reached on appeal from the judgment, as an intermediate order affecting the judgment. *Closen* v. *Allen*, 29 Minn. 87, 12 N. W. Rep. 146. The order of the district court on appeal from the clerk's adjustment must be made before the judgment appealed from is finally perfected. See *Cord* v. *Southwell*, 15 Wis. 216, where it is said by DIXON, C. J.: "Costs constitute a part of the judgment, and I do not think it can be deemed perfect until they are ascertained and included; and, therefore, though the order adjusting costs may in fact have been made after the judgment was otherwise complete, yet for the purpose of appeal and review it must be taken to have been made before."

Upon the state of the record before us we conclude, therefore, that the appellant has not lost his right to appeal from the judgment or move for a new trial.

But the right to have a case or exceptions settled or to move for a new trial is presumptively gone when the time to appeal from the judgment in the action has expired. *Deering* v. *Johnson*, 33 Minn. 97, 22 N. W. Rep. 174; *Bonesteel* v. *Bonesteel*, 30 Wis. 153. Upon a former motion not finally determined the question here decided was not fully presented or considered.

The motion to dismiss the appeal must, however, be granted (though not upon the ground urged by respondent) because the order appealed from is not appealable. The refusal of the trial court or judge to settle or certify a case cannot be reviewed on appeal. The remedy is *mandamus*. *State* v. *Cox*, 26 Minn. 214, 2 N. W. Rep. 494; *State* v. *Macdonald*, 30 Minn. 99, 14 N. W. Rep. 459.

Appeal dismissed.

SMITH, Trustee, etc., *v.* BRAINERD and another, Assignees, etc.

(*Supreme Court of Minnesota.* November 30, 1887.)

1. INSOLVENCY—PREFERENTIAL CONVEYANCE—CONSTRUCTION OF STATUTE—RIGHTS OF ATTACHING CREDITOR.
   A provision in an insolvent or bankrupt law providing that a preferential conveyance made in fraud of the provisions of the statute shall be void, is to be construed as meaning simply that it is voidable only in favor of proceedings under and in aid of the law. A creditor who is not a party to the insolvency proceedings, but is claiming the property by virtue of an attachment or judgment against the insolvent debtor, can claim no benefit from this provision.

2. SAME—SECOND CREDITOR—RELEASE OF SECURITY—PROVING DEBT—ESTOPPEL.
   Where the insolvent law provides that a secured creditor may release and deliver up to the assignee the property held as security, and be admitted as a creditor for the whole of his debt, the proof of the whole claim without a release would not of itself operate to discharge or release the security. Only the assignee in bankruptcy could avail himself of the right which this provision of the act was intended to secure for the benefit of the estate. A mortgagee who has proved his debt against the

estate of the mortgagor without discharging his mortgage, is not thereby estopped to claim under it against a subsequent attaching creditor who has not proved his debt.

(*Syllabus by the Court.*)

Appeal from district court, Otter Tail county; BAXTER, Judge.

Benton & Roberts, for Smith, respondent. *M. R. Tyler* and *Clapp & Woodard*, for Brainerd and others, appellants.

MITCHELL, J. Counsel have discussed various questions as to the extra-territorial effect of insolvency or bankruptcy proceedings, and as to whether the provisions of the insolvent law of Vermont will govern this case.

It is wholly unnecessary to consider these questions, for the reason that, conceding all that the intervenor claims in that respect, and that the Vermont statute will control precisely as if the property were situated in that state, yet, upon all the facts stated in his complaint, he has no possible standing in court. He relies first upon the provisions of that statute to the effect that a preferential transfer or conveyance by an insolvent, or one in contemplation of insolvency within four months of the filing of a petition by or against him to one having reasonable cause to believe that such person is insolvent, or in contemplation of insolvency, "shall be void; and the assignee may recover the property, or the value thereof, as assets of the insolvent debtor." This and similar provisions in bankrupt or insolvent laws are always construed as meaning simply that such conveyances are voidable only in favor of proceedings under and in aid of the law. *Smith* v. *Deidrick*, 30 Minn. 60, 14 N W Rep. 262; *Berry* v. *O'Connor*, 33 Minn. 29, 21 N. W. Rep. 840. The intervenor is an entire stranger to these insolvency proceedings. He is not claiming under them, but in hostility to them under his attachment and judgment lien in a suit instituted by himself against the insolvent debtor. His further contention is that the legal effect of the act of the St. Albans Trust Company in proving their claim against Brainerd before the court of insolvency in Vermont, and accepting dividends thereon, is to release and discharge their security on the land covered by their trust deed. It is not alleged that it was ever in fact released or discharged, and no provision of the Vermont statutes is pleaded which would give to the act of proving the debt any such effect. But, as a matter of fact, by reference to the statute itself, it will be found that a secured creditor has three courses, either of which he may pursue: (1) He may rely on his security alone, and not prove his debt at all; (2) he may have the property held as security sold under the order of the court, and the proceeds applied towards payment of his claim, and then be admitted as a creditor for the residue, if any; or (3) he may release and deliver up to the assignee the property held as security, and be admitted as a creditor for the whole of his debt.

Assuming that the St. Albans Trust Company had proved the full amount of their claim, this, without a release, would not of itself operate to discharge this mortgage or trust deed. It might prevent them from setting it up against the assignee claiming the property as part of the assets of the estate of the insolvent debtor. But only the assignee can avail himself of the rights which the provisions of the insolvent law were intended to secure. The intervenor can claim no benefit from it. Neither can he set up the acts of the trust company in the insolvency proceedings by way of estoppel. There is an entire want of mutuality as well as privity. He has acquired no title from the assignee and is not a party to the proceedings. *Cook* v. *Farrington*, 104 Mass. 212. The facts pleaded, tending to show that the insolvent debtor will be entitled to a discharge from his debts provable under the insolvent law when the insolvency proceedings are brought to a close, are utterly irrelevant. Even if such a discharge had been already granted, it would simply release the debtor from personal liability for these debts, and relieve his subsequently

acquired property from attachment or levy. It would in no way affect valid liens acquired upon property prior to the institution of the insolvency proceedings.

The demurrer to the intervenor's complaint was properly sustained. Order affirmed.

PHELPS, Adm'r, etc., v. WINONA & ST. P. RY. CO.

(*Supreme Court of Minnesota.* November 30, 1887.)

1. NEGLIGENCE — EVIDENCE — CONDITION OF HIGHWAY — FINANCIAL CIRCUMSTANCES OF DECEASED.

Action for damages resulting from the negligence of defendant in obstructing a highway crossing with snow thrown from the railroad track, causing the death of plaintiff's intestate. *Held*: (1) Evidence of the difficulties experienced by other travelers in attempting to pass the crossing prior to the accident, and while the highway was in substantially the same condition, was admissible. (2) Evidence of what the deceased was worth at the time of his death was admissible for the purpose of showing the reasonable expectation of pecuniary benefit to his family from the continuance of his life. Any one who has knowledge of his pecuniary affairs, as an attorney, who managed the settlement of his estate, may testify. The fact that his knowledge was derived in part from proceedings had in the probate court in the settlement of his estate does not render his testimony secondary evidence.

2. DISMISSAL—AFTER NEW TRIAL GRANTED—BAR TO SUBSEQUENT ACTION—ESTOPPEL.

Where an action has been tried, and a verdict for the plaintiff set aside by the court, and a new trial granted, the plaintiff has a right to dismiss or discontinue his action, the same as if no trial had ever been had. It would be a dismissal "before trial," and no bar to another suit for the same cause of action. Nor would the plaintiff be estopped from setting up in the second suit, as the basis of his right to recover, other or different facts from those set up in the first action.

3. ABATEMENT—PENDENCY OF ANOTHER ACTION.

To maintain the defense of the pendency of another suit for the same cause of action, it must be affirmatively proved that the suit is *still pending*.

(*Syllabus by the Court.*)

Appeal from district court, Waseca county.

Wilson & Bowers, for Winona & St. Peter Ry. Co., appellant. *B. S. Lewis* and *M. D. L. Collester*, for Phelps, respondent.

MITCHELL, J. Action for damages resulting from defendant's negligence causing the death of plaintiff's intestate. The negligence charged was throwing snow from the railroad track upon the highway at a crossing, the bank formed by which on one side was highest at the south end, and on the other side highest at the north end, thus rendering the highway impassable on the usual traveled track, and compelling travelers to enter the cut at the end where the bank was lowest on that side, and then follow the railroad track to a point at which they could get out on the opposite side; that this state of things had, to the knowledge of defendant, continued for several weeks, without its removing the obstruction; that while deceased, traveling the highway with a team, was on the railroad track making the crossing in the manner indicated, defendant's train, running at a very high rate of speed, and without any whistle being blown, or bell rung, to warn the travelers at the crossing, ran over and killed him. The defendant, as its first defense, denied negligence on its part, and alleged contributory negligence on part of the deceased.

1. Defendant's first, third, and fourth assignments of error are the admission of evidence tending to show the unsafe and impassable condition of the highway for some days prior to the accident, and the difficulties experienced by other travelers in attempting to make the crossing. There was evidence tending to show that the highway was in substantially the same condition during this time as on the day of the accident, except that the obstruction was increased by additional snow being thrown out from the railroad track. As to the materiality and competency of this evidence there is no room for doubt.

It was admissible both to prove the unsafe condition of the highway, and also that this had continued so long as to charge defendant with knowledge of the fact, and with negligence in not removing the obstruction. These matters were in issue under the pleadings, and also, as appears from the bill of exceptions, under the evidence. The defendant especially complains, in this connection, of the fact that the witness Barber was permitted to testify somewhat in detail of the difficulties which he experienced in attempting to cross on the morning of the day of the accident, and also on the day previous, describing what he did, and the efforts he made to get across with his team. Proof of the fact that other persons were unable to cross, and of the efforts they made to do so, was competent for the purpose of showing the obstructed and unsafe condition of the highway. It is analogous in principle to cases where evidence of similar accidents is admitted to show that the common course was in an unsafe condition. It is the practical test of common experience, often the most satisfactory evidence. *Phelps* v. *Mankato*, 23 Minn. 279; *Kelly* v. *Railway*, 28 Minn. 100, 9 N. W. Rep. 588; *Morse* v. *Railway*, 30 Minn. 471, 16 N. W. Rep. 358; *Kolsti* v. *Railway Co.*, 32 Minn. 133, 19 N. W. Rep. 655; *Darling* v. *Westmoreland*, 52 N. H. 401; *Kent* v. *Lincoln*, 32 Vt. 591.

2. The fourth assignment of error is that plaintiff was allowed to ask a witness what the deceased was making the journey for; his answer being that it was to get some medicine for his wife. Whether material or not, we do not see that defendant could have been prejudiced by this evidence. The presumption is that he was traveling the highway for a proper purpose. There is nothing in the record to indicate that there was any question of fact at issue under the evidence upon which this testimony could have had any effect prejudicial to the defendant.

3. The fifth, sixth, and seventh assignments of error are the admission of certain evidence tending to show what property the deceased had when he come to the state some 20 years before, what occupation he had followed, how much he had accumulated, and what he was worth at the time of his death. This was clearly admissible for the purpose of showing the reasonable expectation of pecuniary benefit to his family from the continuance of life. *Shaber* v. *Railway*, 28 Minn. 103, 9 N. W. Rep. 575; *Opsahl* v. *Judd*, 30 Minn. 126, 14 N. W. Rep. 575. To prove what a man is worth, as in the somewhat analogous case of proving his solvency or insolvency, it is not necessary to produce the title papers for his property, or the records of conveyances to him. Any person who is conversant with the facts, and who has knowledge of the existence and ownership of his property, may testify. One who managed the settlement of his estate after his death, and in that way acquired knowledge as to what property he had, and what he owed, may testify as to those facts. The fact that he acquired this knowledge, in whole or in part, from proceedings had in the probate court, in the settlement of the estate, does not make his evidence secondary in its nature. All the witnesses interrogated on this subject had more or less personal knowledge of the deceased's property and pecuniary affairs, and hence were qualified to testify. The point made that the witness Murphy testified merely as to what deceased told him, is not borne out by the record. His testimony as to what property deceased had at the time inquired about, appears to have been based on what he saw while working for him, or while residing in the neighborhood.

4. The eighth assignment of error is the exclusion of evidence in support of defendant's second defense. This defense is, in substance, that plaintiff had brought a former suit for the same cause of action, in the complaint in which she had alleged the circumstances under which the deceased was traveling on the railroad track at the time of the accident differently from those alleged in this action; that she went to trial on the complaint, and recovered a verdict, which on motion of defendant was set aside, and a new trial granted, on the ground that the deceased had no right to travel on the track under the

circumstances as alleged in the complaint, and that in doing so he was guilty of contributory negligence; that thereupon plaintiff moved the court for leave to amend her complaint, so as to allege the facts as now alleged in the complaint in the present action; that the court refused to allow her to amend, for the reason that she must have known the facts prior to going to trial, and that, having seen fit to go to trial on the complaint as it was, she ought not now to be allowed to make a change of base; that thereupon she "dismissed, or claimed to have dismissed," that action, and then brought the present one, alleging as the grounds for recovery the same facts as in the first action, except as varied by the facts which she had unsuccessfully sought to set up by way of amendment to her first complaint. "Wherefore defendant claims the plaintiff is estopped from maintaining an action or recovering against defendant in this suit on a position or on grounds inconsistent with those set up as her right of action in the first suit, and that it would be inequitable to permit her to take such an inconsistent position after she had, with full knowledge of all the facts, alleged and brought evidence, and sought to recover on different and inconsistent grounds." This defense is to us a novel one, and the fact that counsel of such ability and usual perspicuity fail to make clear on what legal principles they claim it to rest confirms us in the opinion that there is nothing in it. We think the mere statement of the facts is enough to show that they constitute no defense. Whatever probative force this "change of base" may have to prove that it is an after-thought, and not true in fact, the facts alleged do not contain the first element of estoppel. We have found no case, and have been referred to none, to support the proposition that, after a party has dismissed or discontinued a suit, he may not bring another for the same cause of action, with different allegations in his pleading as to the facts on which he predicates his right of recovery. His laches may be good ground for a court in its discretion to refuse to allow him to amend his pleading in the first action; but, that being discontinued, there is nothing to prevent him from bringing a second action, and framing his pleading as he pleases. Cases such as *Railway* v. *McCarthy*, 96 U. S. 267, cited by counsel, are not at all in point. That was a case where the railway company refused to ship cattle solely and expressly on the ground of want of cars. When sued for breach of contract, they set up as a defense the illegality of making shipments on Sunday. The court very properly held that, having placed their refusal to perform a contract or duty exclusively on one ground, they cannot, when sued, shift their position and place their refusal on some other ground. This defense was evidently set up, not as a former adjudication, but in the nature of an estoppel by conduct, which should prevent plaintiff from recovering on an alleged state of facts different from, or inconsistent with, those alleged in the first action. But on the argument it was urged that the dismissal of the first action was a determination on the merits; that, one trial being had, it was not a dismissal "before trial," within the meaning of Gen. St. c. 66, § 262, subsec. 1. This is clearly untenable. The award of a new trial wipes out the verdict. Setting aside a verdict is as if it had never been, and it cannot be used for any purpose. It is a mistrial, and the plaintiff has the same right to dismiss or discontinue as if no trial had ever been had. *Edwards* v. *Edwards*, 22 Ill. 121; Hill. New Trials, 74; *Hidden* v. *Jordan*, 28 Cal. 301; *City of Winona* v. *Minnesota Const. Co.*, 27 Minn. 415, 6 N. W. Rep. 795, and 8 N. W. Rep. 148. Cases arising under the federal "removal acts" are, in view of their manifest purpose, as well as of their peculiar language, not much in point in this case on either side. The court was, therefore, in our opinion, right in excluding all evidence under the second defense, because it did not state facts constituting any defense.

5. The third defense was a plea of a former suit pending for the same cause of action, and the exclusion of evidence alleged to have been offered in support of this defense constitutes the ninth and last assignment of error. The record

shows that in support of the *second defense* defendant offered *seriatim* the summons, pleadings, verdict, motion papers for a new trial, the order and decision of the court on that motion, the motion papers of plaintiff for leave to amend her complaint, and the order and decision of the court thereon, in the first action already referred to, which were all excluded by the court; that defendant then, without stating the object for which the offer was made, offered the *same papers* altogether, and the rejection of them is the error complained of. In view of the circumstances under which the offer was made, there was nothing to suggest to the mind of the court that it was made in support of the third defense. On the contrary, the natural inference would be that counsel was simply fortifying his position in support of his second defense by re-offering the same papers in mass, especially as these were files and records in the very action which defendant had alleged that defendant "had dismissed or attempted to dismiss." If counsel reoffered the papers for another and different purpose, he should under the circumstances have so stated. But, for another reason, there was no prejudicial error in excluding them. No other evidence was offered in support of the third defense. If admitted, the evidence offered would have been utterly insufficient to prove the pending of another action. The effective part of such a plea is that the action is *still pending*. This must be affirmatively proved. The evidence offered would have simply proved that such an action had been commenced, but while law suits are sometimes very protracted, yet we apprehend that there is no presumption of law that a suit once begun is still pending, until the contrary appears.

Order affirmed.

KRAEMER v. DEUSTERMANN.

(*Supreme Court of Minnesota.* November 25, 1887.)

1. TRUSTS—RESULTING—PURCHASE BY AGENT—PROCEEDS OF SALE.
   If an agent employed to purchase lands for his principal, and with his money, upon the purchase thereof, takes the title thereto in his own name without the knowledge or consent of the latter, he will be adjudged to hold the title as trustee for his principal, and, if sold and transferred by him, the proceeds in his hands will be impressed with a similar trust, and the court will compel him to account therefor.[1]
2. DURESS—DEFINITION—PLEADING.
   Duress defined, and the allegations in the complaint held insufficient to sustain a claim that the payment of a certain sum of money was obtained under compulsion.
3. SAME—PAYMENT UNDER—FACTS MUST BE PLEADED.
   Where the payment of money is alleged to have been obtained by fraud and undue influence, the facts constituting the same must be set forth in the pleading.

(*Syllabus by the Court.*)

Appeal from district court, McLeod county; MACDONALD, Judge.

W F. Schoregge, for appellant. *C. D. O'Brien*, for respondent.

VANDERBURGH, J. The complaint in this action is demurred to for insufficiency, and for misjoinder of causes of action.

1. The statement of the transaction out of which a cause of action is claimed to have arisen in plaintiff's favor is not very full or clear, but it may be gathered from it that the relation of principal and agent existed between the parties, and that the defendant undertook, as plaintiff's agent, and by his authority, to negotiate the purchase of a quarter section of land for plaintiff at the price of $1,600, with the understanding that the title thereto should be

[1] Concerning the creation of a trust where one enters into an oral agreement to purchase land for another and takes the title in his own name, see Appeal of McCall, (Pa.) 11 Atl. Rep. 206, and note.

vested in the latter; that thereafter the defendant informed him that the deed of the land had been executed, and deposited in a bank in the village of Glencoe, and that, in order to obtain the delivery thereof, it was necessary for the plaintiff to advance the sum of $200 in cash, part of the price, being the cash payment required to consummate the purchase; that the plaintiff intrusted the management of the business to defendant, and advanced the sum of $200, as required, relying upon the truth of his representation. The purchase was in fact made by defendant, at the price of $1,600, though what arrangement was made in respect to the deferred payment, at the time, the complaint does not show; but it is alleged that, without the knowledge or consent of the plaintiff, the defendant fraudulently procured the deed to be made to himself, and secured the delivery thereof, and caused the same to be recorded, and thereupon sold and conveyed one-half of the land for $1,675, out of which he paid the unpaid balance of the purchase price, leaving a balance of $275, which he fraudulently converted to his own use, and refuses to account for and pay over to the plaintiff; and that plaintiff had no notice of defendant's fraudulent conduct until after the record of the last-mentioned deed. These facts as alleged, if true, are sufficient to constitute a cause of action. The relation of trust and confidence was established between the parties, and the defendant held the legal title of the premises as trustee of the plaintiff. *Reitz* v. *Reitz*, 80 N. Y. 538, 543; Pom. Eq. Jur. § 859; Gen. St. 1878, *c.* 43, §§ 6, 9. The money was furnished before the delivery of the deed, as part payment, upon the express understanding that the purchase was made for plaintiff, and that the deed ran to him. And when the 80-acre tract was sold, the same trust followed and fastened upon the proceeds; and the balance, admitted by the defendant to be in his hands, the plaintiff is presumptively entitled to recover. *Bank* v. *Gas Co.*, 30 N. W. Rep. 440.

2. As respects the second cause of action, the complaint is insufficient. It is sought to recover the sum of $300, alleged to have been paid by plaintiff to defendant under compulsion. Plaintiff alleges that the money was exacted from him by fraud, threats, and duress, but what the fraudulent representations or conduct in the premises or threats may have been, does not appear, save that the defendant threatened to eject and turn plaintiff out of possession of the remaining unsold 80 acres, parcel of the quarter section in question, unless he would pay defendant $300 for a deed; and the defendant, fearing he would carry his threats into execution, and that the plaintiff would thereby suffer great injury and damage, and "relying upon the false representations made by defendant, as aforesaid, and believing them to be true," paid the $300, in order to secure a conveyance of said 80 acres of which plaintiff was then in the actual possession, and upon which he is alleged to have made valuable and substantial improvements, to defendant's knowledge. It does not appear that he threatened personal violence, or to eject plaintiff by force. He may have meant simply that he would exercise the power which the deed gave him to get possession of the land under legal process. The plaintiff therefore could rely upon his possession, and appeal to the courts for his legal rights. Besides, it appears that the money was paid in reliance also upon false and fraudulent representations made by defendant which plaintiff believed, but which are not set forth in the pleading. How much he may have been influenced by such alleged fraud, and how much by threats, is left for conjecture. Without a more full statement of the facts we cannot determine that the money was paid under such compulsion as to amount to duress, or that it was obtained by fraud or undue influence.

In determining whether an alleged payment was in fact made under compulsion, facts and circumstances tending to show fraud or undue influence will be entitled to due weight. *Tapley* v. *Tapley*, 10 Minn. 459, (Gil. 360.) But as respects the charge of duress, in order to entitle a party to recover back money paid under a claim that it was a forced or compulsory payment, it must appear

that it was paid upon a wrongful claim or unjust demand, under the pressure of actual or threatened personal restraint or harm, or of an actual or threatened seizure or interference with his property of serious import to him; and that he could escape from or prevent the injury only by making such payment. *Radich* v. *Hutchins*, 95 U. S. 210; *Brumagim* v. *Tillinghast*, 18 Cal. 256; 2 Dill. Mun. Corp. § 943; *Mayor* v. *Lefferman*, 45 Amer. Dec. 156; *Tapley* v. *Tapley*, 10 Minn. 459, (Gil. 360;) *Fargusson* v. *Winslow*, 34 Minn. 386, 25 N. W. Rep. 942.

3. There is no misjoinder of causes of action. We see no reason why a claim for money, wrongfully withheld, cannot be joined with one for money wrongfully or fraudulently exacted and paid.

Order reversed, and case remanded.

SEEFELD *v.* CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. RAILROAD COMPANIES—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.
Plaintiff brought an action against the defendant railroad company for damage to person and property by collision at a crossing. It was shown that the crossing was a dangerous one, that the view of the railroad was obstructed on both sides, that the noises at the crossing were such as to render it difficult, without stopping his team, for plaintiff to hear the sound of an approaching train, and that plaintiff knew a train to be due at the crossing at the time. *Held*, that the failure of plaintiff to stop his team in order to ascertain if a train was approaching was contributory negligence.[1]

2. NEGLIGENCE—CONTRIBUTORY—PROVINCE OF COURT AND JURY.
Whether the plaintiff is guilty of contributory negligence must be determined from the facts of the particular case. If the testimony on the subject of his negligence is conflicting, the question of negligence is for the jury; if the evidence is undisputed, the question is one of law for the judge.

TAYLOR, J., dissenting.

Appeal from circuit court, Marathon county.

This is an action to recover damages for injuries to the person and property of the plaintiff, alleged to have been caused by the negligence of the employes of the defendant company in operating one of its trains on the Wisconsin Valley division of the company in the city of Wausau. The railroad of the defendant company passes through that city from north to south on the east side of, and near, the Wisconsin river. Bridge street in said city runs east and west, crossing the railroad. A spur track, commencing south of such crossing, extends north, also crossing Bridge street, about 32 feet east of the main track. At such crossing the spur track is between three and four feet higher than the main track. At a point almost 227 feet east of the crossing of the main line, Bridge street crosses First street. From a point west of the crossing of the main line, Bridge street is planked, 16 or 18 feet in width, east, to a point within about 45 feet of First street. In the north-east angle of Bridge street and the spur track, there is a planing mill, with a platform in front and to the west of it, extending to the spur track. At the time of the accident there were piles of lumber upon such platform, and box cars standing upon the spur track, extending in front of the platform south to, and probably upon, Bridge street. There was also a car on that track, south of the others, and partly in the street, with an opening between it and the other cars for the passage of teams on the plank way. During the afternoon

[1] As to the duty of a traveler to look and listen for approaching trains before attempting to cross a railroad track, see Slater v. Railway Co., (Iowa,) 32 N. W. Rep. 264; Kelly v. Railroad Co., (Pa.) 8 Atl. Rep. 856; Purinton v. Railroad Co., (Me.) 7 Atl. Rep. 707, and note; Railroad Co. v. Hutchinson, (Ill.) 11 N. E. Rep. 855; Sherry v. Railroad Co., (N. Y.) 10 N. E. Rep. 128, and note; Guggenheim v. Railway Co., (Mich.) 33 N. W. Rep. 161; Nosler v. Railroad Co., (Iowa,) 34 N. W. Rep. 850.

of July 27, 1885, the plaintiff, who resided west of Wausau, and had come into the city that morning over such crossing, started for his home, and drove his team of horses, hitched to a common lumber wagon, north on First street to Bridge street. He then turned west on the latter street. He had in his wagon eight barrels of lime, a keg of nails, and other articles of merchandise. His daughter was with him. Immediately preceding him, going in the same direction, was a team and wagon driven by one Gerst. This wagon was loaded with large wooden frames about 12 feet in length, laid across the top of the wagon box, and piled as high as an ordinary load of hay. Gerst was riding on the top of the load. Immediately behind the plaintiff was another team which was being driven in the same direction. Bridge street descended very gradually from First street to the spur track, and from thence there was a sharp descent to, and beyond, the main track. A team with a loaded wagon being driven on that street can easily be stopped at any time before the wagon gets across the spur track, but it is difficult to stop after that until the main track is crossed. From a point on Bridge street, a few feet west of the corner of First street, to the spur track, a train on the main line could not be seen by the plaintiff when he was passing there, the view being obscured by the planing mill, the lumber piles on the platform, and the cars standing upon the spur track. The plaintiff drove his team on a walk, and looked and listened for passing trains, but did not stop his team. Gerst drove his team across the main track in safety. He saw a train approaching the crossing from the north when he was between the two tracks, and hastened the speed of his team. When the plaintiff had crossed the spur track he saw the same train, then in the immediate vicinity of the crossing. It was too late to stop his team. He reined them to the south, but not in time to clear the train. Either the locomotive or the tender struck his team, killing one of his horses, and injuring the other, overturning the wagon, destroying the property therein, and inflicting serious injuries upon the person of the plaintiff. The speed of this train, which had been at the rate of almost 35 miles an hour, was slackened to about 15 miles an hour when it passed the crossing. Whether any signal was given from the locomotive by ringing the bell or blowing the whistle as the train approached the crossing, was a disputed question of fact on the trial. After the testimony was all in which established the facts above stated, the circuit judge directed the jury to return a verdict for the defendant, on the ground that the evidence showed conclusively that the plaintiff was guilty of negligence which contributed directly to the injuries of which he complains. A motion for a new trial was denied, and judgment entered pursuant to the verdict. The plaintiff appeals from the judgment.

Bardeen, Mylrea & Marchette and *G. W. Cate*, for appellant. *John W. Cary* and *Burton Hanson*, for respondent.

LYON, J. In consideration of the present case it will be assumed that there was sufficient evidence to send the question of the negligence of the defendant company to the jury. The only question to be determined is, does the uncontradicted evidence prove conclusively that the plaintiff was guilty of negligence which contributed directly to the injuries of which he complains? The circuit judge was of the opinion that, under the peculiar circumstances of this case, it was the duty of the plaintiff to have stopped his team while he could do so that he might the better hear the approach of the train. It is undisputed that, for almost 150 feet before he reached the spur track, and until he had passed that track, where it was too late to avoid a collision with the train, the plaintiff could not see a train on the main track approaching from the north. Driving as he was between two other teams, upon a plank-road, the leading wagon and his own being heavily loaded, the conclusion is irresistible that there must have been sufficient noise in his immediate vicinity seriously to interfere with his hearing the train as it approached the

crossing. Besides, the wind blew from the south, which would be another obstacle to his hearing the train. He was well acquainted with the crossing, and is chargeable with knowledge of all the circumstances of danger which surrounded him. Moreover, the important fact is undisputed that he knew and remembered that the train was due, and should pass the crossing just about the time he reached it. The train was absolutely hidden from his view, and his vision was of no service to him in detecting its presence. So far as seeing the train is concerned, he might as well have been blind. The only sense which could enable him to learn of the presence of the train was that of hearing, and because of the circumstances just mentioned, that was liable to be entirely insufficient for the purpose while his team was in motion. Had he stopped his team as he approached the spur track, which he might easily have done, it is highly probable that he would have heard the train. At any rate, a delay of a few seconds would have avoided the collision and the injury. In view of these conditions, considering that the crossing was a very dangerous one at best, and that the peril was imminent because the train was then due there, of which fact the plaintiff was conscious at the time, is it not reasonable to hold that it was his duty to employ his hearing to the best advantage to discover the approach of the train? And to listen effectually, was it not necessary that he should stop his team? Many adjudications by this and other courts, claimed to be in point on these questions, were cited by the respective counsel in their very able arguments. While such adjudications are valuable in determining the general principles of law on the subject of negligence, yet, inasmuch as no two cases are exactly parallel in their facts, they do not always, or often, furnish sufficient or safe guides for applying those principles correctly to the facts of any given case. Such application must necessarily be made in each case in the light of its own facts. Thus, for example, the rule of law is that the negligence of the plaintiff, or his want of ordinary care, which contributed proximately to the injury of which he complains, defeats an action predicated upon a charge of negligence against the defendant. But whether the plaintiff was guilty of such negligence must be determined from the facts of the particular case. If the testimony relating to such negligence is conflicting, or not being conflicting, if the inferences to be drawn therefrom are doubtful or uncertain, the question of negligence is for the jury. But if the evidence is undisputed, and the inferences therefrom plain and certain, the question is one of law for the court.

The cases cited on behalf of the defendant to show that plaintiff should have stopped his team and listened for the expected train, seem to us to come nearer this case in their facts than those cited to sustain the opposite view. Those cases on behalf of the defendant, or some of them, are here cited, but will not be discussed. *Mantel* v. *Railway Co.*, 33 Minn. 62, 21 N. W. Rep. 853; *Haas* v. *Railroad Co.*, 11 N. W. Rep. 216; *Griffin* v. *Railway Co.*, 68 Iowa, 638, 27 N. W. Rep. 792; *Schaefert* v. *Railway Co.*, 62 Iowa, 674, 17 N. W. Rep. 893; *Tucker* v. *Duncan*, 9 Fed. Rep. 867; *Connelly* v. *Railway Co.*, 88 N. Y. 346; *Wilds* v. *Railway Co.*, 24 N. Y. 430; *Merkle* v. *Railway Co.*, (N. J.) 9 Atl. Rep. 680; *Railway Co.* v. *Holmes*, 14 Pac. Rep. 688; *Kennedy* v. *Railway Co.*, 27 N. W. Rep. 743, and notes. See, also, the late case of *Jepson* v. *Railway Co.*, in United States circuit court of Minnesota, (unreported.) The rule to be deduced from these cases is this: If the view of a traveler on the highway approaching a railroad crossing is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows that a train is due at such crossing at about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force and direction of the wind or of noises in the vicinity, whether made by his own wagon or by other causes, ordinary care requires him to stop his team, while he may do so, and listen for the train.

Most of the cases cited by counsel for plaintiff to sustain the opposite view,

seem to lack some of the conditions just specified. In some of them the view of the railroad track in the direction of the approaching train was not entirely cut off. In others the travelers did not know that a train was then due at the crossing. Because of these features it may well be held that the rule above stated is inapplicable to those cases.

Some decisions of this court which it is claimed relieve the plaintiff of the obligation to stop his team, require brief notice. These are *Duffy* v. *Railway Co.*, 32 Wis. 269; *Urbanek* v. *Railway Co.*, 47 Wis. 59, 1 N. W. Rep. 464; *Eilert* v. *Railway Co.*, 48 Wis. 606, 4 N. W. Rep. 769. In the first of these cases, as in this case, the plaintiff, a traveler on the highway, could not see the approaching train until too near the railroad track to avoid a collision. But, unlike the present case, there is no suggestion that he knew, or had reason to believe, that a train was about to pass, or would probably pass, the crossing, at or about the time he attempted to do so. It was held not to be his duty to stop his team, leave his wagon, go upon the railroad track and look along the same for a train. In *Urbanek* v. *Railway Co.*, the question we are here considering was not made or considered. In the remaining case of *Eilert* v. *Railway Co.*, the jury found, presumably on sufficient proof, that had the plaintiff stopped within reasonable distance of the crossing, and listened, he could not have heard the rumbling of the train. If this finding is true, it would have been fruitless for the plaintiff in that case to have stopped his team. It is very obvious that neither of these cases conflict with the rule above stated, requiring the traveler under certain circumstances to stop and listen for an expected train before going upon the railroad track.

The material facts in the present case affecting the question of the alleged contributory negligence of the plaintiff are undisputed, and they admit of no doubtful or opposing inference. Hence, whether or not those facts establish the negligence of the plaintiff, is a question of law for the court. The inference which the circuit court deduced from the facts was that the plaintiff, by failing to stop his team so that he might listen for the expected train most effectually, failed to exercise that reasonable and proper care and caution to avoid injury which the law exacts of him as a condition precedent to his right to recover in this action. We are satisfied that this is the only inference which can properly be deduced from the facts proved. We hold, therefore, both on principle and authority, that because the plaintiff, when traveling on Bridge street, towards the crossing, could not see a train approaching from the north until it was too late for him to avoid a collision therewith should it pass when he reached the crossing, because he did not hear the train, and there were noises near him, and an unfavorable wind, which necessarily interfered with his hearing it while his team was in motion, and because he knew that a train was due at the crossing at about the time that he reached there, and expected it would then pass the crossing, the law required him to place himself in a more favorable situation to hear by stopping his team and again listening for the expected train before going upon the railroad track. Failing in this, he is chargeable with negligence which contributed proximately to the injuries of which he complains, and cannot recover damages for such injuries. We conclude the circuit judge properly directed the jury to return a verdict for the defendant. Judgment affirmed.

TAYLOR, J, dissents.

GUNN v. WISCONSIN & M. RY. CO.

(*Supreme Court of Wisconsin.* November 22, 1887.)

RAILROAD COMPANIES—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.

An action was brought against a railway company for injury to plaintiff's horses, sleigh, and harness by a collision at a highway crossing. It was shown that the

crossing was a dangerous one with the view of the railroad obstructed by brush in one direction; that on approaching the crossing the driver of plaintiff's team left his team and sleigh, and took a seat on a sleigh preceding his own, so muffled up that he could not well hear an approaching train, and with his back turned in the direction of the most dangerous approach to the crossing. *Held*, that the driver was guilty of gross contributory negligence.[1]

Appeal from circuit court, Eau Claire county.

This action was brought to recover damages for injuries to the plaintiff's horses, sleigh, and harness, alleged to have been caused by the negligence of the employes of the defendant company in running one of its trains between the city of Chippewa Falls and Eau Claire, in February, 1883. At a highway crossing the train ran against and upon the property in question, and inflicted the injury complained of. The case is further stated in the opinion. A motion for a nonsuit was denied. There was a special verdict in which the jury found, among other things, that the injury was caused by the negligence of the employes of the defendant in charge of the train, and that the person in charge of plaintiff's team was not guilty of any want of ordinary care contributing to such injuries. A motion on behalf of the defendant for a new trial was denied, and judgment was entered for the plaintiff for the damages assessed by the jury, to-wit: $372.37. The defendant appeals from the judgment.

W. F. Bailey, for respondent. *D. S. Wegg* and *Howard Morris*, for appellant.

LYON, J. The railroad of the defendant company from Chippewa Falls to Eau Claire runs south, and the highway upon which the team in question was traveling runs nearly parallel with the railroad for some distance, and then turns sharply to the west, and crosses the track. At a point 18 rods north of the crossing the highway is four rods east of the east line of the defendant's right of way, and gradually approaches nearer to the railroad as it approaches the crossing. At the crossing the grade of both railroad and highway is even with the natural surface of the ground. About 100 feet north of the crossing the railroad passes through an excavation about three feet deep. There is a growth of small oak brush between the highway and the railroad track near the crossing. From the crossing north for over a half a mile the track of the railroad is straight. The day of the accident the weather was still and cold. Between three and five o'clock in the afternoon of February 12, 1883, the plaintiff's team, in charge of one Henry Johnson, passed along the highway from the north, going to Eau Claire; two other teams were in company, one in advance of and one behind plaintiff's team. Johnson, the driver of plaintiff's team, was well acquainted with the crossing, having frequently driven over it, and knew that trains frequently passed there. Just before reaching the crossing Johnson left his team and sleigh, and mounted the sleigh in advance of him, sitting upon a rack thereon with his face to the south. He had on a woolen cap drawn over his ears, and a buffalo overcoat, the collar of which was turned up. He sat there looking south as they were crossing the railroad track, his own team following along close to the forward sleigh, without any driver. Just as the forward team was leaving the railroad track, and before the sleigh was clear of it, Johnson

[1] Respecting contributory negligence in crossing a railroad track, see Kelly v. Railroad Co., (Pa.) 8 Atl. Rep. 856; Purinton v. Railroad Co., (Me.) 7 Atl. Rep. 707, and note; Chase v. Railroad Co., (Me.) 5 Atl. Rep. 771, and note; Sherry v. Railroad Co., (N. Y.) 10 N. E. Rep. 128; Cooper v. Railway Co., (Mich.) 33 N. W. Rep. 306; Slater v. Railway Co., (Iowa,) 32 N. W. Rep. 264; Mynning v. Railroad Co., (Mich.) 31 N. W. Rep. 147, and note; Railway Co. v. Henry, (Kan.) 14 Pac. Rep. 1; Glascock v. Railroad Co., (Cal.) Id. 518; Guggenheim v. Railway Co., (Mich.) 33 N. W. Rep. 161; Woodard v. Railroad Co., (N. Y.) 13 N. E. Rep. 424; Nosler v. Railway Co., (Iowa,) 34 N. W. Rep. 859.

glanced over his shoulder, and saw a train within a few feet of the sleigh coming from the north. He gave the alarm. The driver hurried his team, and Johnson jumped from the sleigh. The locomotive struck the hind end of the rack on the forward sleigh, and at the same time struck the plaintiff's horses which were just crossing the track, and inflicted the injuries complained of.

The claim of counsel for the plaintiff is that the oak brush between the highway and the track prevented travelers on the highway from seeing a train approaching from the north until they were very near the railroad track; and that no proper signal was given from the locomotive attached to the train as it approached the crossing. Also, that the train was running at an unlawful rate of speed, the crossing being within the limits of the city of Eau Claire. For the purposes of the case it will be assumed that these propositions are true; that is, that the train was negligently run and operated, and that it could not have been seen by a person approaching the crossing, because of the brush.

The case requires but little discussion. On his own statement, and on the uncontradicted testimony, it is a case of most gross and inexcusable negligence on the part of Johnson, who was in charge of the plaintiff's team and property, and for whose negligence the plaintiff is liable. It seems almost incredible that a person in his senses, driving a team of horses, and approaching a dangerous railroad crossing, rendered doubly dangerous by the presence of the brush which prevented him from seeing an approaching train, and who was thoroughly cognizant of the dangerous character of the crossing, should, just as he was about to cross the railroad track, deliberately lay down his lines, leave his team, go forward and take a seat upon the other sleigh, having his ears so muffled that he could not well hear an approaching train, and sitting with his back turned in the direction of the most dangerous approach to the crossing. If the books furnish a stronger case of contributory negligence, our attention has not been called to it.

We do not overlook the claim of the plaintiff, supported by testimony, that his horses were very gentle, and that if Johnson had had time to order them to stop after he saw the approaching train, and before they went upon the track, they would have obeyed his order. But he had no time to give the order, and it was his own negligence that he had no time to do so. Had he been on the alert, although on the forward sleigh, he might have seen the approaching train before the forward team crossed the track, and would have had abundant time to order his team to stop. Why he did not see it sooner has already been stated; but we do not rest our judgment upon this negligence. We hold that it was negligence for Johnson, under the circumstances, to leave his horses, and surrender the usual control of them by the reins, trusting them to make the crossing in safety without a driver, no matter how gentle they were. Had he been with his team and in the exercise of proper diligence and care, he would doubtless have discovered the approach of the train in time to avoid injury. If by reason of the brush he could not have seen the approaching train, still, had he used proper precautions, he undoubtedly could have heard its approach on that still, cold day. The conditions were all favorable for hearing the train a long distance away had reasonable or proper precaution been taken in that behalf. In *Seefeld* v. *Railway Co.*, *ante*, 278, (decided herewith,) we hold that if the traveler approaching a crossing cannot see the railroad on either side of the crossing, and knowing that it is about time for a train to pass there, and especially if there are noises being made which interfere with his hearing an approaching train, it is his duty to stop and listen before crossing the railroad track. It is reasonably certain that a much less degree of care on the part of Johnson would have saved the plaintiff's property from destruction.

Our conclusions are that the court should have granted the motion for a nonsuit, or should have directed a verdict for the defendant. Failing to do

either, the motion for a new trial should have been granted. The judgment of the circuit court must be reversed, and the cause will be remanded, with directions to award a new trial.

SHIELDS *v.* KLOPF, impleaded with another.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. MORTGAGES—RELEASE—PENALTY FOR REFUSAL OF.
Rev. St. Wis. § 2256, provides that if a mortgagee, after full performance of the conditions of the mortgage, whether before or after breach, shall for seven days after request made and tender of reasonable charges, refuse to discharge the mortgage, he shall be liable to the mortgagor for $100 damages and also for the actual damages. *Held*, that the "$100 damages" is neither a fine nor a forfeiture, but exemplary damages; that payment by the mortgagor of all demanded by the mortgagee in satisfaction and acceptance thereof by the latter in full payment is such full performance in case of a mortgage given to secure a debt; and that, upon such refusal, the penalty is incurred regardless of the mortgagee's honest belief that the debt had not been paid. *Stone* v. *Lannon*, 6 Wis. 497, and *Cohn* v. *Neeves*, 40 Wis. 393, distinguished.

2. RELEASE AND DISCHARGE—PAYMENT ON SUNDAY.
Under Rev. St. Wis. § 4595, imposing a fine for doing any business on Sunday, except works of necessity or charity, payment of a debt on Sunday discharges it, if the creditor retains the consideration paid.

Appeal from circuit court, Clark county.

Action for damages for refusal to discharge a mortgage.

Rev. St. Wis. § 4595, provides that any person who shall do any manner of labor or business, except works of necessity or charity, on the first day of the week, shall be punished by a fine.

This action was brought under section 2256, Rev. St., to recover the damages therein prescribed for the refusal of the defendants to discharge a certain mortgage on real estate, executed by the plaintiff to one Amidon, and by the latter duly assigned to the defendants, which mortgage, it is alleged, was theretofore paid. On the trial the plaintiff testified that on or about April 1, 1877, he paid the mortgage debt to the defendant Klopf, who then surrendered to him the mortgage, and he thought the promissory note accompanying the same. The plaintiff produced the mortgage upon the trial. He was unable to find the note.

The defendant Klopf testified that such payment was never made to him, and denied the surrender of the mortgage and note. Both defendants testified that they had such note as late as 1882, but that the same was lost. The court submitted to the jury the disputed question as to whether the mortgage debt had been paid, and instructed them that the question of the good faith of the defendants in refusing to discharge the mortgage was not in the case. The jury were also instructed that if they found for the plaintiff, he was entitled to recover $100 damages as specified in the statute, and a nominal sum only for actual damages, none having been proved. The jury found for the plaintiff and assessed his damages at $100 penalty, and six cents actual damages. A motion for a new trial was denied and judgment for the plaintiff entered pursuant to the verdict. The defendant Klopf appeals from such judgment.

R. J. MacBride, for appellant. *I. W. Mason*, for respondent.

LYON, J. The statute under which this action was brought reads as follows: "Section 2256. If any mortgagee, his personal representative or assignee, after a full performance of the conditions of the mortgage, whether before or after the breach thereof, shall, for the space of seven days after being thereto requested, and after tender of his reasonable charges, refuse or neglect to discharge the same as provided in this chapter, or to execute and acknowledge a certificate of discharge or release thereof, he shall be liable to

the mortgagor, his heirs or assigns, in the sum of one hundred dollars damages, and also for actual damages occasioned by such neglect or refusal, to be recovered in an action."

1. There was abundant testimony on the trial to support the finding of the jury that the mortgage in question had been fully paid as claimed by the plaintiff. Counsel for the appellant argues, however, that the amount which the defendant testified he paid on account of the mortgage did not equal the amount due thereon for principal and interest. Hence he says there was not "a full performance of the conditions of the mortgage," and the defendants have not incurred the penalty of the statute. In support of this contention he cites *Stone* v. *Lannon*, 6 Wis. 497. In that case only a part of the mortgage debt was paid, and there was an unfulfilled agreement on the part of the mortgagor, when the action was brought, to pay the residue. WHITON, C. J., delivering the opinion of the court, said: "Now it cannot be said that the condition of the mortgage was fully performed, because the testimony shows that a further sum was to be paid by Dunn, the mortgagor." The mortgagee had agreed with Dunn to discharge the mortgage on such partial payment, but this executory agreement was held void for want of consideration. The decision was made upon the hypothetical case that the agreement was valid. There was another very significant fact in that case not noticed in the opinion. The mortgagee tendered performance of his executory agreement to discharge such mortgage by tendering such discharge to Dunn, the mortgagor, and to one Cleary, the grantor of the plaintiff, who then owned the mortgaged premises. Neither of them would accept such discharge. In the present case the testimony tends to show that the plaintiff paid to the appellant all that he demanded in satisfaction of the mortgage debt, and the appellant accepted the same in full payment thereof. Under these circumstances it is clear that the case is not ruled by that of *Stone* v. *Lannon*, and that there was a full performance of the conditions of the mortgage.

2. Counsel for the appellant further maintains that the testimony of the plaintiff shows the alleged payment to have been made on a Sunday, in contravention of the statute in that behalf, (section 4595,) hence that he cannot be heard to allege such payment, because by so doing he claims the benefit of an illegal act. The point is not well taken. It is settled that money paid on Sunday, and retained, discharges the debt. *Johnson* v. *Willis*, 7 Gray, 164. Indeed no case has been cited to the contrary, and we do not recollect to have seen such case. In the case last cited it is said: "It is not on the part of the defendant an attempt to enforce a contract made on Sunday, but a resistence of a claim unjustly set up against right by showing that nothing is due thereon." (Per DEWEY, J.)

3. A demurrer to the complaint for defect of parties was interposed and overruled. It was claimed that the statute, under which the action was brought, in effect imposes a fine or forfeiture, the clear proceeds of which belong to the school fund by virtue of the constitution, (article 10, § 2,) and hence that the state of Wisconsin should have been made a party plaintiff in the action, pursuant to Rev. St. §§ 3295, 3297. We think this objection is not well taken. The "$100 damages" given by statute is neither a fine nor a forfeiture; it is nothing more than examplary or punitory damages, which the successful plaintiff recovers in the action in addition to his actual damages.

4. The only remaining question to be considered is whether the element of good faith is involved in the action, that is to say, whether the defendants can be held liable for the penalty of the statute if they honestly believed that the mortgage debt was not paid when the discharge of the mortgage was demanded of them. As a general rule, no doubt, the penalties of the law are aimed against those who willfully and knowingly violate its requirements. Cases are not wanting in which this rule has been applied to penal statutes, from which the words *willfully*, *knowingly*, and the like, as descriptive of

the offense or prohibited act, have been omitted. *Cohn* v. *Neeves*, 40 Wis. 393, belongs to this class. That was an action to recover treble damages for the conversion of logs. The statute under which the action was brought (section 5, *c.* 42, Tayl. St.) provided that "whoever shall convert to his own use, without the consent of the owner thereof, any logs, timber, boards, or planks floating in any of the waters of the state, or lying on the banks or shores of such waters, or on any island whereon the same may have drifted, except as in this chapter provided for, shall be liable to the owner thereof in treble the amount of damages." It was held, notwithstanding the general language of the statute was sufficiently broad, if literally interpreted, to include any conversion, yet the statute should be expounded according to its fair meaning and true intent. The present chief justice delivering the opinion of the court, said: "Observing this rule of interpretation, looking at the object and purpose of the statute, we cannot think it was intended to apply to every conversion of this kind of property, situated or found as described, without regard to the question whether the conversion was wanton and willful or not." A perusal of the opinion will show that the court reached its conclusion because of certain other provisions in the same statute which indicate the intention of the legislature that it should be so construed. It is entirely competent for the legislature to impose a penalty for the refusal to discharge a mortgage, regardless of the good or bad faith of the holder thereof. On the authority of *Cohn* v. *Neeves*, we must look into the statute itself, which is general in its terms, to ascertain whether the legislature intended that it should be restricted in its operation to those willfully offending against it. We find in section 2256 a satisfactory indication that the general language of the statute was intended to operate without restriction and without regard to the good or bad faith of the holder of the mortgage. The statute gives to any person upon whom the demand is made to discharge a mortgage, seven days in which to determine whether he will discharge it or not. If the application of the statute is to be limited to those only who willfully and knowingly refuse to discharge a mortgage, it is fair to presume that no days of grace would have been given. The seven days were undoubtedly given to enable the person upon whom such demand has been made, if he doubts whether the mortgage has been paid, to ascertain the facts for himself. After the expiration of that time, he acts at his peril of the fact, and if the mortgage has been paid and he refuses to discharge it, he is subject to the penalty of the statute. In the present case the jury must have found that the mortgage debt was paid personally to the appellant. Such being the case, it is difficult to perceive how he can successfully maintain that he refused in good faith to discharge the mortgage, believing that the debt was not paid.

Upon the whole case we find no sufficient grounds for disturbing the judgment. Judgment affirmed.

BURCHARD and another *v.* ROBERTS.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. MORTGAGES—PURCHASE OF TAX TITLE BY MORTGAGEE—REDEMPTION.

A mortgagor of certain lands had no legal title thereto, but was in possession, and the taxes were legally chargeable to him, and, on his failure to pay them, the agent of the mortgagees procured a tax-sale certificate, which he assigned to a third party, who took a tax deed, and at the agent's request conveyed to defendant. Neither the third party nor defendant paid any consideration for their interest in the lands, but the transactions were for the benefit of the mortgagees. Plaintiffs, having the legal title, brought ejectment, and defendant claimed title under the tax deed. Rev. St. Wis. §§ 1158–1160, provide, in effect, that the amount of taxes paid on the mortgaged premises by the mortgagee may be added to the debt, and the security of the mortgage will extend over it. *Held*, that the payment of the taxes by the mortgagee's agent operated as a redemption therefrom, and the tax deed conferred no title on defendant.

2. EJECTMENT—PARTIES—ACTUAL OCCUPANT.
Plaintiffs brought suit in ejectment against defendant, who claimed the lands under a tax deed to his grantor. Defendant was not in the actual possession of the lands, and the evidence to show that the grantor was in possession was vague and unsatisfactory. Rev. St. Wis. §§ 3075, 3076, provides: "If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named in the complaint; if they are not so occupied, the action must be brought against some person exercising some acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the action." *Held*, that defendant was properly sued alone.

Appeal from circuit court, Waupaca county; CHARLES M. WEBB, Judge.

Ejectment for certain land situated in the county of Waupaca. A patent therefor was issued July 18, 1855, by the state of Wisconsin to Austin C. Burchard, who died intestate, September 10, 1863, seized of the land in controversy. He left surviving him a widow and two children. The latter are the plaintiffs. Nellie was born December 27, 1858, and Horace on November 19, 1861. He left no other heirs. The widow conveyed her interest in the estate of her deceased husband to the plaintiffs before this action was commenced, which was on August 22, 1883. Such is the title of the plaintiffs.

The title of the defendants is as follows: November 9, 1866, Charles Burchard, the father of Austin C., the patentee of the land in question, executed a conveyance thereof to one Charles Nes, who, on June 25, 1867, made a deed thereof to Maggie Doty. Giles Doty, the husband of Maggie, was the real purchaser from Charles Burchard. The Dotys went into possession of the land in 1866, and remained in possession thereof until the spring of 1881. In 1875 they mortgaged the land to one Mary Cottrill, since deceased, and one Virginia Thompson. June 28, 1879, Giles and Maggie Doty executed a conveyance of this and other land to Vincent Roberts, who was the agent of the holders of these mortgages, in trust for such holders, and the holder of two other mortgages on such other land, for the payment of the mortgage debts, and in trust also for Giles Doty for whatever of the property should remain after such payments. Vincent Roberts thereupon executed to Doty a contract to the effect that when the latter should fully pay to Roberts the amount of such debts, to-wit, $5,100, and interest as therein specified, it should be in full for the price or purchase money of the lands conveyed by such trust deed, which should then be reconveyed to Doty. Also that Doty should pay all taxes assessed on such lands, and should hold the lands as tenant by sufferance of Vincent Roberts. Before this action was commenced, probably in 1882, Vincent Roberts quitclaimed the lands so conveyed to him in trust, to Horton Cottrill, administrator of the estate of Mary Cottrill, who held the mortgage so executed to her by the Dotys. In 1879 the land in controversy was assessed to Giles Doty. It was returned to the county treasurer for non-payment of the taxes assessed upon it for that year, and in May, 1880, was duly sold by such treasurer to Vincent Roberts. Certificates of such sale were thereupon issued to him. He paid therefor the amount due for taxes and charges thereon. This purchase was so made, and the certificates taken, for the sole use and benefit of the Cottrill estate and the other beneficiaries in such trust deed. In the spring of 1881 the Dotys ceased to occupy the land, and one Bowker then went into the occupancy thereof, and cultivated the same as the tenant of Vincent Roberts. Vincent Roberts assigned said tax-sale certificates to Bowker, to whom a tax deed was executed June 22, 1883. A few days later Bowker, at the request of Vincent Roberts, conveyed the land covered by such tax deed to the defendant, John Roberts, who is the son of Vincent. Bowker paid nothing for the certificates, and never claimed any interest in the title to the land, but took the tax deed for the use and benefit of Vincent Roberts and those whom he represented. The defendant paid no consideration for the tax deed.

In December, 1882, the plaintiffs commenced an action in the circuit court of Waupaca county against Vincent Roberts and Giles Doty, to recover the land in controversy here. In March following, Horton Cottrill was, by order of the court, made a defendant to that action by service of summons and complaint therein upon him. Such action was removed to the circuit court of the United States, and was pending in that court when this action was commenced. This action was tried by the court without a jury.

The above facts are established by the pleadings, the uncontradicted evidence, and the findings of fact thereafter made and filed by the circuit judge. The judge also found that the plaintiffs are the owners in fee-simple of the land in controversy; that the defendant paid nothing for the land, or on account of the conveyance thereof to him; that he took such conveyance for the purpose of defeating the title of the plaintiffs in the action then pending in the United States court; that since the execution of such conveyance the apparent and nominal possession of the land has been in the defendant secretly for the Cottrills, they having received the rents and profits of the land; and that Bowker was in possession under the Cottrills from the spring of 1881 to the time he took the tax deed. By the term "the Cottrills" is meant the heirs of Mary Cottrill, represented by Horton Cottrill, the administrator of her estate. The judge also filed the following conclusions of law: "(1) The purchase of lands described in the complaint of Vincent Roberts at the tax sale of 1880 was a payment of the tax, and that the deed which was issued on such sale is therefore invalid. (2) The plaintiffs were at the commencement of the action owners of the land described in the complaint, and their estate therein was in fee-simple, and they were at the commencement of this action, and are now, entitled to possession thereof. (3) The defendant asserted such claim to said lands at the commencement of this action as entitled these plaintiffs to maintain this action, and that at the commencement thereof the defendant unlawfully withheld the possession thereof from the plaintiffs." Judgment for the plaintiffs was afterwards entered, pursuant to the findings of fact and conclusions of law, for the recovery of the land claimed, and for costs. The defendant appeals from the judgment.

Myron Reed and *Moses Hooper*, for respondents. *M. B. Patchin* and *E. P. Smith*, for appellant.

LYON, J. This appeal presents two questions for determination. These are: (1) Was the action properly brought against John Roberts alone? And (2) was the purchase of the land in controversy by Vincent Roberts at the tax sale of 1880, and the payment therefor of the amount of the taxes and charges due thereon, a payment of the taxes and a redemption of the land therefrom?

1. The statute relating to parties in actions of ejectment contains the following provisions: "If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the complaint; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto or some interest therein, at the commencement of the action. The plaintiff may join as defendant any person claiming title to such premises, with any actual occupant thereof, or of some part or parcel thereof, holding as tenant under such person so claiming title or otherwise. * * *" Rev. St. p. 801, §§ 3075, 3076. Under these provisions, if Bowker, the grantor of the defendant, was in the actual possession of the land claimed in August, 1883, when this action was commenced, he should have been made a party defendant to the action. In such case the present defendant, John Roberts, under whom Bowker was in possession, if at all, is also a proper party defendant, although not in the actual possession of the land. The circuit court found that Bowker was in the actual possession of the land until he took the tax

deed thereof. This was June 22, 1883. Perhaps the court might also have properly found that he retained the possession thereof until he conveyed to the defendant, a few days later. But we find no satisfactory proof that Bowker was in possession when this action was commenced, in August following. When asked directly whether he had remained in possession of the land ever since he deeded to the defendant, he answered evasively, as follows: "Since then he has told me that John Roberts owned the land; that I was to settle with him for this land; the rent of the land I have not paid for this last year; in fact I have not paid the interest on all the lands I own." Indeed all the testimony on the subject of Bowker's occupancy of the land after the conveyance to the defendant is very general, vague, and unsatisfactory. It is quite obvious from the testimony that neither the Dotys nor Bowker ever resided upon the land, but only used it for farming purposes. We are left entirely in the dark as to the extent of that use, or, so far as Bowker is concerned, its continuity. A finding that Bowker ceased to occupy the land when he conveyed it to the defendant, and that it was unoccupied when the action was brought, could not properly be disturbed. This is probably the meaning and significance of the finding that the defendant after such conveyance had "the apparent and nominal possession" of the lands. In such case the action was properly brought against the defendant alone, for the taking of the tax deed was a claim of title to the land, which is sufficient under the statute (if the land be unoccupied) to support ejectment against the claimant. We reach this conclusion the more readily because we are satisfied, as the learned circuit judge evidently was, that the title and possession of the land were being manipulated by the two Roberts, father and son, for the purpose of embarrassing and defeating the plaintiffs in their pending action in the federal court, and that Bowker was a pliant tool in their hands to aid in accomplishing such purpose. This was an unjustifiable interference with the course of justice by Bowker and the defendant, who were not parties to the action, and because they were acting in unison it would be strict justice to hold, in analogy to the law which makes a conspirator liable for the acts of his co-conspirators in furtherance of the object of the conspiracy, that the act of one, or the possession of one, intended by both to affect the plaintiffs unfavorably in their other suit, is the act or the possession of the other as well. We conclude that the action is well brought against the defendant alone. It is not determined whether, conceding that Bowker should have been made a party, the defendant can, on the final hearing, and not having demurred for defect of parties, take advantage of such defect. Doubtless he might have applied to the court at the proper time for an order compelling the plaintiffs to bring in Bowker, if he was in possession, as a party defendant, but he failed to do so.

2. In considering the second question above suggested, as to whether the purchase of the land at the tax sale by Vincent Roberts, and the payment therefor of the amount of taxes and charges against it, operate as a payment of the taxes. Cottrill and the other beneficiaries in the trust deed for whose benefit the purchase was made will be regarded as the purchasers. Obviously, such was the legal effect of the transaction. Such beneficiaries stood in the relation of mortgagees of the land. The execution of the trust deed may have had the effect of vesting the legal title to the land in their agent, Vincent Roberts, but such deed, and the defeasance executed by such agent to Doty, operated to preserve the mortgage relation between them, changing the securities, perhaps, to equitable mortgages. Such change, however, does not seem material to the question under consideration. The taxes of 1879 were assessed against Doty, who was then in possession of the land, claiming title thereto. Under the statute (Rev. St. p. 341, § 1043) the tax was properly assessed against him, and he was legally chargeable therewith. Had he purchased it at the tax sale, there can be no doubt the transaction would have operated as a payment of the tax, although tax certificates may have been issued

to him. *Smith* v. *Lewis*, 20 Wis. 369; *Bassett* v. *Welsh*, 22 Wis. 169; *Jones* v. *Davis*, 24 Wis. 229. The question is whether the mortgagees of the land are in any better condition than Doty, the mortgagor, to acquire title thereto by purchasing at the tax sale, and taking certificates of sale. We have been referred to no case decided by this court, and are not aware there is any such case, in which it is held that a mortgagee may, in this state, cut off the mortgagor's equity of redemption by acquiring title to the mortgaged land under a tax deed. True, several cases determined by this court are cited by the learned counsel for defendant as holding that a mortgagee may thus acquire adverse title, but an examination of those cases will show that none of them so hold. They will be noticed briefly in their order.

In *Wright* v. *Sperry*, 21 Wis. 336, 25 Wis. 617, the plaintiff was grantee of the purchaser at a foreclosure sale on a mortgage executed by Sperry, the defendant, on the whole 80 acres of land. Sperry owned only an undivided interest in the land. After such sale he acquired the remaining undivided interest. In the mean time Wright obtained the interest conveyed by a tax deed of the whole 80 acres issued on a tax sale for the non-payment of the taxes assessed upon the land before such foreclosure sale. Wright was not, therefore, a mortgagee of the land, but was claimed to be a tenant in common with Sperry, and the validity of his tax deed was contested on that ground. The tax deed was held valid, and hence under it Wright was entitled to recover such after-acquired interest of Sperry in the 80 acres in controversy.

Sturdevant v. *Mather*, 20 Wis. 606, was an action to redeem from an equitable mortgage. The mortgagee had acquired the interest conveyed by two tax deeds of the mortgaged premises. Such deeds were held invalid for defective execution. The defendant, Mather, was the grantee of the mortgagee, and after taking such conveyance he also acquired several tax deeds of the same premises. It was held that, under the instrument giving the lien, the mortgagee had no estate in the premises which he could convey to Mather, and hence the latter was a stranger to the original title, and might assert title under his tax deeds to defeat the action.

Lybrand v. *Haney*, 31 Wis. 230, presented no question as between mortgagor and mortgagee. Neither did *Link* v. *Doerfer*, 42 Wis. 391. The first of these cases decides that one in possession of land under a valid tax deed may maintain an action based upon other tax deeds to him issued on sales for the non-payment of taxes on the same land, which he was under no obligation to pay, to foreclose the title and right of the original owner in and to such lands. In *Link* v. *Doerfer*, it was held that a mere intruder in possession of land without color or claim of title is capable of acquiring adverse title by tax deed or other conveyance to himself.

It is plain that none of the above cases sustain the proposition to which they are cited. On the contrary, we are satisfied on principle and authority, and especially in view of the statute which will presently be cited, that in the present case the purchase of the land at the tax sale for the mortgagees, and the taking of tax certificates thereon, must be regarded as for the protection of the estate, and the mutual benefit of the mortgagees and mortgagor. As was said by DIXON, C. J., in *Fisk* v. *Burnette*, 30 Wis. 102, such purchase and the taking of the certificates must be regarded as so much money advanced to the mortgagor on the faith of the security. The above reference is to Rev. St. §§ 1158–1160, inclusive. These sections, in effect, add the amount so paid for taxes by the mortgagee to the mortgage debt, and extend the security of the mortgage over it. These statutory provisions give the mortgagee an adequate remedy to reimburse himself for the taxes thus paid by him, and are inconsistent with the idea that he may cut off the mortgagor's equity of redemption in the mortgaged premises by acquiring an adverse title thereto under tax proceedings. Moreover, without regard to statutory provisions, there is high authority for thus holding on general principles

of law. Judge Cooley, in his treatise on the law of Taxation, says: "It cannot be said in such a case that either mortgagee or mortgagor is under no obligation to the government to pay the tax. On the contrary, the tax being one that purposely is made to override the lien of the one as well as the title of the other, it might well, as it seems to us, be held that neither mortgagor nor mortgagee was at liberty to neglect the payment as one step in bettering his condition at the expense of the other, but that the presumption of law should be that the party purchasing did so for the protection of his own interest merely. And so in general are the authorities." Pages 503, 504, and cases cited in notes. This language of Judge Cooley is quoted approvingly in Mr. Freeman's learned note to *Blake* v. *Howe*, 15 Amer. Dec. 684. This doctrine commends itself to our judgments as reasonable and just. It must be held, therefore, that as to Doty the purchase of the land at the tax sale by Vincent Roberts, for the benefit of the mortgagees, operated as a payment of the tax, and a redemption of the land therefrom.

It remains to be determined how the plaintiffs are affected by the transaction. Had the mortgagees, instead of purchasing the land at the sale, and taking tax certificates, paid the taxes, and taken a receipt therefor, there can be no doubt that such payment would have inured to the benefit of these plaintiffs, and no question of a tax lien on the land or tax title on account of such taxes could be raised against them. Holding, as we do, that the transaction above mentioned operated as a payment of the taxes, no good reason is perceived why the same result should not follow, although, instead of paying and taking a receipt therefor, they bid off the land for the amount of the taxes, paid the same, and took certificates of sale. We are quite unable to see how these transactions can operate as a payment as to Doty, while as to the other plaintiffs it is the acquiring of a title paramount to theirs. There are, doubtless, cases elsewhere which hold the opposite doctrine. Whether these cases are based upon statutes differing from ours, or made in the absence of any statute on the subject, we shall not stop to determine. Our duty is to construe our own statute, and thus settle the law in that behalf in this state. It will be observed that the statute above cited (sections 1158–1160) refers only to taxes. No mention is made of any other description of incumbrance which the original lienholder may pay, and extend his lien to cover such payment. Hence, if a mortgagee or other lienholder should, for the protection of his lien, purchase a paramount outstanding mortgage or judgment, it is not here decided whether he may or may not acquire an adverse title thereunder which will cut off the mortgagor's equity of redemption in the mortgaged premises. It follows that the tax deed to the defendant is void. That deed eliminated from the case, there can be no doubt of the plaintiff's right to recover. Certain acts of Charles Burchard, who sold the land in controversy to Doty, were proved tending to show an interference by him with the land, and that he claimed to own it, but nothing appears which can operate to divest the plaintiffs of their legal title thereto.

The judgment of the circuit court must be affirmed.

MACK and others *v.* MEISEN, Garnishee.

(*Supreme Court of Wisconsin.* November 22, 1887.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—CREDITORS OMITTED FROM SCHEDULE.

An assignment, after preferring the claim of a clerk for labor, directed the residue of the proceeds of the property to be used "to pay in full all and singular the debts, demands, and liabilities due or to grow due, enumerated and designated as 'Class No. 2,' and all other indebtedness owing by said party of the first part to any person or persons whomsoever." In the schedule eight creditors were enumerated, and in the list which was verified and filed two creditors, to whom the assignor owed

small amounts, were added. Plaintiff claimed the assignment was void on the ground that the eight creditors enumerated were preferred over the two. *Held*, that the assignment did not make such preference.

Appeal from circuit court, Fond du Lac county; A. G. GILSON, Judge.
Finches, Lynde & Miller, for appellants. *Geo. P. Knowles*, for respondent.

COLE, C. J. The garnishee held the property of the judgment debtor under an assignment executed July 15, 1886. If the assignment was valid, it is obvious that the proceeding against the garnishee was properly dismissed; but it is claimed that the assignment is void because it gives an illegal preference of one creditor over another. The correctness of this view can only be determined by the language of the assignment itself to which we refer. The assignment is headed, "Voluntary Assignments, with Preferences." It provides that the assignee shall pay the demand of a clerk for two and a half months' wages in the assignor's store at $20 per month. This is the only debt mentioned and provided for in class No. 1, and it is admitted by the learned counsel for the appellant that the law allows such a preference. The statutes expressly prefer such claims. Chapter 349, Laws 1883, and chapter 48, Laws 1885. The assignment then provides for the payment of the debt designated in Schedule C as "Class No. 1," and the assignee was directed, with the net proceeds of the residue of the assigned property, "to pay in full all and singular the debts, demands, and liabilities due or to grow due, enumerated and designated as 'Class No. 2,' *and all other indebtedness owing by said party of the first part to any person or persons whomsoever*, if there be sufficient of the net proceeds remaining in the hands" of the assignee for that purpose; and if there be not sufficient, then the assignee was required to "apply the same, as far as they will go for that purpose, to and in payment of the debts, demands, and liabilities enumerated and designated as 'Class No. 2,' ratably and in proportion to the respective amounts thereof." In the schedule referred to in the assignment, eight creditors are enumerated in what is designated as "Class No. 2," whose claims amount to $1,656.36. In the list of creditors, which was verified and filed within 10 days after the assignment was made, two creditors were added, whose claims amounted to $94, and whose names did not appear in the schedule filed by the assignor at the time of the assignment in class No. 2. Now it is insisted that in the language above quoted a preference was made in favor of the eight creditors mentioned in the list first filed, over the two creditors named in the subsequent list, and this is the preference relied on to invalidate the assignment.

We think the clause in question makes no such preference among the creditors as counsel claims. True, the assignor, in class No. 2 named eight creditors who were to be paid, but he also included with them all other indebtedness which he owed. Consequently, creditors not mentioned in the list were placed upon the same footing precisely as those named, and were equally entitled to their ratable share of the proceeds of the assigned property. We think this is the real meaning of the clause; certainly we are clear that no preference is made among the creditors except as to the wages of the clerk, where a preference is allowed. But in respect to all other creditors they are embraced in the same class, no discrimination being made between them. Doubtless, in preparing the list of creditors when the assignment was made, the assignor failed, through forgetfulness or mistake, to name all his creditors in it. It is not strange that he failed to remember two creditors whom he owed small amounts. If he had omitted the names of his large creditors, there would be some reason for claiming that the omission was intentional, and for some unlawful purpose. But even then, where he provides, as he does here, in the clearest language, that not only those creditors designated in class No. 2, but also all other creditors not enumerated, shall be paid ratably, it is difficult to see how any preference is made of one creditor over another.

And this is the effect of the clause as we understand it. We think the mistake which counsel falls into in interpreting the clause is in supposing that two classes of creditors are designated in it: one class, the eight creditors named; the other class, the two creditors not named. But, as we have said, this is not our construction of the assignment, which makes no preference to any one except the clerk; all the other creditors, both those specified and those not named, being embraced in the same class, and placed on the same footing. At the close of this clause the assignee is directed to apply the proceeds in payment of the debts "enumerated and designated as 'Class No. 2.'" These, however, are not to be understood as words of limitation upon the previous language used, which, as we have said, included all creditors,—as well those named as those not named. We have no doubt but this is a proper construction of the assignment; consequently there is no ground for saying that an unlawful preference is made in it of one creditor over another.

As the case turns upon the meaning of the language used in the assignment, we do not deem it necessary to comment upon the cases cited which have no particular bearing upon the question before us. We think the judgment of the circuit court is correct, and must be affirmed.

THOMAS *v.* TOLFORD and others.

(*Supreme Court of Wisconsin.* November 22, 1887.)

SALE—WHEN TITLE PASSES.

Plaintiff sold all the lumber at his mill except some culls. The vendees confirmed their purchase by letter, and gave plaintiff the right to sell to his local trade, and instructed him to work some of the lumber before shipping. In their letter they disclaimed "all liability in connection with the stock until it has been loaded on the cars, and consigned to them." All risk from fire was assumed by plaintiff until he obtained evidence from the railroad company that he had consigned the lumber to vendees. *Held*, that the sale was executory merely, and the title to the lumber still remained in the plaintiff.

Appeal from circuit court, Clark county.

C. F. Grow and *Sturdevant & Sturdevant*, for respondent. *Bardeen, Mylrea & Marchetti* and *James O'Neill*, for appellants.

COLE, C. J. This is a controversy about a quantity of lumber. The plaintiff claims it as his property, and alleges that it was wrongfully taken from him by the defendants, and converted to their use. The defendants admit the taking, but justify that the property was seized under an execution as the property of Deatherage & Ewart, the defendants in the execution. The case was tried without a jury, and the trial court found upon the evidence that, at the time the property was seized under the execution, it was not the property of the judgment debtors, but belonged to the plaintiff. The question which we have to determine is, does the evidence show that this was the fact, or that there was such an executed contract of sale as to vest the title to the lumber in the judgment debtors, contrary to the decision of the court below?

These facts are admitted: That about the first of September, 1885, Ewart, of the firm of Deatherage & Ewart, came to the plaintiff's mill at Colby, and made a purchase of a quantity of lumber. The plaintiff says he sold him all the lumber he had at the time in his yard, with the exception of culls, amounting in quantity to more than 1,000,000 feet. Then three letters passed between the parties relating to this sale, and which it is admitted contain the contract which the parties made. These letters are too long to be quoted at length, and we shall only refer to certain sentences in them which seem to bear upon the question before us. There is certainly language in them which sustains the contention of the defendant's counsel that there was a complete executed sale and purchase of the lumber, so as to pass the title thereof to the vendees. In the first letter, dated September 1, 1885, written the plaintiff by

Ewart, from Chippewa Falls, he says: "I now confirm the purchase made of you yesterday for Deatherage & Ewart of your stock of lumber, culls out, at $9.50 per M., f. o. b. cars at your station, with the following additional charges for working." Then follows a description of the lumber, and an estimate of the quantity of stock, "as near as may be." The next day the plaintiff answered this letter saying, among other things: "I find no difference in our understanding." A third letter, dated Kansas City, September 9th, was written by the vendees to the plaintiff. In the testimony the letters f. o. b. are explained to mean "free on board cars." In both letters written the plaintiff by the vendees, directions are given about sales from this stock of lumber which the plaintiff was to make in his local trade, and to Chicago parties, and the average of such sales was to be charged or credited to them according as the same was more or less than the purchase price which they agreed to pay. These are the principal circumstances relied on to show an intention to vest the title of the lumber in the vendees. But against these acts and declarations as to the sale there is other language which must be considered. In the first letter written by Ewart, he says: "We are to have no liability in connection with this stock until it has been loaded on cars by you, and consigned to us. All risk of fire is assumed by you while the stock remains in your yard." To this the plaintiff says: "The risk is mine until I obtain evidence of the R. R. that I have consigned it to you. I hope I shall not lose it in that way, nor you either. But in case I would, I wish you agree not to try to cause me to replace it, because you know I cannot do that without another loss." This language shows quite conclusively that the parties did not intend the title to pass until the lumber was loaded upon the cars and consigned to the vendees, because it is agreed that the vendees should have no liability for the lumber until this had been done. If the property had been lost and destroyed by fire while in the plaintiff's mill-yard, the loss would clearly have been his. The language is perfectly plain and distinct upon that point.

It is said that the parties were contracting only with reference to the risk by fire while the lumber was in the mill yard of the vendor; but the language is not so qualified, while it is undoubtedly true that loss by fire was one risk which the parties had in mind. But, according to our understanding of the letters, the intention was that the vendees assumed no liability, or rather incurred no responsibility, for the property, until it had been loaded on the cars; in other words, that the vendor was to retain the ownership until this was done. There are some other circumstances which tend to support the conclusion that the sale was an executory one, and that the title did not pass when the contract was made. There were culls intermixed in the lumber, which were to be separated and thrown out of the stock. There were also stipulations made as to "working" or dressing the lumber before it was shipped. These circumstances are not conclusive as to the nature of the sale, but they are entitled to weight when trying to ascertain the understanding of the parties as to when the title would pass to the vendees.

There was testimony outside the letters, but it was not important, and affords little aid in determining the question whether the contract amounted to a sale *in præsenti*, and passed the title, or was merely an executory contract of sale. While the parties have failed to express their intention as clearly as they might have done, yet, upon all the evidence bearing upon the question, we agree in the conclusion reached by the learned court below,—that the lumber when seized on the execution was not the property of the vendees, or judgment debtors, but was the property of the plaintiff. The directions which were given him by the vendees as to sales are not inconsistent with that view. The vendees had contracted for the purchase of all the lumber in the yard, culls out. This is an admitted fact. They had the right therefore that all should be delivered upon the contract; but they were will-

ing to allow the plaintiff to make sales from the stock in his local trade, and to Chicago parties, at certain prices, as they would have the benefit of such sales when above the prices which they had agreed to pay. But when the vendees say, as they do in effect, "We are to have no liability nor incur any responsibility in connection with the stock until it is loaded on the cars;" and the vendor replies, in substance, "The risk is mine until I obtain evidence of the railroad company that I have placed it on the cars, consigned to you; and if the lumber is lost or destroyed before that is done, I want you to agree not to insist upon my replacing it, because this I cannot do without another loss," —but one possible inference can be made as to the intention of the parties and the nature of the contract. It was not a sale where title or ownership of the property passed to the purchasers. No money was paid when the contract was made. Payment was to be made for the stock on the first of January following, except as to $1,000 or $1,500 at an earlier day if the plaintiff should request. The vendees in Kansas City were to give directions from time to time about shipments and dressing the lumber. The case most nearly resembling this in its facts to which we were referred is *Lingham* v. *Eggleston*, 27 Mich. 324, where Mr. Justice COOLEY gives a very instructive opinion, which strongly bears upon many of the questions discussed in the case at bar. We do not enter upon a discussion of the legal principles applicable to the case, as they are plain, if we are right in our construction of the letters, that the parties only contemplated making an executory agreement in them. That being our conclusion from the language used, it follows that the judgment of the circuit court must be affirmed.

MCDONALD v. Estate of KELLY.

(*Supreme Court of Wisconsin.* November 22, 1887.)

APPEAL—REVIEW OF EVIDENCE.

On an appeal on questions of fact alone, the appellate court will not disturb the findings of the trial court unless they are against the clear preponderance of testimony.

Appeal from circuit court, Marathon county.

Cate, Jones & Sanborn, for appellant. *Reed & Lines*, for respondent.

COLE, C. J. This appeal involves merely questions of fact upon the evidence which was given in the court below. The appellant presented in the county court a claim for $2,000 against the estate of N. T. Kelly, which claim was allowed. From this allowance an appeal was taken to the circuit court, where the cause was tried by the court, a jury having been waived. The claim was for $2,000 paid by the appellant on a contract for the purchase of real estate which the vendor afterwards sold and conveyed to another party. To prove his claim, the appellant produced a receipt signed by Kelly, stating that the $2,000 was received in part payment of property sold. The receipt was dated October 13, 1881. It appeared that Kelly sold and conveyed the property to another purchaser October 21, 1881. Kelly died January 26, 1884. Among other findings of fact, the circuit court found that this claim was settled or adjusted between the parties in the life-time of Kelly, and reversed the order of the county court allowing the claim. It is now said that this finding is without any testimony to sustain it.

The objection calls for an examination of the evidence, which we have made. After such examination we cannot agree with counsel that the finding is wholly without proof to sustain it. It is said the receipt is conclusive evidence that the money was paid to Kelly, and the burden of showing that it had been settled and adjusted in some way was upon the representatives of the estate. We shall enter upon no discussion of the testimony, as it would subserve no useful purpose. But we will allude to one or two considerations

arising upon the facts which are well established, which tend to justify the conclusion reached by the court below. Kelly was a man, as Mr. Reed testified, abundantly able to pay this claim at any time. The appellant was insolvent; that is, in July, 1883, judgment against him for a small amount could not be collected. In supplemental proceedings taken to collect this judgment, the appellant swore, as the commissioner testified, that he had no interest in any real estate nor property or money out of which he could pay the judgment. If the claim in question had not been settled when appellant gave this testimony, he was guilty of swearing falsely. He makes an explanation about that testimony in order to overcome or destroy the inference which would naturally be made from it, but the explanation shows that he did not disclose the real truth about his ability to pay if the claim which he now makes was never settled. Besides, the appellant and Kelly lived in the same place, must have seen each other often, and it is strange that this claim was allowed to stand 27 months without any serious effort being made to collect it, if it was still unsettled. True, the witness Livermore testified that the claim was in his hands for collection, and that he spoke to Kelly about it at a certain place and time in November, 1883, and that Kelly replied: "Let that go now." There was no recognition of the claim by Kelly, and no promise made to arrange it. Livermore is directly contradicted by Reed, who states very positively that no such conversation was or could have been had at the time and place as testified to by him. Now, while there is perhaps no positive or direct evidence of the settlement of this claim in the life-time of Kelly, there is very strong presumptive proof of the fact. The effect of the evidence depends in some degree upon the statements of witnesses who were sworn and testified on the trial. The circuit judge had the advantage of seeing the witnesses, and their manner of testifying. He was in a better position than the members of this court can be to judge of the weight or credibility which should be given their conflicting statements. The rule is well settled and very familiar that this court refuses to disturb the findings of the trial court on questions of fact unless they are against the clear preponderance of testimony. That rule must be applied here.

The judgment of the circuit court must be affirmed.

DINWOODIE *v.* CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. RAILROAD COMPANIES—STOCK-KILLING CASES—FENCES—EVIDENCE.
   In an action brought to recover for the killing of an ox upon defendant's railroad track, it appeared that at the place of the killing the right of way was fenced on the east side, but not on the west. Plaintiff testified that, in seeking to ascertain the point at which the animal went upon the track, he discovered cattle tracks leading from the west side across the switch track onto the main track where the ox was killed; that he saw no other tracks than these upon the right of way between the depot grounds and the place of the killing. *Held*, sufficient evidence upon which to base an instruction that, to entitle plaintiff to recover, the jury must be satisfied that the ox got upon the right of way at some point other than the depot grounds and was killed outside its limits.
2. SAME.
   In an action brought to recover for the killing of an ox upon defendant's railroad track, the evidence showed that at the place of the killing, which was 60 rods north of the station, there was a ditch and an embankment; that on the west side of the main track was a spur running parallel with it used for storing cars. It did not appear that this spur was ever used for loading or unloading freight, but towards the end where the ground was level it had been used for loading ties. *Held*, that the question of whether or not the animal was killed within the limits of the depot grounds was properly submitted to the jury.

Appeal from circuit court, Portage county.

Cate, Jones & Sanborn, for respondent. *John W. Carey*, for appellant.

COLE, C. J. The errors relied on for a reversal of the judgment are (1) that there is no testimony which shows or tends to show that the ox which was killed got upon the right of way at a point where the defendant company was bound to maintain a fence and did not; (2) that the undisputed testimony shows that the ox was killed upon its depot grounds. The fact is admitted that the animal was killed about 60 rods north of the station building at Hutchinson; that at this point the right of way was fenced on the east side, but not on the west. It appears from the testimony that there was a ditch and an embankment at this point, but not sufficient to prevent cattle from coming on the track from the west. The evidence as to where the ox got upon the track is the testimony of the plaintiff himself, who said, in effect, that he examined the track for the purpose of seeing where the ox came upon it; that cattle tracks came from the west side of the right of way, across the side track, and upon the main track of the railroad. The witness did not see the ox go upon the track, but he said the tracks which he saw were ox tracks, leading straight from the west side across the switch track and onto the main track, where he was killed. The witness saw these cattle tracks leading through the ditch and up the embankment to the railroad track. He saw cattle tracks at no other place on the right of way. Now this evidence is not conclusive as to the point where the ox came onto the railroad track, but it was sufficient to warrant the jury in finding that the animal came upon the defendant's track from the west of that place. Were one to trace cattle tracks plainly made in the dirt or soil for several feet from the west line of the right of way directly across a ditch and embankment onto a railroad track, as the witness said he did, he would naturally conclude that an animal had there passed onto the railroad. Such a conclusion or inference would not rest in mere conjecture, but would be supported by visible signs raising a strong probability of the fact, such as men act on in the affairs of life. It is true that the witness could not swear that these cattle tracks which he saw were made by his ox, because he did not see the ox go there. Still it did not appear that any cattle tracks were seen at any other places on the right of way between the point where the ox was killed and the depot building south. We think, therefore, it was not error to submit to the jury the question, upon all the evidence, whether the plaintiff's ox did come upon the railroad track from the west near where he was killed. The probabilities of the case tend to show that he did. The trial court directed the jury that, to justify a finding for the plaintiff, they must be satisfied affirmatively from the weight of the whole evidence that the ox got upon the defendant's right of way at some point other than the depot grounds, and was killed outside the limits of such grounds. We surely are not warranted in disturbing the verdict upon the question thus fairly submitted.

Upon the other question, does the testimony show that the ox was killed upon the defendant's depot grounds? The statute makes it the duty of a railroad company to erect and maintain on both sides of its road, depot grounds excepted, good and sufficient fences, to prevent cattle from straying upon the right of way. Section 1810. The statute does not attempt to define what are depot grounds. We must therefore refer to the sense in which these words are used in the authorities. In *Fowler* v. *Trust Co.*, 21 Wis. 78, it was said a railroad depot was a place where passengers get on and off the cars, and where goods are loaded and unloaded; and all grounds necessary or convenient and actually used for these purposes are depot grounds. The learned circuit judge gave substantially the same definition to the words "depot grounds," to guide the jury in determining the question whether the ox was killed within the limits of such grounds. We have already said the ox was killed 60 rods north of the station building. In addition to the main track running north there was a side or spur track on the west side, which extended about 100 rods parallel with the main track, which was used for storing cars. There were also two

other side tracks and switches; one of these tracks ran off to a saw-mill, the other to a planing-mill, both mills being east of the main track, and quite a distance from the station. It does not appear that the spur track 60 rods north of the station was used for loading or unloading freight, though towards the end, where the ground was level, it had been used occasionally for loading ties. But still where the ox was killed we infer that the ditch and embankment would render it difficult, if not impossible, for teams to get up to the spur track, either to load or unload freight. The statute relieves a railroad company from the duty of fencing its depot grounds, because it would be inconvenient to the public and company to have them fenced, inasmuch as it would seriously interfere with the loading and unloading of cars, and handling of freight. It is necessary to have free access to and through such grounds to deposit goods for transportation or receive goods ready for delivery. It cannot be said, as a matter of law, that the depot grounds included the spur track 60 rods north from the station, or that the right of way along there was properly embraced in depot grounds. One thing is certain, it was fenced at that point on the east side of the right of way. But it was for the jury to determine, from all the facts and circumstances, whether the railroad at the point where the ox was killed was within the limits of the depot grounds, as defined by the court, or not. Were the grounds at that place used in connection with the depot for loading or unloading freight, or were they necessary or convenient, and actually used for such purposes? If they were, then they were included in the depot grounds, where the company was not bound to maintain a fence; but if not, they were no part of such grounds, and the company was required by the statute to fence them. It seems to us it was a question essentially for the jury, and not the court, to determine whether it was necessary to leave the right of way unfenced at that place in order to transact the business of the company in receiving and delivering goods. It is not pretended that it was a place where passengers got on and off the cars. The court was right in submitting the question to the jury, as it did.

The liability of the company is predicated upon its failure to fence its right of way as the law requires. Upon the whole record we see no reason for disturbing the verdict, and the judgment of the circuit court is therefore affirmed.

JOHANNES *v.* STANDARD FIRE OFFICE OF LONDON and others.

(*Supreme Court of Wisconsin.* November 22, 1887.)

INSURANCE—OWNERSHIP CLAUSE—LAND CONTRACT.

In an action brought against a fire insurance company to recover damages from fire, it was shown that at the time of his application for a policy plaintiff had possession of the realty on which the insured property was situated under a land contract upon which he had paid part of the purchase price, the remainder being paid after the issuance of the policy, but before its delivery to him; that this land contract was shown to the insurance agent when his application was made, and no questions were asked or representations made as to plaintiff's title or interest in the land or building, and that the improvements on the land were of greater value than the insurance. *Held*, that plaintiff was the real owner in equity, and held, within the meaning of a condition in the policy, "the entire, unconditional, and sole ownership of the property."

Appeal from circuit court, Eau Claire county.

Geo. C. Teall & Son, for respondent. *L. M. Vilas*, for appellants.

COLE, C. J. The defense is based upon alleged breaches of the conditions in the policy, which it is claimed exonerate the defendants from all liability for the loss. The policy provided it should be void if there was "any omission to make known every fact material to the risk," and "if the interest of the assured in the property be other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building

insured stands on leased ground, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy to be void." It is said the facts proven on the trial show a breach of these conditions. There is really no disagreement about the material facts of the case.

It appears that the plaintiff applied to the local agent of the Standard Company for insurance about the first of July, 1883. At this time he had possession of the realty on which the building and insured property were situated, under a land contract upon which he had paid $100; $200, the balance of the purchase price, became due and was paid after the policy was issued. The improvements on the land were of greater value than the insurance. The policy was issued and remained in the hands of the agent until the land was paid for and a warranty deed obtained, which was in August, 1883. The plaintiff received the policy from the agent in October following. There was no written application made for insurance, and no representations made, or question asked as to plaintiff's title or interest in the land or building; nothing was said upon that subject. The agent testified that he did not know what the plaintiff's title was in the land or that he held it under a contract of purchase. The plaintiff, however, testified that when he made application for insurance he showed the agent the contract, who took it to obtain a description of the land on which the insured building was situated; and, in answer to a question submitted, the jury found that such was the fact. It is plain, therefore, that the agent had the means of information as to plaintiff's interest in the realty before him, and it is almost incredible that he did not know what his title was. Under the circumstances, the plaintiff cannot be justly charged with an omission to make known the fact that he held the land under a contract for the purchase thereof. We do not dwell upon these facts, nor express any opinion as to how they would affect the liability of the company, providing it was made to appear that the plaintiff was not the sole and unconditional owner of the entire interest in the property within the meaning of the condition relied on. But if the plaintiff is held to the exact language of the condition, which it is perfectly clear he never saw until long after the policy was issued, still the evidence shows that his interest in the property was an entire, unconditional, and sole ownership. He was the real owner of the property in equity and for all purposes of insurance. The condition does not relate to a legal title in fee-simple nor is that the interest described. An equitable title, if sole and unconditional, answers the description fully, and if the property was destroyed the entire loss would fall upon the plaintiff. There is no ground, therefore, for saying there was a misdescription of the nature of the plaintiff's interest in the property. If the company deemed it material that the state of the legal title should be described, it doubtless would have framed the language to call for that information. But it did not. The interest of the plaintiff satisfies the condition as we construe it, as he was in possession and was the sole equitable owner. In the absence of any specific inquiry by the insurers, or express stipulation in the policy, no particular description of the nature of the insurable interest is necessary. *Strong* v. *Insurance Co.*, 10 Pick. 40; *King* v. *Insurance Co.*, 7 Cush. 13; *Insurance Co.* v. *Brown*, 43 N. Y. 389. But the question before us seems to be settled by the adjudications. In *Hough* v. *Insurance Co.*, 29 Conn. 10, an applicant for insurance had described the property in a written application as "his house," and it was so described in the policy. The policy contained the condition "if the interest in the property to be insured is not absolute it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance shall be void." The legal title to the property was in another party, with whom the insured had, at the time of the application, made a parol contract for its purchase, for a price agreed upon, which the insured had agreed absolutely to pay, and a part of which he had paid, and the insured had entered into possession as purchaser, and had made valuable improvements on the property. Upon the

claim of the insurance company, in a suit on the policy, that the insurance was void by reason of the omission of the insured to state in his application the condition of the title, the court charged the jury that the plaintiff was to be regarded as the owner of the property, if he had the equitable title, and his interest was such that the loss would fall on him if the property was destroyed. This charge was held to be correct, and that an absolute interest which is so completely vested in the party owning it that he could not be deprived of it without his consent, would satisfy the condition. In *Dolliver* v. *Insurance Co.*, 128 Mass. 315, a policy of insurance contained the same condition precisely as the one before us. The insured, at the time the policy was issued, was the owner in fee of the property insured, but had mortgaged it, and also leased it for a term of years. The policy contained no statement of these incumbrances, still it was held that the policy was not thereby avoided. The court say: "The provision is in the body of the policy, and is inserted for the benefit of the insurer. It is to be construed strictly against it, and liberally in behalf of the assured. If, therefore, its terms can be satisfied by a construction which will save the policy, and at the same time accord with the established rules of law, such construction must be adopted." There are numerous cases which hold that one who has an equitable interest in property may be described as the owner thereof. *Insurance Co.* v. *Tyler*, 16 Wend. 385; *Insurance Co.* v. *Martin*, 31 N. J. Law, 568; *Pelton* v. *Insurance Co.*, 77 N. Y. 605; *Insurance Co.* v. *Weill*, 28 Grat. 389; *Acer* v. *Insurance Co.*, 57 Barb. 68; *Insurance Co.* v. *Fogelman*, 35 Mich. 482; *Dohn* v. *Insurance Co.*, 5 Lans. 275; *Insurance Co.* v. *Wilgus*, 88 Pa. St. 107; *Martin* v. *Insurance Co.*, 44 N. J. Law, 486; *Insurance Co.* v. *Haven*, 95 U. S. 242.

In this case, the plaintiff, by the contract and its part performance, had acquired an absolute vested interest in the property which he could incumber, sell, and which would descend to his heirs. He was not in default in making payments, and was to all intents and purposes the sole owner. The condition in question speaks only of the nature of the interest insured, not of its extent or legal character. The plaintiff's interest fully answered the description in the condition. In *Hinman* v. *Insurance Co.*, 36 Wis. 159, the assured made a written application in which he falsely represented his interest in the property. He was in default in his payments, and this court held that a representation that he was the sole and undisputed owner of the insured property was in the nature of a warranty, and, being untrue, avoided the policy. The case is distinguishable from the one at bar. The learned counsel for the defendants called our attention to cases which decide that one who has merely an estate for life in premises cannot be regarded as the sole and absolute owner, within the meaning of a condition such as we are considering, (*Davis* v. *Insurance Co.*, 67 Iowa, 494, 25 N. W. Rep. 745; *Garver* v. *Insurance Co.*, 69 Iowa, 202, 28 N. W. Rep. 555;) or one who has but a lien for a debt, as in *Rohrback* v. *Insurance Co.*, 62 N. Y. 47; or a purchaser at an execution sale, (*Insurance Co.* v. *Brennan*, 58 Ill. 158;) or a mortgagee in possession, (*Southwick* v. *Insurance Co.*, 133 Mass. 457; *Waller* v. *Assurance Co.*, 10 Fed. Rep. 232;) or one who has only a leasehold interest, (*Mers* v. *Insurance Co.*, 68 Mo. 127.) But these cases, it is obvious, are not in point here, where the insured was in no default in making payments, and was the equitable owner, having the right to enforce a specific performance of the contract, and obtain the legal title outstanding in his vendor.

It follows from these views that there was no breach of the condition in question shown, and that the judgment must be affirmed.

MEIER v. PAULUS.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. POOR AND POOR-LAWS—DUTY OF POOR MASTER TO CARE FOR SICK PERSON.
In an action against a county poor master for neglect in not properly caring for plaintiff while in his charge, it was claimed in defense that plaintiff was brought to the poor farm without authority from the proper officers of the county, and during the absence of defendant; and that defendant was not required by law to receive or care for him. *Held*, that the fact that plaintiff was received, and care bestowed upon him by defendant, made defendant responsible for such care and attention as ordinary prudence required. Whether such care were given was a question to be submitted to the jury.

2. DEPOSITION—OF ADVERSE PARTY—WHEN MAY BE USED—DEPONENT PRESENT.
A deposition taken under Rev. St. Wis. 1878, § 4096, which, as amended, read, "* * * the examination of a party * * * otherwise than as a witness at the trial, may be taken by deposition, at the instance of the adverse party in any action or proceeding at any time after the commencement thereof, and before judgment," may be produced, and used as evidence on trial, even if deponent be present in court.

3. SAME—EXCLUDING AT TRIAL—ERROR NOT WAIVED BY CALLING PARTY AS WITNESS.
The deposition of defendant taken at plaintiff's instance was excluded at the trial, on the ground that defendant was present in court, whereupon, plaintiff called him as a witness. *Held*, that plaintiff did not thereby waive the error in excluding the deposition.

Appeal from circuit court, Marathon county.

Neal Brown and *L. A. Pradt*, for appellant. *Bardeen, Mylrea & Marchetti*, for respondent.

TAYLOR, J. This action was brought by the appellant against the respondent to recover damages for the neglect of the respondent in not properly watching and caring for him, while he was in his charge, being then sick, and temporarily deranged from the effect of such sickness. The complaint alleges that the defendant, Paulus, was duly appointed to take the care and custody of the poor of Marathon county during the year 1883, and that he assumed the duties incident to his position, in accordance with such appointment; that the county provided a dwelling-house near the city of Wausau for that purpose, and that defendant went into possession of such building, and had in his custody in said building a large number of the poor of said county; that on March 6, 1883, the plaintiff was at a public hotel in the city of Wausau, without money or means to care for himself; that the plaintiff became very sick of inflammation of the lungs or pneumonia, and was confined to his bed, and became delirious, and was unable to know what was being done with him; that while in that condition the officers of Marathon county were notified of plaintiff's condition, and came and took charge of the plaintiff, and caused him to be taken to the said county poor-house, where they committed him to and left him in the care of the defendant, with directions to give him proper care, attention, food, and medicine; that the defendant accepted the charge and custody of the plaintiff; that when plaintiff was taken to said poor-house, and all the time he staid there, he was very sick and helpless, had a high fever, and was in a delirious condition, caused by said sickness, and was in great danger of injuring himself unless properly watched and cared for. The complaint further alleges that the defendant, in violation of his duty to care for and protect the plaintiff, and well knowing his delirious condition, carelessly, negligently, and wrongfully left the plaintiff in the night-time, without proper care and attention to guard and protect him, and in consequence thereof, the plaintiff, being then sick and delirious in consequence of such sickness, and not able to protect himself, left the said building in which he was placed by the said defendant, and wandered away for many miles, entirely unconscious of what he was doing, at a time when the snow was deep, and the weather very cold, while the plaintiff was very thinly clad, and with-

out shoes upon his feet, and by reason thereof the plaintiff's feet were frozen so that it became necessary that a portion of each of them should be amputated, and claims damages for such injury.

The answer denies that at the time alleged in the complaint, defendant was the agent of Marathon county for the care and custody of the poor of said county; admits that he was in possession of the county poor farm in 1883, and alleges that he held possession under a lease from the county; denies upon information and belief that the plaintiff on the eighth of March, 1883, was sick with inflammation of the lungs or pneumonia; and alleges that on the contrary the plaintiff was a lunatic or insane person at that time, and for several weeks thereafter, and was in such condition as to require close confinement; denies upon information and belief that the plaintiff was taken in charge by any officer or agent of Marathon county, and taken to the poor farm, and alleges that the plaintiff was taken to said poor farm without authority from any officer or agent of said county. The answer further alleges that the poor of said county of Marathon were under the exclusive control and management of a committee of the county board of supervisors, and that admission could only be had to the poor farm by persons who had received authority from some member of such committee; alleges that the plaintiff was brought to said poor farm in his absence, and that his wife, who was then in charge of the same, refused to receive him, and that, notwithstanding her refusal, the persons having him in charge carried him into the poor-house on said farm, and left him there. The answer further alleges that at the time no provision had been made by said county for the custody of insane persons at said poor farm, and there was no room or place at such farm where an insane person could properly be cared for. The answer denies that the defendant ever received the plaintiff at said farm, or that he ever promised or agreed to give the plaintiff care or attention; and then alleges that although the plaintiff was at the poor farm without authority, and, although he was under no obligation to give him care or attention, that he did, during the time plaintiff remained at the farm, for about 36 hours, give the plaintiff such care and attention as he was able to give with the means and conveniences he had at hand; that he provided watches for him, guarded and protected him to the best of his ability, and was not negligent or careless in that respect; and that if the plaintiff met with any injuries it was without the fault or negligence of the defendant. The foregoing are all the material allegations in the pleadings. The action was tried by the court and a jury. After the parties had produced their evidence on the trial, on motion of the defendant the court directed the plaintiff to be nonsuited, and upon the judgment entered in favor of the defendant upon such nonsuit, the plaintiff appeals to this court.

The appellant alleges as error—*First*, the refusal of the court to receive as evidence the deposition of the defendant taken before the trial in the manner prescribed by section 4096, Rev. St. There are also three errors alleged in the rejection of other evidence offered by the plaintiff, and for receiving certain evidence on the part of the defendant. The fourth error assigned is that the court erred in directing the plaintiff to be nonsuited. We shall content ourselves with the consideration of the first and fourth errros assigned. Was it error to refuse to permit the plaintiff to read to the jury the deposition of the defendant taken before the trial in the manner prescribed by section 4096, Rev. St.? It seems to us very clear that the very object of the statute giving a party the right to examine the opposite party, when such examination is made after issue joined in the action, was for the purpose of obtaining evidence in favor of the party seeking the examination, and against the party examined. In many cases the examination would render it wholly unnecessary for the party taking such examination to seek for evidence from the other witnesses to sustain his action or defense on the trial, and he would, therefore, not avail himself of such other testimony as he might produce were it not for the statements made by

the party examined. If he can only use such examination as evidence against his opponent when such opponent absents himself from the trial of the action, then his right to use the examination depends upon the will of his opponent. The statute declares that this examination shall in all respects take the place of the old bill of discovery. The very object of the old bill of discovery was to procure evidence against the opposite party, to be used on the trial of an action; and it was never held that the answer of the party to the bill could not be used against him, if he appeared at the trial of the action, in aid of which it was taken, and was willing to submit himself to an examination in such action. The statute undoubtedly goes further than the bill of discovery, and not only allows an examination of the party as to those matters which the party seeking the examination cannot prove by other witnesses or testimony, but it allows an examination as to all the material issues in the action. This examination of the party at the instance of the opposite party is not strictly the deposition of a witness taken in an action, and its admissibility as evidence on the trial is not governed by the provisions of section 4089, Rev. St., which provides "that no deposition shall be used, if it shall appear that the reason for taking it no longer exists, unless the party producing it shall show other sufficient causes, then existing, for its use." It is evident that the reasons for taking a deposition referred to in this section are the reasons given for taking the same specified in sections 4101, 4110, Rev. St., and can have no reference to the taking of the examination of a party. His examination is taken because he is a party to the action, and for no other reason, and that reason exists as much on the trial as at the time of taking it. The examination of a party is in the nature of an admission so far as his answers are material to the issues in the action, and such admissions are always admitted as original evidence against him. Section 4098 also treats the examination of the party as different from the deposition of a witness, by providing that the party calling for the examination of the party may, after making use of the examination on the trial, rebut the testimony of the party given in the examination, as though he were a hostile witness. It is urged by the learned counsel of the respondent that, if it be admitted that the court was wrong in refusing to permit the reading of the examination of the defendant in the first instance, it was cured by the fact that the plaintiff called the party and examined him on the trial. We do not think this cured the error. The plaintiff knew the party was a hostile witness, and he did not wish to be compelled to put him on the stand to prove his case, when he had his sworn admissions, made at a time when perhaps he would be less liable to be swayed by the exigencies of the situation. He had the right to place before the jury, in the first instance, the statements of the defendant as made on his examination, and if the defendant desired to vary, color, or contradict them he should be compelled to do so as a witness in his own behalf, and not as the witness of the plaintiff. Upon the merits of the case we are inclined to hold that the learned judge improperly took the case from the jury, upon all the evidence.

It may be admitted that the plaintiff was brought to the poor farm without any authority from the proper officers of the county, and that the defendant was not required by law to receive the plaintiff into the poor-house, or to take care of him there; still the fact remains that he did receive him into his house, and did undertake to take care of him. There was evidence tending to show that he knew of the nature of the plaintiff's disease; he knew that he was not permanently insane or a lunatic; he also knew that the effects of the disease under which he was laboring rendered him for the time wholly incompetent to take care of himself; he knew that in his delirium he was inclined to leave the house and expose himself in that way. There was evidence that he knew that he had left the house the first night he was in his custody, and the evidence certainly tended to show that about 2 o'clock A. M. on the second night,

the plaintiff had left the house again, with nothing but stockings on his feet, and nothing but his shirt and pantaloons on his body. He knew the weather was very cold, and the snow deep, and that the probabilities of his being injured by his exposure were very great; yet he made no attempt to rescue him from this dangerous situation himself, nor did he request or direct any person under his control to make any attempt to rescue him. We do not think that, as a matter of law, a court can say that there was no evidence tending to show that the defendant neglected his duty towards the plaintiff in his unfortunate condition, and that he is neither legally nor morally responsible for the consequence which resulted from his exposure that night. As we understand the evidence in this case, the plaintiff does not seek to charge the defendant for the negligence of his servants, or for the negligence of the poor people under his care, but for his personal neglect in not providing a more secure place for him, and in not attempting to rescue him from the inclemency of the weather, when he knew the plaintiff had unconsciously exposed himself to great danger therefrom. The defendant, having permitted the plaintiff to remain in his house, knowing his condition, and his disposition in his delirious state to expose himself to the dangers of the cold and snow in the nighttime, cannot divest himself of all responsibility for his care and safety. He cannot be grossly negligent of the welfare of this unfortunate man, and hope to escape all legal responsibility. He might, perhaps, under the evidence in the case, have refused to receive him into his house, or under his care, and when, as he says, he found that the plaintiff had been placed in his house in his absence, and without his knowledge or consent, he might have refused to take any responsibility in regard to him, and he might have carried him back, and left him in the custody of those who had brought him to his home; this he did not do, but permitted him to remain, and undertook to care for him. The material question in the case was whether, after undertaking such control and care of the plaintiff, he was guilty of such neglect as resulted in an injury to the plaintiff. Did he give him such care and attention as a man of ordinary prudence would have given under like circumstances? If he did not, he did not do his duty. And whether he did or not was, we think, clearly a question of fact for the jury, and not of law for the court. See Cooley, Torts, 630, 683, and cases cited in notes; also page 668.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

INGRAM, Surviving Partner, *v.* OSBORN, Garnishee.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. ASSIGNMENT—OF CONTRACT RIGHTS—AGREEMENT TO PAY CREDITOR FROM PROFITS—VALIDITY—GARNISHMENT.

A principal defendant in a garnishee suit had entered into a contract with a railroad company to build a dock, and, being insolvent, induced the garnishee to obtain the bond required and advance the money needed to start the work. It required more money than was anticipated, and, to secure the garnishee, defendant sold and assigned to him all his rights under the contract, together with all tools and machinery, defendant to receive $200 per month for his services, and the garnishee agreeing that, if his profits amounted to a certain sum, he would pay a debt due by defendant to a bank; the garnishee further assumed the debts of the concern. *Held*, that the transfer from the defendant was complete and absolute, and the agreement to pay one of his creditors if the profits permitted, did not operate as a fraud on the other creditors, and was obligatory on the garnishee and enforceable by the bank as soon as the profits accrued; and the profits could not be garnished by other creditors.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT CONSTITUTES.

Laws Wis. 1883, c. 249, § 1, forbids preferences in an assignment for the benefit of creditors, or in transfers made 60 days before such assignment. Rev. St. Wis. §§

1694–1696 provide that all assignments for the benefit of creditors shall be void as against the creditors, unless a bond is given. Defendant assigned all his interest in a certain uncompleted contract to the garnishee, in consideration that the garnishee should pay the debts on the contract, and should, out of his profits, pay a certain debt of defendant, either in whole or part. *Held*, that the transfer to the garnishee was absolute and unconditional in consideration of the payment of the debt by the garnishee, and, as it was unaccompanied by any trust in favor of defendant or his creditors, the transaction was not an assignment for the benefit of creditors, within the meaning of the statute.

Appeal from circuit court, Eau Claire county.

September 29, 1884, C. C. Smith, the principal defendant herein, entered into a written contract with the Milwaukee, Lake Shore & Western Railway Company, wherein he agreed to perform all the labor and furnish all the materials necessary to fully complete, in the most substantial and workmanlike manner, and to the satisfaction and acceptance of said company's chief engineer, an ore dock at Ashland, according to specifications annexed, under the direction of the superintendent in charge of the work and said chief engineer, upon (among others) the terms and conditions (1) that such work should be commenced within 10 days thereafter and fully completed on or before June 15, 1885, except as to filling with slabs and rock, and the same was to be completed by July 15, 1885; (2) that said superintendent and chief engineer should have full power to reject and condemn all work and materials which, in their opinion, should not conform to the spirit of such agreement, and to decide every question which might or could arise thereunder, and their decision was to be conclusive upon both parties; (3) that the contract was to be performed in such a manner that Smith was not to be relieved from the immediate charge and responsibility of the work, no part of which was to be transferred or sublet to other parties, unless by the sanction of the company; (4) that if any foreman or laborer employed by Smith, should, in the opinion of the superintendent, execute his work unfaithfully or unskillfully, or should be remiss, inadequate, disrespectful, or riotous, he might discharge him; (5) that if any damage should be done by Smith or any of his men to any lands adjoining, or in the vicinity of such work, the company might pay the same and deduct it from the value of the work; (6) that in doing the work, Smith was not to keep or to suffer to be kept or used by any of his men any ardent spirits, and was liable to discharge if he did. It was also agreed therein that the company was to pay as agreed, upon the engineer's certificate of completion of the work; that estimates were to be made during the progress of the work on or about the first of each month, and payments made upon the certificate of the superintendent approved by the engineer, on the twentieth of each month for the amount of such estimate less 10 per cent.; that, upon such payments being made, the title to the property covered thereby was to vest in the company as security for such payments; that Smith execute and deliver to the company a bond in the penal sum of $25,000, with two good and sufficient sureties to be approved by it, conditioned for the full and faithful performance of all the terms, conditions, covenants, and agreements contained in the contract; that, if Smith refused or neglected to remedy an imperfection pointed out, or violated any of the conditions of the contract, then, in certain conditions, the engineer was empowered to terminate the contract, and the company was thereupon authorized to retain such percentage and recover the full penalty of the bond, or take measures to complete the work and deduct the expense from the contract price; that said chief engineer was thereby made an umpire to decide all matters of dispute between the parties arising or growing out of the contract, and his decision to be final and conclusive.

In taking the contract, Smith's bid was some $30,000 lower than any other, and, being insolvent, he was unable for a time to give the requisite bond. He thereupon offered a half interest in the contract to the garnishee, Osborn, if he would furnish the bond and sureties required, and the means to perform

the contract, which he represented would not exceed $5,000. About November 10, 1884, by verbal agreement, Osborn accepted such offer, by which he was to have a half interest in the contract and the profits accruing therefrom, and furnish such bond and sureties, which he did, and thereby agreed to put $5,000 into the business, but with the understanding that he was not to devote more than a week in a month to the business. Smith was then, to the knowledge of Osborn, badly embarrassed, insolvent, and practically bankrupt. December 29, 1884, and after Osborn had put $4,800 into the business in pursuance of such agreement, and when it was evident that he would have to put in $3,000 more the next month, and devote his whole time to the business, Smith, by an instrument in writing, with the consent of said sureties and the company, sold, assigned, conveyed, and set over to said Osborn all his right, title, and interest in and to said contract, together with all profits which had accrued or might thereafter accrue thereon, together with all contracts made by Smith for timber, rock, materials, tools, and supplies to carry out said contract, together with all such things and supplies then on hand for such purpose, together with all moneys due or to become due from the company thereon, upon the express condition, however, that Osborn, by the acceptance thereof, agreed to and did assume and pay all liabilities on Smith's part arising or growing out of said contract with the company, and such other contracts, fully and faithfully,—the business of carrying out and completing said contract to be done by Osborn in the name of "C. C. Smith & Co.;" that at the same time, Osborn, in writing, accepted of said assignment upon the terms and conditions stated, and thereby agreed, in consideration of such consent of the company, and said assignment, to fully and faithfully carry out and complete said contract, and to keep and perform all the terms and conditions thereof on the part of said Smith, and also to pay said Smith, for his services as superintendent of the work of such performance of said contract, $200 per month from the commencement of the ore dock, November 15, 1884, to the time of its completion, and that if the net profits accruing therefrom should equal or exceed $13,600, then to pay to the Batavian Bank of La Crosse $5,000, to be applied on the indebtedness of Smith to said bank; that if said net profits should be less than $13,600, then he agreed to pay said bank one-half of the amount of said net profits less the said $200 per month. Osborn received from the company on the contract, $177,000, and the net profits he had received thereon amounted to $17,392.14, including the $5,000 paid, and he hoped to get $1,715.55 more. He paid to the bank $2,000, July 27, 1885, and $3,000, September 28, 1885, and the same were indorsed on said agreement. June 23, 1885, the plaintiff commenced this action by the service of the summons and complaint upon Smith, and the garnishee summons and papers upon Osborn. At that time the contract with the company had been performed to within $1,000. The complaint against Smith was upon notes dated March 1, 1884, and in which judgment was entered in favor of the plaintiff for $5,715.40 damages and costs, September 27, 1886. Osborn, as garnishee, answered in time, denying any indebtedness or liability as such garnishee. The plaintiff took issue in due form. Upon the trial of the garnishee action, the only evidence consisted of said several writings, the judgment roll against Smith, and the testimony of said garnishee; and thereupon the court found as a conclusion of fact, in effect, that at the time of the service of the garnishee papers on said Osborn, he was not indebted to said Smith in any sum whatever, and had no property or effects in his hands belonging to him, or in which he had any interest. And as conclusions of law the court found that said garnishee should have judgment, that said garnishee proceedings against him be dismissed, and that he recover of the plaintiff the costs of the action. From the judgment entered thereon the plaintiff brings this appeal.

L. M. Vilas, for appellant. *Cameron, Losey & Traer*, for respondent.

CASSODAY, J. The plaintiff's indebtedness against Smith, upon which this action was brought, was incurred more than six months before the making of the contract with the railroad company. At the time of taking that contract, Smith had no available means and was insolvent, and with no ability to pay his numerous debts. He seems to have had, however, sufficient force of character to secure a contract with the railway company for putting in an ore dock amounting to nearly $200,000, notwithstanding the fact that he had not the means for carrying it into execution, and was badly in debt. Through his acquaintance with Osborn, the latter was induced to furnish the requisite bond and sureties, and agreed to put $5,000 into the business under the parol agreement that he should have one-half of the net profits and devote only one week in each month to the business. After having put $4,800 into the business, and after about one month's experience, and before there were any profits in the concern, and when the total estimates had only reached about $9,000, Osborn discovered that it would be necessary for him to devote his whole time to the business, and to put $3,000 more into it during the next month, or to subject himself and the sureties on the bond, which he had furnished, to a forfeiture of the contract and consequent liability for damages upon the contract and bond. Smith was not only powerless to aid in the matter, but his embarrassments, in consequence of his insolvency and prior existing individual indebtedness, subjected the business to additional annoyances by way of garnishments which might prevent estimates and the payment of men employed, and thus jeopardize the execution of the contract, and the liability of the bondsmen, without any benefit to any one. All the parties were, under the stringent conditions of the contract in case of any default in its performance, wholly in the hands of the company, who might thereupon terminate the contract, and hold the sureties for damages. Smith, realizing the situation, expressed the necessity of his getting rid of the contract, or he would, in the manner indicated, be deprived of anything to live on, as in case of garnishment there would necessarily be a stoppage of payment. In view of the whole situation, it was agreed, with the consent of the company and the sureties, that Smith should sell and assign all his right, title, and interest in the contract, tools, and materials on hand to Osborn, who agreed to assume and pay all debts of the concern, carry out and execute the contract in the name of C. C. Smith & Co., employ Smith to superintend the same at $200 per month, and in case the net profits of the job reached the figures named, or less, then he was to pay on Smith's prior indebtedness to the bank one of the sums named. All this was done and the papers executed, December 29, 1884. The case must turn upon the validity of that transaction. There is no pretense that the plaintiff's debt was among those assumed by Osborn, or in any way connected with the business. There is no evidence that the tools and materials on hand at the time of the sale and assignment to Osborn exceeded in value the indebtedness then assumed by him. There is no evidence that Smith's services were not worth all that he was to receive per month. In the absence of such evidence, we must assume that the skill and ability essential to superintend such a job, was worth as much per month as he was to receive. Considerable more money or good financial credit was requisite in order to secure anything from the contract, and confessedly Smith had neither. In what way, then, were Smith's individual creditors, including the plaintiff, to be injured by the transfer? The whole thing was a venture. There was, indeed, a possibility, and we may assume a probability, of securing prospective profits from it. But such profits could only be secured by putting in more money, and performing the contract. Smith could not put in any money, and did nothing in performing the contract, except as an employe. Osborn assumed the whole responsibility, did put in more money, and did perform the contract, and thereby secured the net profits. Of course, had the assignment been made with the intent to hinder, delay, or defraud creditors, it

would have been void as to creditors. But we find no evidence of such intent. It appears, even, from one of the cases cited by the learned counsel for plaintiff, that the mere fact that Osborn purchased with knowledge of Smith's insolvency was not evidence that such transfer was made with the intent to defraud creditors. *Darland* v. *Rosencrans*, 56 Iowa, 122, 8 N. W. Rep. 776. It is much stronger in favor of the garnishee than it would have been had Smith retained the contract himself and then sold and assigned the future profits under it. And yet it has been held that such a sale and assignment is operative and valid in equity when fairly made and not opposed to any rule of law or public policy. *Field* v. *Mayor, etc., of New York*, 6 N. Y. 179, 57 Amer. Dec. 435, and note; *Mulhall* v. *Quinn*, 1 Gray, 105, 61 Amer. Dec. 414. And in a recent case it has been held that such an assignment of wages to be subsequently earned, is good even as against the creditors of such assignor. *Lewis* v. *Lougee*, 63 N. H. 287. 'Where an interest in prospective profits is reserved by the debtor, it may be subject to garnishment after it has actually accrued and become payable to him, but not before. *Foster* v. *Singer*, 34 N. W. Rep. 395. But here the debtor absolutely disposed of all his right, title, and interest in and to the whole contract. He retained nothing but mere employment at fair wages, which he made no attempt to dispose of. There is nothing to indicate that any portion of such profits were to be secured or held by Osborn for the benefit of Smith. The transfer was intended by both Osborn and Smith to be complete and absolute. True, in consideration of the sale and assignment, Osborn was to make a payment to the bank, —a creditor of Smith's,—the amount of which was to depend upon whether the net profits should be above or below a certain figure named. But that was not for the benefit of Smith, but for the benefit of one of his creditors. True, it was a cancellation of one of Smith's debts to the amount of such payment, but it would be a solecism to say that it operated, or could operate, as a fraud upon any of Smith's creditors. The agreement to make such a payment was obligatory upon Osborn from the moment it was entered into, and was enforceable by the bank as soon as such profits accrued. *Wynn* v. *Carter*, 20 Wis. 107; *Putney* v. *Farnham*, 27 Wis. 187; *Johannes* v. *Insurance Co.*, 66 Wis. 57, 27 N. W. Rep. 414.

The only remaining question is whether the transaction was void as securing a preference to one of Smith's crditors over others? At the time of that transaction, preferences were only forbidden when given by an "assignment" "made for the benefit of creditors," or in transfers made by the debtor within 60 days prior to the making of such an "assignment" by him. Chapter 349, Laws 1883. Here there was no assignment "for the benefit of creditors," unless the sale and transfer of the contract with the railway company is to be regarded as such an assignment. If that is to be regarded as a voluntary assignment "for the benefit of creditors," then it was also void for the further reasons that it was not accompanied by the bond and other conditions required in the making of such assignments. Sections 1694–1696, Rev. St. The statute expressly declares that "all voluntary assignments or transfers whatever * * * *for the benefit of or in trust for creditors* shall be void as against the creditors of the person making the same, unless" such bond is given and such other conditions complied with. Section 1694. There can be no question but what the "assignments" mentioned in chapter 349, Laws 1883, refers to the same class of "assignments or transfers" thus mentioned in the statutes. The whole question, therefore, resolves itself into this: was the transaction in question a voluntary assignment or transfer "for the benefit of or in trust for creditors," within the meaning of the statute. It is claimed that this is such an assignment, within the decision of *Winner* v. *Hoyt*, 66 Wis. 227, 28 N. W. Rep. 380. In that case, the debtors transferred *all* their property not exempt by means of six chattel mortgages and five assignments running to five different creditors, and all given at substantially the same time, in pursuance

of the same agreement, for the same common purpose, and in relation to the same subject-matter, with the understanding and intent that *one* of such creditors, *for himself and as agent and trustee for the others*, should take immediate possession, which he did, and then convert the same into money, and divide the same *pro rata* among such favored creditors. The court simply held that such eleven written instruments, given under such circumstances and for such a purpose, and with such an understanding and intent, would be construed together as one instrument in law, and that when so construed, they were, in legal effect, a voluntary assignment or transfer of all the property of the debtors not exempt, "for the benefit of or in trust for creditors," within the meaning of the statute. Certainly they transfered all the property of the debtors. Certainly all of such property was taken by one of such creditors, for himself and as agent and trustee for the others, with the intent of all the parties that he should convert such property into money, and then divide the same *pro rata* among such favored creditors. The mere fact that he was a creditor as well as such agent and trustee, did not deprive the transaction of its trust feature thus imposed for the benefit of such other creditors. If that was not an assignment for the benefit of or in trust for creditors, within the meaning of the statute, then there can be no such assignment or transfer, unless made in the precise manner prescribed by the statute. But that would be the complete subversion of this statute, which clearly contemplates other ways of making "voluntary assignments or transfers * * * for the benefit of or in trust for creditors," than thus prescribed, and then declares that if one is made in any such other way, it "shall be void as against the creditors of the person making the same." This distinction was maintained in *Landauer* v. *Victor*, 34 N. W. Rep. 229. Thus, also, in *Lucas* v. *Railroad Co.*, 32 Pa. St. 464, it was said by the court: "We have here property, a trustee, a trust, and creditors of an insolvent company, who are to take under it; and the simple question is whether, by an ambiguous inversion of language, the real meaning of this instrument can be so covered as to defeat the operation of a most salutary law;" and then the court held the instrument to be a voluntary assignment in trust for some of the creditors of the assignors. See *Bank* v. *Noe*, 5 S. W. Rep. 433. According to Burrill, "voluntary assignments for the benefit of creditors are transfers, without compulsion of law, by debtors, of some or all of their property to *an assignee or assignees, in trust*, to apply the same or the proceeds thereof to the payment of some or all their debts, and to *return the surplus, if any, to the debtor*. Burrill, Assignm. § 2; *Wiener* v. *Davis*, 18 Pa. St. 333. Where the assignment is by way of security only, such trust is implied from the nature of the security as to any surplus that may remain. Id. § 3. There must be a trust, a trustee, creditors, and *cestui que trust*, who can compel an enforcement of the trust, in order to constitute an assignment for the benefit of or in trust for creditors. Bish. Insolv. § 130. *Dickson* v. *Rawson*, 5 Ohio St. 222. "Where the assignment is to a single creditor, or to a few selected creditors, and is made absolutely and by way of full payment or *satisfaction*, it is, of course, wholly divested of the character of a trust, and is in the nature of an ordinary conveyance or sale for a valuable consideration." Burrill, Assignm. § 3. Here, in our judgment, the sale and transfer to Osborn was absolute and unconditional in consideration of the full or partial payment and satisfaction of a debt actually due to the bank from Smith, unaccompanied by any trust in favor of Smith or any of his creditors. It follows that the transaction in question was not an assignment or transfer for the benefit of creditors, within the meaning of the statute. At the time the garnishee papers were served upon Osborn, he had paid Smith about $100 more than was due him for wages.

The judgment of the circuit court is affirmed.

NOYES and others *v.* SCHNER and another, Garnishee.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. FRAUDULENT CONVEYANCES—TRANSFER OF STOCK—VALIDITY AS AGAINST CREDITORS.
The principal defendant in a garnishee suit had borrowed money of the garnishee to start business. It not resulting advantageously, he turned over his stock to the garnishee in satisfaction of the debt, which was considerably greater than the value of the stock. *Held*, that there was nothing in the evidence to justify any court in holding the transaction fraudulent as to creditors.
2. ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT CONSTITUTES.
A debtor turned over all his stock to a creditor in full satisfaction of his debt, which was greater than the value of the stock. *Held* that, as the transfer was unaccompanied by any trust in favor of the debtor or his creditors, it was not an assignment for the benefit of creditors, under the provisions of Laws Wis. 1883, c. 249, § 1; and Rev. St. Wis. §§ 1694–1696; following *Ingram* v. *Osborn*, *ante*, 304.

Appeal from circuit court, Eau Claire county.

V. W. James, for appellants. *W. F. Bailey*, for respondent.

TAYLOR, J. The appellants, creditors of E. Schner, brought an action against him to recover their debt, and in that action they garnished the respondent Qvale. Qvale answered by denying that he had in his possession any property of any kind belonging to the defendant Schner. The respondent took issue upon his answer, and that issue was tried by the court without a jury. Qvale was the only person sworn on the trial upon the question as to whether he had any property in his possession belonging to Schner. The substance of his testimony is as follows: Qvale testified that on the eleventh day of August, 1886, he had no property in his possession belonging to Schner; that prior to that date he had received a bill of sale of a certain drug stock from Schner in the city, and that stock was in his possession at the time the garnishee summons was served; that he received the bill of sale and possession of the stock from Schner on the thirty-first day of July, 1886; the value of the stock was between $3,200 and $3,300; no inventory was taken since February, 1886; he also received book accounts for $75 to $100. The consideration for the transfer to him was $4,125, money he had lent to Schner in January and February, 1885; had loaned him $300 since February. "I took notes for the entire amount, secured by chattel mortgage in October or November, 1885, on the stock and fixtures. The chattel mortgage was for the sum of $3,600 or $3,700. Never took possession under this chattel mortgage, but had the mortgage filed in the clerk's office." Afterwards he removed the chattel mortgage from the files, and canceled the same. The reason given for removing the chattel mortgage from the files, and canceling the same, was to prevent being taxed for the amount of it. He also said he canceled the notes mentioned in the mortgage, and simply charged Schner with the moneys loaned in his account against him. "In January or February, 1886, I loaned Schner $130. He paid back a part of this, and I again loaned him a little; the last loan was in July, 1886. The price agreed upon by Schner and him for the purchase of the stock was his indebtedness to him. I proposed the trade July 29 or 30, 1886, a day or two before the bill of sale was made. There was a good deal said about the trade. Schner accepted the proposition, and gave the bill of sale. I gave him a day or two to consider, I think; it was not accepted immediately. Mr. Salsbury was present when the papers were made. My object in buying this store was to realize my money that I had lent to Schner. I canceled my account against him for the money loaned, when he gave me the bill of sale of the store; the notes had been canceled before that. I never knew what Schner owed until the day before I took the bill of sale. I was then informed that he owed $1,400 to $1,700. He claimed it was only about $600. At the time I let Schner have this money, he had no property that I knew of. I staked the money on

the risk of his success in the business. I took possession of the stock immediately on the day of the bill of sale. Schner was to remain there at an agreed salary, and I was to pay him $75 per month. I hired him for no definite time. My object was to sell the store, and I have offered it at a discount. I surrendered this debt for this stock in order to get my pay. My opinion at the time I took the stock was the same as now as to its value, and I proposed to give him the debt of about $3,300 for the stock. I knew one or two of his creditors were crowding him at the time I took the stock for my debt." "The money was paid to Schner within a week or ten days; it was paid when Schner brought in bills to be paid. I did this simply to help Schner get into business, and not for speculation. There is no agreement that Schner is to receive anything further out of this stock or otherwise. The property that was transferred to me by the bill of sale was all the property Schner had, so far as I know." The only other evidence in the case was the testimony of V. W. James, as to the insolvency of Schner at the time he sold the stock to Qvale. The learned circuit judge decided in favor of the garnishee, and consequently must have found that there was no fraud, in fact or in law, in the sale from Schner to Qvale, the garnishee. As to the question of fraud in fact in the sale, it is very clear that the decision is fully sustained by the evidence. The evidence, if to be believed, and there is nothing in the case which shows it is not worthy of belief, shows that the garnishee, for reasons sufficient in his mind, advanced money to set the defendant, Schner, up in the business of a druggist, and that, when he found that the business was not likely to turn out advantageously for either party, to secure himself, in part at least, for the money advanced, he took the stock in satisfaction of his debt. The consideration was ample, and considerably more than the stock was worth. He was as well entitled to get his pay as any other creditor of Schner, and if Schner saw fit to pay him, by a sale of his property to him at a large price, he had the right to do so. Fraud is not to be presumed, but must be proved; and it being admitted upon this evidence, as we think it must be, that Schner was indebted to Qvale between $3,000 and $4,000, there is nothing in the evidence which could justify any court in holding the transaction fraudulent in fact as to the other creditors.

The learned counsel for the appellant has made a point that the sale amounts to a legal fraud on the other creditors, and is therefore void. It is claimed that the sale of stock to Qvale is in effect a voluntary assignment within the meaning of the law, and is therefore void, because there has been no compliance with the law regulating such assignments, and *Winner* v. *Hoyt*, 66 Wis. 227, 28 N. W. Rep. 380, and several other cases in the Federal Reporter, as well as in the supreme court of Missouri, are cited to maintain this proposition. For our answer to this point, made by the learned counsel, we refer to the opinion of Justice CASSODAY, in the case of *Ingram* v. *Osborn*, *ante*, 304, which is filed at the same time with this opinion.

The judgment of the circuit court is affirmed.

MURRAY v. SCRIBNER.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. APPEAL—WHEN LIES—ORDER FOR JUDGMENT.
An order for final judgment for plaintiff, and denying defendant's motion for judgment, being a mere interlocutory order, is not appealable under Rev. St. Wis. § 3069.

2. TRIAL—SPECIAL VERDICT—CONSISTENCY OF FINDINGS.
In an action to recover damages from the overflow of water caused by a mill-dam, defendant claimed the right to overflow the land by adverse user. A special verdict found that defendant had maintained the water at the dam at the same height for over 20 years previous to the action, except when prevented by casualty; that the height of the water had not been increased since 1864; that the lands in

question had been injured by overflow and soakage caused by the mill-dam, but had not been continuously injured from such causes for a period of 10 years next prior to the action. *Held*, that the verdict was not inconsistent or contradictory, as it was not to be inferred that the maintenance of the water in the pond at the same height for the period named caused the plaintiff's land to be overflowed during the whole of that period.

Appeal from circuit court, Green Lake county; GEO. W. BURNETT, Judge.

The defendant erected and maintained a mill-dam upon and across the west branch of the Fond du Lac river, thereby creating a water-power to run his flouring-mill. The plaintiff owns a farm upon the river a few miles above. July 3, 1882, this action was commenced under the mill-dam law for damages to the farm caused from flowage by reason of the dam. The defendant answered, and, in effect, denied such flowage or damage, and alleged that the dam and the waters of said stream above said dam had been maintained at the same height continuously for more than 25 years before the commencement of the action. By amendment the defendant further answered, to the effect that he and his grantors had peaceably, under a claim of right, and adversely to all others, maintained said dam and the waters in said river to the same height uninterruptedly and continuously for 10 years and more next preceding January 1, 1864, and ever since, and for 10 years next preceding January 1, 1874, and forever since. Upon the trial, the jury returned a special verdict to the effect (1) that the plaintiff was the owner of the farm; (2–5) that by reason of the maintenance of the dam and obstruction of the river by the defendant between July 1, 1879, and October 1, 1886, said farm had been injured by the overflow of half an acre, and the soakage of 40 acres, to the amount of $17.50; (6, 7) that the dam should not be lowered any, nor left open any part of the year; (8, 9) that so long as the dam is used in conformity with the verdict, the payment of $30 annually would be a just and reasonable compensation, or $300 in gross for the perpetual right to so use the same; (10) that the defendant maintained the water in his mill pond by means of his mill-dam, for the use of his mill, openly, peaceably, and adversely, under claim of right, at the same height for the 10 years next preceding the commencement of this action, except when prevented during said 10 years by casualty, leakage, draught, evaporation, or the use of water for his mill; (11) that he did the same, subject to the same exceptions, for the 10 years next succeeding the building of his dam in 1864; (12) that he did the same subject to the same exceptions, for same consecutive 10 years after the rebuilding of the dam in 1864, and before the commencement of this action; (13–16) that the defendant never increased the height of water in his pond since May 1, 1864; (17–19) that the defendant and prior owners raised and held the dam at the same efficient height from its erection in 1856 to the commencement of this action—26 years—except when prevented by casualty; (20) that the water which flows the plaintiff's land comes from the river and other lands above his, or one of them; (21) that the full head of the defendant's water-power is at a bolt-head, 3⅛ inches below the top of a post described; (22) that the lowest point of the plaintiff's land is 1½ inches higher than a level line from the full head of the water-power; (23) that the mill pond at full head flowed the plaintiff's land before the drainage of Rosendale marsh, in 1879, and later, and before the completion of the ditches on plaintiff's land, and other lands above his, in 1876 and later, on other occasions than extraordinary and unusual freshets; (24) that the flow of water in the river above and along plaintiff's land has not been largely increased beyond the river's natural capacity since 1879, by the artifical drains last mentioned; (25) that the flowage does not occur solely in freshets, whether ordinary or extraordinary; (26) that the primary and proximate cause of the flowage is the defendant's mill pond; (27–28) that the plaintiff's land was naturally half marsh and half bottom, and before the erection of the dam was subject to flowage by

freshets; (29) that no part of said lands were *continuously* flowed or otherwise injured for a period of 10 years next prior to this action by reason of the dam. Thereupon the defendant, upon the pleadings, record, and special verdict, moved the court to set aside said verdict, and for a new trial, on the ground that the same was inconsistent and contradictory, which was, by order entered November 20, 1886, denied by the court; and thereupon the plaintiff and defendant severally moved the court, upon the pleadings, the record, and said special verdict, for a judgment upon said special verdict, each in his own favor; and upon the hearing thereof the court, by order entered November 20, 1886, denied the defendant's motion, without costs, and granted the plaintiff's motion; and ordered that he have judgment against the defendant for the damages awarded, and costs to be taxed. The defendant brings this appeal from each of said orders so entered November 20, 1886, and the whole and every part of each.

Geo. P. Knowles, for respondent. *Chas. E. Shepard*, for appellant.

CASSODAY, J. A mere interlocutory order for judgment is not appealable. *Manufacturing Co.* v. *St. Croix*, 68 Wis. 647, 24 N. W. Rep. 417; *Hoey* v. *Pierron*, 67 Wis. 267, 30 N. W. Rep. 692; *Bourgeois* v. *Schrage*, 34 N. W. Rep. 96; *Goldmark* v. *Rosenfeld*, 34 N. W. Rep. 228, and the cases referred to in the opinions cited. On the contrary, an appeal to this court, by a party aggrieved, from an order, can only be from such an order as is defined in section 3069, Rev. St., as being appealable. Section 3048, Rev. St.; 63 Wis. 650, 24 N. W. Rep. 417. Among the orders thus made appealable is "an order affecting a substantial right, made in any action, when such order, in effect, *determines* the action and *prevents* a judgment from which an appeal *might be taken*." Sub. 1, § 3069. Here the order does not "determine the action," much less "prevent" such judgment. On the contrary, it orders a judgment which will determine the action, and from which an appeal may be taken. No judgment has as yet been entered. The mere fact that the order for judgment includes an order denying the defendant's motion for judgment, does not make the order appealable, since every order for judgment, wholly in favor of one party, necessarily precludes any judgment in favor of the other party. In other words, the two orders mentioned are together, in effect, but one order for judgment in favor of the plaintiff, and against the defendant. Such orders, therefore, were not appealable, and hence so much of the appeal as relates to them is dismissed.

2. But the order refusing to set aside the verdict and grant a new trial is appealable. Sub. 3, § 3069, Rev. St. Upon this appeal from that order, we are only at liberty to consider whether the several findings of the jury are so inconsistent and contradictory as not to authorize a judgment thereon in favor of the plaintiff. The past damages found were such as accrued after July 1, 1879. It is claimed that if such damages were the extent of the injury, for the period mentioned in the verdict, then the prospective damages found by the jury, as stated, both annually and in gross, were excessive. But with no bill of exceptions of record, we are unable to reach any such conclusion. Besides, to say that past annual damages is a certain criterion of the amount of prospective annual damages, would obviate the necessity of any trial or verdict as to the latter class of damages. The statute, however, contemplates separate findings as to each class of damages. Section 3381. This seems to indicate that each class of damages rests upon its own basis. It is claimed that the tenth, thirteenth to the sixteenth, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-eighth findings, above stated, in effect, establish the defendant's claim of 10 years' adverse user under a claim of right next preceding the commencement of this action; and that the twenty-ninth finding mentioned is in direct conflict with such other findings, and to the effect that there was no such continuous adverse user or

flowage under such claim of right for that period. This claim is based upon the assumption that it appears from such other findings that such flowage of the plaintiff's land had been continuous and uninterrupted for the 10 years mentioned. But such assumption is, as we think, unauthorized from such findings. It nowhere appears in the record that there was any such 10 years' continuous and uninterrupted adverse user or flowage under such claim of right during that period. We are not at liberty to infer that the mere maintenance of the dam, and the water in the pond, at the same height for the period mentioned, necessarily caused the plaintiff's land to be flowed during the whole of that period to the same extent that it was flowed subsequently to July 1, 1879. To do so would be to commit the same error for which the judgment in *Smith* v. *Russ*, 17 Wis. 227, 84 Amer. Dec. 739, was reversed. It is the flowage of the land which sets the statute of limitations running. Sub. 3, § 4221, Rev. St.; *Johnson* v. *Boorman*, 63 Wis. 273, 22 N. W. Rep. 514. To be available as a defense, it "must be continued, uninterrupted, and adverse, for the length of time prescribed by the statute." *Haag* v. *Delorme*, 30 Wis. 594; *Sabine* v. *Johnson*, 35 Wis. 203; *Scheuber* v. *Held*, 47 Wis. 350, 2 N. W. Rep. 779. The extent of the right thus acquired by adverse user is not determinable merely from the height of the dam, and the head of water at the dam, but is only commensurate with such actual flowage. *Mertz* v. *Dorney*, 25 Pa. St. 519; *Carlisle* v. *Cooper*, 21 N. J. Eq. 594; *Gilford* v. *Lake* Co., 52 N. H. 265; *Powell* v. *Lash*, 64 N. C. 458. Especially should such be the rule where, as here, the land alleged to have been flowed is situated some miles above the dam. Here, there is an absence of any finding that the land was flowed at all prior to 1876; and hence there is no finding of any such adverse user as required by the statute. Certainly, in the absence of any bill of exceptions, we cannot say that there is any such inconsistency or contradiction in the findings as require that the verdict should be set aside.

The order of the circuit court refusing to set aside the verdict and grant a new trial is affirmed.

WHEREATT *v.* ELLIS.

(*Supreme Court of Wisconsin.* November 22, 1887.)

JUDGMENT—BY DEFAULT—SETTING ASIDE—DISCRETION OF COURT.

Defendant was sued in 1883 for services rendered, and pleaded meritorious defenses and a counter-claim. July, 1885, the court struck his answer from the files, and ordered judgment for refusal to appear and be examined by deposition; the order on appeal was affirmed, and judgment entered on *remittitur*, June, 1886. The court then set aside default on terms, judgment to stand as security. Defendant asked to be allowed to comply with the order of 1885, to appear as witness, which was denied. On appeal from the judgment and orders they were affirmed (30 N. W. Rep. 520) and rehearing refused (31 N. W. Rep. 762.) Defendant asked, March, 1887, for the setting aside of default and trial, on terms, alleging that all his appeals had been made in good faith in advice of counsel, and that he had a meritorious defense. *Held*, that this was a matter of legal discretion with the court, but it should be exercised to secure substantial justice; and where the defendant in default was excused, as in this case, and had a meritorious defense, he should have a trial on terms working no injustice to the plaintiff.

Appeal from circuit court, Trempealeau county.

This cause was commenced in 1883. This is the fourth appearance of this case in this court. The nature of the three several causes of action alleged in the complaint, will be found in 58 Wis. 625, 17 N. W. Rep. 301. In March, 1884, the defendant by his verified answer denied each and every allegation contained in each and every of said causes of action, except as expressly admitted therein; and in answering the first cause of action alleged, in effect, that the legal title to the farms mentioned in that cause of action

had been taken in the name of one James W. Taylor, a lawyer of Newburgh, N. Y., and this defendant, jointly, on foreclosure sales of mortgages belonging to clients of said Taylor, with the agreement that this defendant should have no right, title, or interest in any of said farms, nor the rents, issues, and profits thereof, except to hold the same as security for the payment of this defendant's costs, fees, services, charges, and disbursements in and about the same; that this defendant was authorized by said Taylor to employ a man to assist him in the management, care, sale, and rental of said farms; that the plaintiff made application for such employment, and was then fully informed of such agency of this defendant for said Taylor, and of all terms, conditions, and requirements thereof made by said Taylor in respect to the same; that the plaintiff, to induce the defendant to hire him for said Taylor as such assistant, warranted himself to this defendant, as such agent for said Taylor, to be especially qualified, experienced, competent, careful, and reliable in the care and management of farms; that in consideration thereof, and that the plaintiff would for and on behalf of said Taylor, in a skillful, diligent, faithful, and proper manner, under the defendant's direction, care for and manage all said farms, and keep them in good condition, repair, and improvement, find and secure tenants and purchasers therefor, and do whatever was proper or required of him in relation to the same for the period of one year, or until the crops of 1881 should be marketed, and then, as a part of the agreement, he, the said Taylor, was to account for and pay over to the plaintiff, as his full compensation therefor, one-tenth of the proceeds of said several farms as measured by the share in fact received by said Taylor, less the expenses incident to his share; and for finding purchasers, 5 per cent. commission on the price of any farm sold, on the receipt thereof; that such was the only agreement in which the plaintiff was to have one-tenth of the crops; that the plaintiff rendered his account for services in June, 1882, and the defendant as such agent fully paid him therefor; that the plaintiff continued such employment under the same agreement, except, in lieu of said one-tenth share, the plaintiff was to receive a reasonable compensation until June, 1882, when the defendant, by order of Taylor, discharged the plaintiff; that, while under said agreement for reasonable compensation, the plaintiff performed his services negligently, carelessly, and unfaithfully, to said Taylor's great damage and injury, to such an extent as to render such service wholly worthless and of no value to said Taylor; that the plaintiff was not especially qualified, experienced, competent, diligent, careful, and reliable as so warranted; that the leases for said several farms were only executed in the name of the defendant for convenience; that the defendant had no interest or ownership in the rents and profits thereof; that the same belonged to said Taylor in trust as aforesaid. In answering the second and third causes of action, it was alleged that the services mentioned were wholly performed by the plaintiff under the agreement aforesaid, and prior to June, 1882, and were settled for and paid to the plaintiff in June, 1882. The answer also contained a counter-claim, wherein it was alleged that the plaintiff was indebted to the defendant as more particularly stated in an account thereto annexed, as a part thereof, in the sum of $494.67, with interest from July 1, 1882, for which judgment was demanded. The plaintiff, replying, denied each and every allegation of the counter-claim.

The defendant having refused to appear before a circuit court commissioner, and give his deposition "otherwise than as a witness on the trial," as required, the court, on July 2, 1885, made the order set forth in 65 Wis. 640, 644, 27 N. W. Rep. 630, and 28 N. W. Rep. 333, whereby said answer was stricken out, and judgment ordered in favor of the plaintiff, and against the defendant, in said action, unless the defendant should give such deposition and comply with the other terms of said order within 20 days from the service of a copy thereof. Such service was made July 13, 1885, and July 24, 1885, the

defendant appealed to this court from that order; and the same was affirmed April 6, 1886. 65 Wis. 639, 27 N. W. Rep. 630, and 28 N. W. Rep. 333. The *remittitur* thereon was filed June 8, 1886. June 11, 1886, and without notice, judgment was entered, as upon default, in favor of the plaintiff, and against the defendant, for $2,938.10.

June 12, 1886, the defendant gave notice of a willingness to comply with the conditions of the order of July 2, 1885, and designated June 22, 1886, as the time for so doing, which offer the plaintiff refused. Upon application of the defendant, the court, June 17, 1886, ordered, in effect, that the said answer be allowed to stand as the defendant's answer therein, and the cause stand for trial, upon condition that the defendant pay the costs therein mentioned, and give such deposition before said court commissioner at a time and place designated therein, and that said judgment stand as security, and, upon failure to comply with such conditions, that it stand as the final judgment in the cause. June 25, 1886, the defendant appealed to this court from said judgment, and also from said order of June 17, 1886, both of which were affirmed February 1, 1887, as will more fully appear from the report of the case in 68 Wis. 61, 30 N. W. Rep. 520, and 31 N. W. Rep. 762. The *remittitur* on that appeal was filed March 3, 1887. Thereupon, and on March 5, 1887, upon the affidavits of the defendant and his attorney, and the records and papers on file therein, the plaintiff was ordered to show cause, in effect, why, on such terms and conditions as to the court might seem just, reasonable, and proper, the defendant's default in complying with said order of June 17, 1886, should not be set aside and vacated, and the said answer be allowed to stand, and a trial had thereon upon payment of costs, giving such deposition, and complying with all conditions which had been or should be imposed. The said affidavit of the defendant contained in effect, among other things, an affidavit of merits, that said appeals had been taken in good faith, under the advice of counsel, and upon the honest belief that said order imposed unlawful and unjust conditions; that said judgment was erroneous and voidable; that it was entered by the clerk in vacation, and without notice; that it was for $542.95 in excess of the relief demanded in the complaint; that the bond required was burdensome; that the appeal was not taken for delay; that the only reason or grounds for such default was that the advice of his attorneys was erroneous, as evinced by the decision of this court; that by the affirmance of the order of June 17, 1886, the defendant was left absolutely without relief, or the right to his day in court, or the defense of the action; that he relied upon the advice of his counsel in taking said appeals; that he was ready and willing to comply with the conditions of the order of June 17, 1886, and give such deposition, and to do and perform any other reasonable condition which the court might impose for the opening of such default, and the privilege of maintaining such defense; that the plaintiff was very limited in his means and property, and that, unless the defendant be so allowed to defend, he would be without remedy as to the counter-claim, as well as the judgment. The affidavit of said attorney stated, in effect, among other things, that he had advised the defendant as above stated; that he had paid to the plaintiff's attorney $84.75 costs in this court on said last appeal within 24 hours after the filing of the *remittitur* thereon, and, at the request of the defendant, and in his behalf, offered to comply with all the conditions of said order of June 17, 1886, and give said deposition; all of which was refused by the plaintiff's attorney, who declined to afford the defendant any adequate and reasonable relief from such default. Upon the hearing of that application, and on March 24, 1887, it was ordered by the court that said motion be, and the same was thereby, overruled and denied. From said last-named order the defendant brings this appeal.

L. M. Vilas, for respondent. *Alex. Meggett* and *W. F. Bailey*, for appellant.

CASSODAY, J. This is the sixth appeal to this court in this cause. No trial or hearing upon the merits has ever been had, notwithstanding an answer upon the merits to each of the several causes of action was served nearly three years ago. The wisdom of meeting all questions having merits, upon the merits, at the first opportunity, is here both illustrated and demonstrated. But we are not prepared to say that these several appeals were the result of mere perversity. The first appeal from the order on the demurrer was before the answer, and not here involved. No such perversity can be fairly claimed, as to the appeal from the order of July 2, 1885, as the question involved went to the jurisdiction of the commissioner, and was decided by a divided court. No bad faith can be imputed by reason of the appeal from the judgment, as it raised questions which were fairly debatable. The only ground left for imputing bad faith is the appeal from the order of June 17, 1886, and the order of the judge at chambers made June 23, 1886; and which last appeal was dismissed. 68 Wis. 61, 30 N. W. Rep. 520. Those orders were made after the defendant's answer had been stricken out, and judgment entered, without notice, as upon default. As indicated in the opinion last cited, the entry of such judgment in that way was manifestly a surprise to the defendant. As there said, it "apparently grew out of a misconception or inadvertence in relation to the order of July 2, 1885, and the effect of the appeal from it." The defendant seemed to have acted on the theory that the stay of proceedings, granted by a justice of this court, and then continued by the court, related back to the time of taking the appeal, and hence prevented any default of the defendant. But as there shown, the time for paying the costs, and giving the requisite notice, expired July 27, 1886, and the stay was not granted until July 28, 1886, and then only operated from that day, and pending the appeal. It is easy to perceive how an attorney might be misled under such circumstances. Among the conditions of the order of June 17, 1886, was the one that the judgment should stand as security for the payment of any judgment the plaintiff might recover. This being so, an appeal from the judgment, in good faith, would seem to indicate the necessity of appealing also from the order; whereas, not to appeal from either would have left the defendant in a position where, if beaten upon the merits, he would have been obliged to pay a judgment which, if we are to believe his affidavit, he conceived to be not only excessive, but unjust. Moreover, as the continuance of the judgment was among the conditions of the order, the mere giving of the deposition and payment of costs, after the appeal from the judgment, would not have been a full compliance with the order; besides, there had been an offer to give the deposition.

Upon the facts stated, can we say that the defendant has forfeited all right to any trial or hearing upon the merits? The application here refused was addressed to the sound discretion of the trial court. Section 2832, Rev. St. In *Bank* v. *Benjamin*, 61 Wis. 514, 21 N. W. Rep. 523, it was said that terms may "be imposed which, as near as may be, will place the plaintiff in as favorable a position as he would have been in had the relief been denied. But the order of the court places the plaintiff in a better position, for it gives it absolute security for any judgment it may recover in the action," and hence it was held to be an abuse of discretion. In *Morgan* v. *Bishop*, 61 Wis. 410, 21 N. W. Rep. 263, the order was reversed on the ground that there had been an abuse of discretion, because the defendant was allowed, after the cause had been at issue for some time, and the plaintiff had subpœnaed his witnesses, and was ready for trial, to amend his answer by pleading for the first time the statute of limitations, *without imposing any terms* except the mere costs of the motion. It is there said: "What will be in the 'furtherance of justice,' and what 'terms' are to be regarded as 'just,' must depend upon the facts of each particular case." Then, after citing several cases illustrative of the rule, it is further said on page 411: "Such being

the established rules of law, the obvious duty of a trial court, sitting as a court of conscience, in the exercise of a sound discretion upon such application, *is to do or secure substantial justice to the parties under all the circumstances;*" among which were there enumerated, "the state of the litigation, the amount of costs that have been incurred, whether the allowance of such amendment would work a continuance, and any other fact going to the equity of such allowance."

Here, the answer stricken out, and sought to be made available as a defense, did not set up the statute of limitation, nor usury, nor any unconscionable defense, but defenses which, if true, were each and all meritorious, and such as to entirely defeat each of the causes of action alleged in the complaint, to say nothing of the counter-claim. The defendant may never be able to prove the defenses alleged, but for the purposes of this application they must each be taken as true. So taken, and the case presented is a judgment of about $3,000 against the defendant as upon a default, when he had a good defense upon the merits to each and all the several causes of action alleged in the complaint, but which he had been precluded from proving in the manner indicated, and which he can never make available. In other words, upon the case thus stated, the defendant is held liable for the payment of $3,000, without any meritorious cause of action against him, as the price of his temerity in appealing from an order of the trial court under the advice of counsel, instead of submitting thereto, as we have held he should have done. Defaults incurred through the ill advice or negligence of counsel are to be relieved against as well as any others. *Morgan* v. *Bishop, supra; Hanson* v. *Michelson*, 19 Wis. 498. Of course, as urged, the trial court has a discretion in such matters, but "such discretion must be a legal discretion, and where the application is made in time, and presents a case of 'mistake, inadvertence, surprise, or excusable neglect,' accompanied by a verified answer alleging a good defense on the merits, it is a manifest abuse of discretion not to open the judgment upon reasonable terms." *Cleveland* v. *Hopkins*, 55 Wis. 390, 13 N. W. Rep. 225. The duty of the trial court, sitting as a court of conscience, in such matters, is, as above indicated, "to do or secure substantial justice" between the parties, under all the circumstances. To do that, where a defendant is in default, having a good and conscionable defense, thus excused and presented, is to give him a trial or hearing upon the merits, upon such terms and conditions as to do no injustice to the opposite party. The trial court acted upon that theory in making the order of June 17, 1886. That order should have been complied with. The failure to comply with it operated as a delay from June to the March following. A new order, the same in substance, with new dates for the time of the payment, and the examination therein mentioned, and in addition requiring the defendant to pay to the plaintiff or his attorney such sum as may be fixed by the trial court, not exceeding $50, should now be entered.

The order of the circuit court is reversed, and the cause is remanded, with direction to enter an order in substance and effect as indicated.

SMITH v. CLARKE.

(*Supreme Court of Wisconsin.* November 22, 1887.)

VENUE IN CIVIL CASES—APPLICATION FOR CHANGE—SUFFICIENCY OF AFFIDAVIT.

The defendant applied for a change of venue on account of the alleged prejudice of the judge. An affidavit in support of the application stated that defendant "has reason to fear and does fear, that he cannot have a fair trial," instead of "has reason to believe, and does believe," etc., as required by Rev. St. Wis. § 2625. *Held*, not sufficient.

Appeal from circuit court, Marathon county; C. M. WEBB, Judge.

At a term of the court at which the cause had been noticed for trial the defendant applied for a change of venue, on account of the alleged prejudice

of the judge, but the same was denied. The case being reached for trial was submitted to the jury upon the plaintiff's evidence alone. From the judgment entered upon the verdict returned in favor of the plaintiff the defendant brings this appeal.

C. F. Eldred, for appellant. *Silverthorn, Hurley & Ryan* and *D. Lloyd Jones*, for respondent.

CASSODAY, J. The only error assigned is the refusal to change the venue. The right to such peremptory change of the place of trial can only be acquired by the applicant filing an affidavit to the effect "that he has *good reason to believe, and does believe*, that he cannot have a fair trial of such action on account of the prejudice of the judge, naming him." Section 2625, Rev. St. Here the affidavit merely states that the applicant "has *reason to fear, and does fear*, that he cannot have a fair and impartial trial, * * * on account of the prejudice of" the judge, naming him. We are not aware of any decision of this court holding the two expressions to be equivalent. To our minds they are substantially unlike. To hold them to be equivalent by refining upon the words of each would be to establish a rule which would call for another departure whenever some new form of expression should be presented. The statutory requirement is jurisdictional. In such a case, the substitution of equivalents to be ascertained by such finical reasoning would be dangerous.

The judgment of the circuit court is affirmed.

HOFFMAN v. SDEA, Town Clerk, etc.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. MANDAMUS — TO COMPEL TOWN CLERK TO PLACE JUDGMENT ON TAX-ROLLS — ANSWER BY SUPERVISOR.
   Plaintiff obtained a rule to show cause why a peremptory writ of *mandamus* should not issue to compel defendant as town clerk to place upon the tax-roll for collection a certain judgment against the town. Defendant did not answer, but the chairman of the board of supervisors made an affidavit in answer. *Held*, that this was a default on the part of the clerk which could not be supplied by the affidavit of the chairman, and a peremptory writ should have been allowed as of course.
2. SAME — ISSUE ON FACTS — ALTERNATIVE WRIT.
   When there is likely to be an issue on the facts, proceedings for a writ of *mandamus* should be instituted by an alternative writ.

Appeal from circuit court, Wood county.

Gardner & Gaynor, for respondent. *Cate, Jones & Sanborn*, for appellant.

ORTON, J. This is a proceeding for a peremptory writ of *mandamus* against the appellant, to compel him, as clerk of the town of Remington, in the county of Wood, in this state, to insert in the tax-roll for collection a certain judgment against said town rendered in the circuit court of the United States for the western district of Wisconsin on the twenty-eighth day of September, 1875, in favor of the Muscatine National Bank, of $839.50, damages and costs, and afterwards assigned to the respondent. The proceeding was instituted by a rule to show cause, upon the affidavits of the respondent's attorney, and there has been no alternative writ. This practice can be sanctioned only when there is no controversy or dispute about the facts, as in this case; but where there is likely to be an issue on the facts, the proceeding should be instituted by an alternative writ, in the first place. *State* v. *Town of Delafield*, 64 Wis. 218, 24 N. W. Rep. 905. In this case the proceedings subsequent to the rule to show cause appear to have been very irregular. There is no answer to the rule by the appellant, as clerk of the town, in any form, and consequently there is no admission or denial of the facts stated in the affi-

davit upon which the rule to show cause was allowed, and there is really a default on his part, and a peremptory writ would follow as a matter of course.

One W. H. Bondin, as chairman of the board of supervisors of said town, made answer to said rule to show cause under oath, and misrecited the rule as having been made for an order or *mandamus directing said town to collect* the balance claimed to be due on said judgment. He states therein that his affidavit is made on behalf of said appellant, but it is in no sense the answer of said appellant, and it could not supply the want of an answer by the appellant. Certain facts are stated in said affidavit, but whether the appellant is bound by such statement, *quære?* Such loose and irregular practice in so important a proceeding, if tolerated in this instance, ought not to be encouraged. The facts stated in said affidavit are as follows: "It appears from the tax-roll of said town the collector of taxes for the year 1875 was directed to collect, to pay judgments against said town, $1,487.69, and that said amount was 52 per cent. of all the taxes ordered to be collected for that year, and that the whole amount collected for that year for all purposes was $1,448.14, as appears from the collector's roll, being 52 per cent. of all the said taxes ordered to be collected for that year, and that the proportion applied to said judgment amounted to $753, and, as the deponent was informed and believed, no other judgments except the judgment in this action aforesaid were included in said amount ordered to be collected to pay judgments against said town, and that, as appears by the application herein, $867.07 has been received by the plaintiff in said action upon the judgment aforesaid." It is denied in said affidavit that anything is due on said judgment. In respect to this last denial, it was conceded on the hearing by the appellant's counsel that there was the amount yet due on said judgment, as alleged in the affidavit of the attorney for the respondent, to-wit, $327, including interest to January 31, 1887. This answer, if it can be called an answer of the appellant, it being merely the affidavit of a stranger to the record, evades the real fact which it evidently seeks merely to insinuate or suggest—that this judgment had already been placed upon the tax-roll and collected in the year 1875. The affidavit states that the sum of $1,487.69 was placed on the tax-roll of that year to pay judgments generally, and that the affiant is informed, and believes, that no other judgment except this one was included in the amount so ordered to be collected. Whether this judgment was placed upon that tax-roll any one can know with certainty by consulting the tax-roll or record of that year, for the statute (section 1075, Rev. St.) clearly contemplates that judgments against towns should be placed on the tax-roll in separate columns, opposite the valuation of the property to be charged. The statements in relation to judgments being placed in the tax-roll of that year, and that this judgment was the only one, are contradictory, besides being made on information and belief, when the deponent ought to have known the fact to be true or not. But the amount collected, according to this affidavit, was less than the judgment, and that is sufficient. If this judgment had ever been placed upon the tax-roll and collected, it might have been easily and clearly proved, and it is not even alleged in the affidavit. What would be the right of the respondent, if the judgment had been collected and the town or its treasurer refused to pay it over we need not inquire, for there is no proof or allegation that it has ever been so collected. It is too clear for argument that the respondent was entitled to the judgment awarding the peremptory writ of *mandamus*.

The judgment of the circuit court is affirmed.

WILSON and another *v.* RUDD and others, Exr's, etc.

(*Supreme Court of Wisconsin.* November 22, 1887.)

LIEN—ON MACHINERY IN BUILDING—RIGHT OF REMOVAL—TIME OF FILING CLAIM.

Plaintiffs sold on time and delivered to the owners of a steam saw-mill certain machinery. The mill was on leased ground, and the purchasers of the mill had previously given a chattel mortgage on it to secure the purchase money to the owners of the land. They afterwards made an assignment, and the assignee conveyed the mill to the mortgagees, not reserving the machinery which had been purchased, and which could not be removed without injury to the mill. Plaintiffs brought suit in replevin to recover the machinery. Rev. St. 1878, § 3314, provides that if one purchases any machinery, not having sufficient interest in the building or premises for a builder's lien, the person furnishing the machinery shall have a lien on it, and, in case of default, shall have the right to remove it, leaving the building in good condition. Section 3318 provides that within six months from the date of the last charge for furnishing material, a claim of lien shall be filed in order to secure a lien or bring an action to enforce it. *Held*, that the lien of plaintiffs was a statutory one, and was lost by not filing their claim as prescribed in section 3318.

Appeal from circuit court, Monroe county.

Carl C. Pope and *Young & Lightner*, for appellants. *R. P. Perry* and *Lusk & Bunn*, for respondents.

TAYLOR, J. This action was brought by the appellants to recover the possession of a steam-engine, two boilers, and other articles of machinery. The action was tried by the court without a jury. The court found in favor of the defendants, and judgment was entered in their favor, from which the plaintiffs appealed to this court.

The facts found by the court on the trial were in substance as follows: In September, 1882, Rudd & Green, whom the respondents in this action now represent, sold to the firm of Withee & Pennewell a steam saw-mill with the appurtenances, and at the same time made a verbal agreement, or lease, by the terms of which the said Withee & Pennewell were to have the use, occupancy, and possession of the lands upon which said steam saw-mill stood until they should cease to need the premises for saw-mill purposes, which was expected to be about two years; that said Withee & Pennewell took possession of said leased premises under said verbal lease, paid a part of the purchase money for the mill, and put valuable improvements on the land and into the mill, a part of which were the machinery purchased of the appellants, to recover the possession of which this action is brought; that said Rudd & Green were the owners in fee of the lands on which said mill and machinery were situated, and that the title to said premises is still in the respondents, and that respondents have been in possession of said mill premises and machinery ever since July, 1884; that on the eighth of November, 1882, the said Withee & Pennewell gave the said Rudd & Green a chattel mortgage for more than $2,000 to secure a part of the purchase money of the said steam-mill. This mortgage in terms covered the saw and planing mill and the fixtures and machinery thereto belonging; that said mortgage was duly filed as the law requires, and that $500 had been paid on such mortgage; that afterwards, the said Withee & Pennewell made an assignment of their interest in the mill and machinery, and in the land upon which the same was standing, to an assignee, and afterwards, and in July, 1884, the assignee, with the assent of the said assignors, quit and surrendered possession of said premises to Joseph L. Green and D. B. Rudd, surviving partners of Rudd & Green, and delivered the mill over to said Rudd & Green, and did not reserve any right to remove any of the buildings or machinery, the said lessees and their assignees having ceased to need said premises for saw-mill purposes; that on March 26, 1883, the plaintiffs sold and delivered to the firm of Withee & Pennewell certain machinery to be used in and about the construction or repair of the steam-mill situate on said leased premises, and then in possession of said Withee & Pennewell, viz.: One

16x24 plain sliding engine, two No. 7 tubular boilers with full boiler fronts, and smoke-stacks and fixtures, two sets of binding bars and wall-brackets, four square tubular mill lamps, one exhaust fan, a lot of shaftings, couplings, boxes, iron pipe, and leather belting; that this machinery was, about the date last aforesaid, used by the said Withee & Pennewell in rebuilding the steam saw-mill on said premises, and became a part of said mill and the machinery thereof. The court also found that the appellants demanded the machinery, etc., of the respondents in March, 1885, and the respondents refused to deliver the same; that the machinery was of the value of $2,500. The court also found as a fact that the machinery was put into an addition, which was a part of the mill building, and the same could not be removed without injury to the mill. The court also found as a conclusion of law that the defendants were entitled to judgment dismissing the action, with costs. No exceptions were taken to the findings of fact, the only exception being to the conclusion of law.

Upon the findings of fact there can be no pretense of right on the part of the appellants to recover the property in question. The finding being that on the ——— day of ———, 1883, they sold and delivered the property in dispute to the parties under whom the defendants claim title, there can be no claim of ownership on the part of the appellants as against the vendees and those claiming under them. To entitle the appellants to claim a lien in any shape, it was clearly necessary that there should have been proofs, and a finding that the machinery so sold and delivered was sold on credit, and that the purchase money, or some part thereof, remained unpaid to the plaintiffs. Although there is nothing in the findings of fact upon this question, both parties have in their printed briefs treated it as though this fact was in the case, and perhaps supposed it was in the findings. That the fact appeared on the trial would seem admitted from the course taken by the learned counsel for the respondents in the argument in this court. We will therefore decide the case upon the supposition that it appeared on the trial that the appellants sold the machinery on credit, and had not been paid therefor by the vendees.

The appellants base their right to recover this machinery by an action of replevin, or its value in trover, if delivery of it be refused upon demand made upon the party having it in possession, under the latter clause of section 3314, Rev. St. 1878. This clause reads as follows: "In case any person shall order or contract for the purchase of any machinery to be placed in, or connected to or with, any building or premises, and such person not having an interest in such building or premises in or connected with which such machinery is placed, sufficient for a lien as provided in this chapter to secure payment for said machinery, the person furnishing such machinery shall have and retain a lien upon such machinery, and shall have the right to remove from such building or premises such machinery in case there shall be a default in the payment for such machinery when due, leaving such building or premises in as good condition as they were before such machinery was placed in or on the same." It is claimed by the learned counsel for the appellant that, under the lien given by this clause, the vendor of the machinery may at any time take possession of the property so sold and delivered, on default of payment of the purchase price, without filing any notice of his lien as prescribed in section 3318, Rev. St., and without taking any proceedings either under said chapter 143, Rev. St., or any other statute law of the state; and, if the party in possession refuse to deliver up the possession, he may maintain either an action of replevin for the property or trover for its value. We cannot believe this to be the reasonable construction of this statute. The section in which this clause appears is a section devoted simply to declaring in what cases, and under what circumstances, a contractor who performs any work or labor, or furnishes any materials in the construction, repair, protection or removal of buildings or machinery constructed so as to become a part of the

freehold upon which it is situated, shall have a lien upon the premises upon which the building or machinery is placed so as to become a part of the freehold, and declares the priority of all such liens. The latter clause, above noted, secures to the furnisher of machinery, attached so as to become a part of the freehold, a lien upon such machinery, when the person purchasing and attaching it to the freehold has no interest in the freehold out of which the claim of the furnisher can make his debt, and declares that in such case, to satisfy his lien, he may detach the machinery from the freehold, and remove the same. How he shall secure his right to enforce this kind of lien is not declared in said section, or intended to be so declared. The subsequent provisions of the statute are directed to that subject, and they clearly set forth the manner in which the liens declared by section 3314 shall be enforced. This court has repeatedly declared that it must be enforced in the manner prescribed by the act, and in no other way. *Dorestan* v. *Krieg*, 66 Wis. 604–611, 29 N. W. Rep. 576; *Dewey* v. *Fifield*, 2 Wis. 725; *Dean* v. *Wheeler*, Id. 224; *Du Bay* v. *Uline*, 6 Wis. 588; *Huse* v. *Washburne*, 59 Wis. 414, 18 N. W. Rep. 341; *Druse* v. *Horter*, 57 Wis. 644–646, 16 N. W. Rep. 14. Section 3318, Rev. St., provides that "no lien hereby given shall exist, and no action to enforce the same shall be maintained, unless within six months from the date of the last charge for performing such work and labor, or of the furnishing of such materials, a claim of lien shall be filed," etc. This provision of the statute, it seems to us, must apply to the lien mentioned in the last clause of section 3314, as well as to the lien mentioned in the first clause. It is very clear that the words "no lien hereby given" refer to the liens mentioned in said section 3314, and therefore include the lien upon the machinery mentioned in said second clause, as well as that mentioned in the first clause thereof.

It is argued by the learned counsel for the appellant that the lien mentioned in the second clause is only an extension of the common-law lien of the vendor for unpaid purchase money to the case where the possession of the property sold has been delivered to the vendee; but it is very clear that no such lien existed at common law after a delivery of the property after sale, when a credit for the purchase money was given. The lien claimed by the appellants is clearly a lien given by the statute, and consequently is lost after six months from the sale, unless a claim for such lien be filed as required. There is the same propriety in requiring a notice of this lien as there is in requiring it in the other cases. The law does not favor secret liens in favor of any one. The common law required the possession to be held by the lien claimant in order to protect himself, and the statute has in all cases, when a lien is given upon property not in the actual possession of the claimant, required that a notice of such claim of lien shall be given within a prescribed period, and an action commenced to enforce the same within some other prescribed period, or the lien shall be lost. The circuit judge was clearly right in holding that the appellants had lost all right to the property in question by not filing their claim for a lien, as prescribed in said section 3318. Whether a person claiming a lien under said last clause of section 3314, and having filed his claim of lien as prescribed by said section 3318, can enforce his claim in any other way than as prescribed in the subsequent sections of said chapter 143, Rev. St., need not be determined in this case, as, upon the admitted facts in the case, he has lost all claim to a lien by not filing his claim as prescribed by said section 3318.

The judgment of the circuit court is affirmed.

MILLER v. TOWN OF JACOBS.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. MUNICIPAL CORPORATIONS—TOWN—UNDERTAKING ON APPEAL.
A town is a "municipal corporation" within the meaning of Rev. St. Wis. § 3062, which provides that no undertaking need be given upon an appeal taken by a municipal corporation.

2. TOWNS—LIABILITY ON ORDER DRAWN BY OFFICERS OF SCHOOL-DISTRICTS.
Under Rev. St. Wis. § 519, providing that a town board of school directors is a body corporate, and shall possess the usual powers of a corporation for public purposes, that it may sue and be sued, and be capable of contracting and being contracted with, a suit cannot be maintained against a town for non-payment of a school order given for teaching, signed by the proper officers of the district, and drawn on the town treasurer, specifying that the amount is to be paid out of the school fund.

Appeal from circuit court, Price county.

J. B. Hagarty, for respondent. *Lamoreux & Gleason*, for appellant.

TAYLOR, J. This is an appeal from an order overruling a demurrer to the complaint of the plaintiff, on the ground that it does not state facts sufficient to constitute a cause of action. The complaint, omitting the title of the case, reads as follows: It alleges that the defendant is a corporation, being a duly-organized town existing under and by virtue of the laws of the state, having the township system of school government therein, and had on the date hereinafter mentioned. That the defendant is indebted to the plaintiff herein upon the following-described order:

"$100. SCHOOL ORDER No. 154.

GLIDDEN, WIS., July 26, 1886.

"*To the Town Treasurer of the Town of Jacobs:* Pay to G. W. Geraghty, or bearer, the sum of one hundred dollars, out of moneys in the school fund not otherwise appropriated, being for teaching.

[Signed] "C. W. KLEIN, President.

[Countersigned] "GEO. BELL, Sec'y."

—That said order was duly presented for payment to the town treasurer of said town, defendant, more than 30 days prior to the commencement of this action, September 3, 1886, and payment thereof duly demanded, which was refused for want of funds, by said town treasurer. The complaint then alleges a sale and delivery of said order to the plaintiff, for value, before the commencement of the action, and that he is the owner and holder of the same; alleges that there is now due on said order the said sum of $100, and interest from the date of the presentation of the order, which sum the defendant promised and agreed to pay on demand, but has failed and neglected to do so, and the same has not been paid, or any part thereof, and demands judgment for said $100 and interest, with costs of the action.

On the argument in this court the learned counsel for the respondent moved that the appeal be dismissed, for the reason that the appellant town had not given any undertaking on appeal as required by the statute. To this motion the appellant answers that under the provisions of section 3062, Rev. St., the town may appeal without giving any undertaking, unless ordered to give one by this court. This section reads as follows: "When the state, or any state officer, or state board in a purely official capacity, or any municipal corporation within the state, shall take an appeal, service of the notice of appeal shall perfect the appeal, and stay the execution or performance of the judgment or order appealed from, and no undertaking need be given. But the supreme court may, on motion, require security to be given in such form and manner as it shall in its discretion prescribe, as a condition of the further prosecution of the appeal." It is insisted by the counsel for the respondent that a town is

not a "municipal corporation" within the meaning of this section, and cites *Norton* v. *Peck*, 3 Wis. 714, and *Eaton* v. *Manitowoc Co.*, 44 Wis. 489, to sustain his contention. The first case construed the meaning of the words as used in our constitution, and the second case their meaning in section 1 of chapter 112, Laws 1867. This section limits the time within which a deed can be issued upon a tax certificate to six years from the date of the sale, with an exception that this limitation shall not apply to cases when the tax certificate is owned by counties or municipal corporations; and in that case it was held that the exception did not apply to towns; the reason given being that counties and cities were authorized to purchase at tax sales, and towns were not so authorized, and it should be presumed, therefore, that the exception was to be intended in favor of such municipalities only as were authorized to purchase and hold certificates issued on tax sales. While we are entirely satisfied with the conclusions reached in these cases, we think they are not conclusive as to the construction to be given to the words in the law now under consideration.

It seems to us that when the object of the section above quoted is considered, the town comes within the relief intended to be given as fully as the county, city, or village, and it should have the benefit of the relief. All the taxable property of the town is made liable for the payment of any judgment recovered against it, the same as the city and village, and it ought to be entitled to like privileges in its litigations. In common parlance, and even in legislative and judicial language, the word "municipality" is applied to towns as well as to cities and incorporated villages. See 1 Dill. Mun. Corp. (3d Ed.) §§ 19–21, and cases cited. We think towns are within the meaning of the law above cited, and they may appeal without giving an undertaking in the first instance. If there be any good reason for requiring an undertaking in order to stay proceedings in the action in which the appeal is taken, relief can be obtained in this court. The appeal was properly taken.

Does the complaint set up a cause of action against the town? We are very clear that it does not. If it were to be admitted that a town, within which the township school system prevails, is liable in an action for the refusal of the town treasurer to pay a school-district order drawn upon such treasurer, the complaint in this case does not show that any such order was ever drawn by the proper officers of the school-district board. There is no allegation in the complaint that the persons who signed said order were the proper officers of said school-district board. We think this allegation necessary. The court cannot take judicial notice that George Bell was secretary, or that C. W. Klein was president, of said school-district board. We do not, however, put our decision upon this point alone. Admitting that the school order was issued and signed by the proper officers of the district, for a lawful claim against said school-district, and was lawfully presented for payment to the treasurer of said town, and payment refused by such treasurer for any reason, either the want of funds or other reason, still no action can be maintained by the holder of the order against the town. The debts of the district are not the debts of the town. The statute declares that the clerks of the several subdistricts in any organized town in this state, which shall have adopted the town system in the manner prescribed in section 552, Rev. St. 1878, together with the clerks of the joint subdistricts, the school-houses of which are situated in such town, shall constitute the town board of school directors. See section 518, Rev. St. Section 519 declares that said board shall be a body corporate, and shall possess the usual powers of corporation for public purposes, by the style of the "board of school directors of the town of ———, and in that name shall sue and be sued, and be capable of contracting and being contracted with, holding real and personal estate, and selling the same as authorized by the provisions of this act; the clerks aforesaid shall constitute the board of directors of the town, and hold their office until the

next annual meeting of the subdistricts of the town." The subsequent sections of the statute provide for regular and special meetings of the board, declare what number shall constitute a quorum, provide for the election of a president, vice-president, and secretary of the board, empower the board to purchase or hire school-buildings or school-houses, to fence and improve the same, etc., and when no longer needed to sell and convey the same, such conveyance to be executed by the president and secretary of the board; make it the duty of the board to determine the amount of money which will be necessary for the support of schools, and for building and repairing school-houses in the town for the ensuing year; require the board to establish and maintain schools in the several subdistricts under their charge, as they may deem expedient, and that all such schools shall be kept each year for not less than five months, and that the board shall have in all respects the supervision and management of all the schools, etc. Section 528 constitutes the president and secretary of the town board of directors an executive committee to carry out and enforce all the orders of the board, the acts of the committee to be, however, subject to review by the board at any regular meeting. Section 529 gives the executive committee the power to employ necessary teachers, and fix the compensation of such teachers. Section 533 empowers the clerk to draw orders on the town treasurer for money in the hands of such treasurer, which have been apportioned to the town, and for money collected and received by him from other sources for school purposes, for the payment of teachers' wages, the purchase of school-sites, the building, buying, leasing, repairing, and furnishing school-houses, and for all other lawful purposes, and each order shall designate the object for which, and the fund upon which, it is drawn, and shall be countersigned by the president. The statute further provides that the town board of directors shall make an estimate of the amount necessary for the support of the schools during the ensuing year, specifying the sum needed for the following purposes: (1) Teacher's wages; (2) for school-house sites, and for building, leasing, or purchasing such school-houses; (3) for fuel; (4) amount for incidental expenses; (5) an amount not exceeding $100 for library; and it is made the duty of the secretary of the board, at least five days before the annual town meeting, to present this estimate, with other matters, to the town board of supervisors. The only duty the town board have in the matter is to present such estimates to the electors of the town at the annual town meeting, and the electors are required to vote on each item; and if for any reason the electors shall not vote money for the support of schools, at the annual town meeting, or a sufficient amount shall not be voted, then the supervisors shall again present the estimates to the electors at the general election in the fall; and if the town shall finally fail to vote an amount of money sufficient to maintain a school in each subdistrict for the term of five months during the year ensuing, the secretary of the school board shall certify to the town clerk the amount estimated by the board of directors necessary for the teachers' wages, fuel, repair of school-houses, and incidental expenses, and the town clerk shall assess the aggregate sum so certified on all the taxable property on the assessment roll for that year, and the town treasurer shall collect the same as other taxes. See sections 535 and 539, Rev. St. Section 540 directs that "the town treasurer of each town shall apply for and receive from the treasurer of his county all money apportioned for common schools in his town, and pay out the same, together with all money collected or received by him for school purposes, upon the order of the president and secretary of the town board of directors."

It will be seen from an examination of these provisions, and others in the statute, providing for the maintenance and government of schools in towns in which the township system of schools has been established, that the town government has no control whatever of the subject of such schools or of their maintenance and support. Even the electors of the town have no control, ex-

cept to refuse to vote the estimates as presented by the school-district board; and when they refuse to vote the necessary amount to support schools for at least five months in the year, the board of school directors, through their secretary, may enforce the collection of the necessary sum by a tax to be placed upon the tax-roll by the clerk of the town. The treasurer of the town holds all school money for the benefit of the school-district board, not for the town, and it can only be paid out on the order of the board, through their secretary and president. The town having no authority as a town to provide any moneys for the support of the schools, under the care of the town board of directors, it cannot be liable upon the orders issued by said board when there are no funds in the hands of the treasurer sufficient to pay such orders.

If any action can be maintained upon an order of the town board of directors, which has been issued for the payment of teachers' wages, or for any other legitimate expenditures of the board, when no money has been provided by the board for its payment, and there are no moneys in the hands of the town treasurer derived from other sources applicable to such payment, and it is very clear there is no fault on the part of the town that it is not paid, such action cannot be maintained against the town. The order of the board may be evidence of an indebtedness incurred by the board of school directors of the town, to the party in whose favor the order is drawn, but it certainly furnishes no evidence that the town is in any way indebted to such person. If an action can be maintained against the town, upon an order of the school board, there would seem to be just as good reason to hold that the town would be liable upon any other contract made by the board, with a teacher or with any other person, in relation to any matter concerning which the statute authorizes the board to contract. We think even the learned counsel for the respondent would not contend that an action could be maintained against the town to enforce the performance of, or to recover damages for the non-performance of, a contract entered into between the town board of directors and a third person.

It is clear that, the statute having declared the town board of directors a body corporate, with the usual powers of a corporation for public purposes, and declared that such corporation may sue and be sued in the corporate name, and that it may contract and be contracted with, all actions to enforce the contracts of such corporation must be brought against such corporation; and in the absence of some statute which in express terms gives the right to maintain an action for such enforcement against the town, within which such corporation has its existence, no such action can be maintained. The fact that the taxable property of the town may be the ultimate fund from which the money to pay the demand must be raised, is not a sufficient reason for saying that it is immaterial whether the action be brought against the board or the town. The town officers know nothing of the transaction out of which the cause of action arises, and are wholly unprepared to defend it. The officers of the corporation which incurred the supposed debt are supposed to know all about it, and are the party who should be called upon to defend the action. They know whether there is any defense to the order or not, and are the only parties who can properly make an answer to the plaintiff's claim. It is not, therefore, a matter of indifference as to whether the town or the board be made the defendant in the action.

The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

PAIGE *v.* PETERS and others, impleaded, etc.

(*Supreme Court of Wisconsin.* November 22, 1887.)

MECHANIC'S LIEN — MACHINERY FURNISHED — GOVERNMENT LAND BEFORE ISSUANCE OF PATENT.

Plaintiff filed a claim for a lien upon land for machinery placed upon it before a patent had issued to the defendant. *Held* that, under Rev. St. U. S. § 2296, which protects land from liability for the satisfaction of a debt contracted prior to the issuing of the patent, plaintiff could acquire no interest in the land, but that his lien upon the machinery might be enforced.

Appeal from circuit court, Langlade county; GEO. H. MYERS, Judge.

This action was commenced August 18, 1884, to enforce a lien for certain mill machinery and materials purchased of the plaintiff by the defendant Theodore H. Peters, and used by him in the erection, construction, and repairing of a steam saw-mill upon the lands described. The complaint contained the usual averments, and was against Peters and wife, and others having, or claiming to have, liens upon the property. Peters and wife answered, among other things, to the effect that the land was entered as a homestead under the laws of the United States; that said Theodore had no title, legal or equitable, to the land, but that the same was vested in the United States, and that no patent had yet been issued therefor. The answer of the appellant company was a mere general denial.

There is no bill of exceptions. The parties to the issues stipulated to an agreed state of facts, which were found by the court, to the effect (1) that on and prior to February 11, 1884, the plaintiff was a manufacturer and dealer in mill machinery at Oshkosh; (2) that on that day he sold and delivered to said Theodore mill machinery, belting, shafting, pulleys, etc., to be used, and which were used, by him in the erection and completion of a steam saw-mill, situated on the 40 acres of land described, not within any incorporated city or village; (3) that said machinery, etc., so furnished was of the value of $881.15; (4) that no part thereof had been paid, except $86.25 paid before the commencement of this action, leaving the balance due thereon and unpaid of $594.87; (5) that for a portion thereof the said Theodore, January 22, 1884, gave his promissory note to the plaintiff for $541.81, payable in four months from that date, with interest at 8 per cent. per annum; that said note has not been paid, and is yet in the possession of the plaintiff; (6) that the last day upon which said mill machinery, etc., was sold and delivered was February 11, 1884; (7) that July 11, 1884, the plaintiff filed his claim for a lien for the amount due and owing him from said Theodore, in the requisite clerk's office; (8) that October 7, 1878, said Theodore made homestead entry No. 2848, of the 40 acres of land in question, and other lands, at the United States land-office at Wausau; that, by the authority of the commissioner of the general land-office, by letter dated September 8, 1883, and upon the applications of said Peters, said homestead filing was amended in the description; that April 7, 1884, said Theodore made and filed his final proof of said entry and occupation of said land, pursuant to the law of the United States, at Wausau, said final proof being numbered 1789, and covered the land in question and other land; (9) that said Sophia is the wife of said Theodore; (10) that said company, and other defendants not named, claimed some lien upon the premises in question, and that their claims were subsequent and subject to the lien and claim of the plaintiff; (11) that August 16, 1884, the plaintiff filed, in the requisite office, a notice of the pendency of this action.

As conclusions of law, the court found, in effect, (1) that said Theodore is indebted to the plaintiff in the sum of $594.87; that said sum, together with the costs of this action, is a lien upon said saw-mill building, and upon all the right, title, and interest which the said Theodore and wife had in and to said 40 acres of land upon which the same is situate, and upon all the right, title,

and interest which they, or either of them, have since acquired in and to said premises; (2) that the plaintiff is entitled to a judgment accordingly; that said premises be sold pursuant to law, and, upon said sale being made, that the defendants, and all persons claiming under them, or either of them, since February 11, 1884, be barred and foreclosed of all right, title, and interest, which they, or either of them, had in and to the said premises upon which the same is situated since the day and year last aforesaid, or which they, or either of them, have since acquired thereon.

From the judgment entered upon, in pursuance of, and according to, said findings of fact and conclusions of law, March 14, 1885, the three defendants above named bring this appeal.

J. H. Trever and *Silverthorn, Hurley, Ryan & Jones*, for appellants. *Bardeen, Mylrea & Marchetti*, for respondent.

CASSODAY, J. 1. Peters entered the land as a homestead claimant under the laws of the United States, October 7, 1878. Sections 2289, 2290, Rev. St. U. S. April 7, 1884, he made and filed in the land-office his final and requisite proofs, and thereby became entitled to a patent. Id. It is conceded that no patent was issued thereon until after the trial of this action. The plaintiff's debt against Peters was contracted, and the machinery purchased thereby used in and upon the saw-mill, upon the land in question, some two months prior to the making and filing of such final proofs. He claims a lien therefor, and, in fact, filed such claim, as required by the statutes of the state, July 11, 1884. Sections 3314, 3318, 3320, Rev. St. The action was commenced and notice of *lis pendens* filed within the time and manner required by the statutes to preserve the lien, if not otherwise barred. Sections 3318, 3321, 3322, Rev. St. It is claimed by the plaintiff, that notwithstanding no patent had ever been issued to Peters, yet that he had an equitable interest in the land, to which such alleged lien attached, and against which it can be enforced. The statutes of the United States, under which such homestead entry was made, declare that "no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Section 2296, Rev. St. U. S. Did this section bar the claim of the plaintiff for a lien upon the land? Upon such a question, the decisions of the supreme court of the United States are, of course, binding upon the state courts. In speaking of a somewhat similar statute it was said in *Wilcox* v. *McConnell*, 13 Pet. 516, 517, that "congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. * * * We hold the true principle to be this: that, whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." See *Irvine* v. *Marshall*, 20 How. 564; *Gibson* v. *Chouteau*, 13 Wall. 92. To the same effect is *Seymour* v. *Sanders*, 3 Dill. 440, 441. In *Fink* v. *O'Neil*, 106 U. S. 283, 1 Sup. Ct. Rep. 325, Mr. Justice MATTHEWS, *arguendo*, speaking for the court, said the above section "providing for the acquisition of homesteads for actual settlers upon the public lands, has made their exemption from sale on execution a *permanent* part of the national policy, by declaring that lands so acquired shall not 'in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.'" This is in harmony with the decision of this court

in *Gile* v. *Hallock*, 33 Wis. 523. See *Russell* v. *Lowth*, 21 Minn. 167; *Miller* v. *Little*, 47 Cal. 348. As to those classes of cases holding that the interest of such occupant of such land is taxable, (*Railway Co.* v. *Price Co.*, 64 Wis. 594, 26 N. W. Rep. 93;) or may be mortgaged or conveyed, (*Fuller* v. *Hunt*, 48 Iowa, 163; *Nycum* v. *McAllister*, 33 Iowa, 374; *Kirkaldie* v. *Larabee*, 31 Cal. 455)—it is unnecessary here to speak, since they do not come within the prohibition of the federal statutes cited. We must hold that the plaintiff acquired no lien upon any estate in the land, either legal or equitable.

2. Whether he lost his lien upon the machinery sold to Peters, and by him put in the mill, is a different question. Our statutes provide, in effect, that in case the person so ordering or contracting "for the purchase of any machinery to be placed in, or connected to, or with, any building or premises," has no interest in such building or premises, "sufficient for a lien as provided" therein, "to secure payment for said machinery, the person furnishing such machinery shall have and retain a lien on such machinery, and shall have the right to remove from such building or premises such machinery, in case there shall be default in the payment for such machinery when due, leaving such building or premises in as good condition as they were before such machinery was placed in or on the same." Section 3314, Rev. St. Under this statute, Peters contracted for and received the machinery in question, subject to such lien. The plaintiff has neither said nor done anything indicating an intention or willingness to relinquish such lien. On the contrary, he took all the statutory steps to preserve and continue the same. Has he lost it by the mere act of the defendant in placing it upon land which he occupied, but to which the title was in the United States? Peters necessarily knew the condition and nature of his title. Whether the plaintiff did, does not appear. The federal statute quoted was merely to preserve the *land* from the liability therein mentioned. It was no purpose of that statute to render state laws giving a lien upon personal property nugatory, merely because such property happened to be placed upon such land. Our statutes give such lien upon such machinery purchased under the circumstances indicated, as personal estate, to be enforced as prescribed. *Wilson* v. *Rudd*, *ante*, 321, decided herewith. We have not overlooked the Kansas case cited, *Lumber Co.* v. *Jones*, 32 Kan. 195, 4 Pac. Rep. 74. That case may be distinguished, since there is nothing here indicating any permanent attachment of the machinery to the soil; nor that a removal of the same will materially impair the realty. We must, under our statutes, and upon the facts stated, hold that the plaintiff has a lien upon the machinery in question, as upon personal property, to be enforced in this action.

The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment in favor of the plaintiff, and against the defendant, as indicated in this opinion.

TOURVILLE v. NEMADJI BOOM CO.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. APPEAL—EXCEPTIONS—REVIEW OF EVIDENCE.
An appeal was taken without an exception of record, and on the sole ground that the verdict was contrary to the evidence. It appeared that the evidence was conflicting as to all the material facts upon which the verdict was founded. *Held*, the verdict would not be disturbed.

2. SAME — EXCEPTION NOT TAKEN TO ORDER DENYING NEW TRIAL — REVIEW OF EVIDENCE.
Under Rev. St. Wis. § 3070, providing that the supreme court may review any intermediate order or determination of the trial court involving the merits, and necessarily affecting the judgment, appearing upon the record, whether the same

were excepted to or not, the court may review the sufficiency of the evidence to sustain verdict, even if no exception to or appeal from the order overruling motion for new trial has been made.

3. SAME—DAMAGES FOR FRIVOLOUS APPEAL—DISCRETION OF COURT.

The court will not grant damages in view of the groundlessness or frivolousness of the appeal, except in a case where the appeal is not only groundless, but taken with the evident purpose of mere delay or in bad faith.

Appeal from circuit court, Jackson county.

White & Reynolds and *Stephen Bacon*, for respondent. *J. W. Burhaus* and *P. H. Perkins*, for appellant.

ORTON, J. This is an appeal without a single exception in the record. The case is brought here and presented on its merits on the sole ground that the verdict is contrary to the evidence, a motion to set aside the verdict and for a new trial having been overruled without exception.

It is urged by the learned counsel of the respondent that the appellant not having excepted to the order overruling the motion for a new trial, and not appealing therefrom, admits that the decision of the circuit court thereon was correct. This would be so if it were not for section 3070, Rev. St. which allows this court "to review any intermediate order or determination of the court below which involves the merits, and necessarily affects the judgment, appearing upon the record returned or transmitted from the circuit court, whether the same were excepted to or not." In a case, therefore, where there was no evidence to support the verdict, or a clear preponderance of evidence against the verdict, it might be the duty of this court to reverse the judgment and award a new trial, if no exception was taken to the order denying a motion for a new trial in the court below. But in this case it was admitted by the learned counsel of the appellant upon the argument that there was evidence both ways upon all the material facts upon which the verdict was founded, and it appears that upon the evidence on behalf of the plaintiff alone he would be entitled to the verdict rendered, and that the testimony upon material questions is in conflict. In such case the verdict of the jury ought not to be disturbed. *Meusel* v. *Semple*, 48 Wis. 86, 4 N. W. Rep. 110. In this case the matters in dispute are complicated, and the evidence contradictory, and this court could not hope to arrive at a more correct conclusion upon the merits than the jury that rendered the verdict, or the learned circuit court that refused to set it aside and grant a new trial. We shall be compelled, therefore, to affirm the judgment by force of the invariable rule governing such cases.

The learned counsel of the respondent asks this court, in view of the groundlessness or frivolousness of the appeal, to adjudge to the respondent damages for his delay, by virtue of section 2951, Rev. St., not exceeding 10 per cent. on the amount of the judgment. This is a matter left to the discretion of this court, and we think we ought not to exercise such a discretion except in a case where the appeal is not only groundless, but taken with the evident purpose of mere delay or in bad faith. This appeal was taken the seventh day of June of the present year, and there has been no unnecessary delay in this court of this cause, as this court will endeavor there shall not be in any cause. The delay by this appeal, therefore, scarcely demerits the assessment of damages under this statute, and as we cannot think that this appeal was taken for the mere purpose of delay, and as the respondent has not suffered much from delay, we shall decline to adjudge any such damages in this case.

The judgment of the circuit court is affirmed.

WALKER and others *v.* GRAND RAPIDS FLOURING-MILL CO.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. FIXTURES—MACHINERY ATTACHED WITH SCREWS AND BELTING.
When the owner of a machine adapted for use in a flouring-mill consigns it to himself in the care of another, to have it tested in a flouring-mill belonging to a third person, and the machine is set up by that other in the mill on legs, and attached to the floor with screws, and to the main shafting of the mill with belts and pulleys, the machine does not thereby become a fixture as between the owner and a purchaser of the realty.[1]

2. PRINCIPAL AND AGENT—NOTICE TO AGENT BINDING ON CORPORATION.
A corporation acquired personal property from one who had notice of want of title in his vendor, and who had managed its affairs from its organization. *Held*, that it took the property charged with the same notice.

3. ESTOPPEL—IN PAIS—INTRUSTING CHATTELS TO THIRD PERSON.
Certain personal property belonging to plaintiff, and by him consigned to himself in the care of another, was by the latter sold to a third person, and conveyed by him to defendant, who retained it. Defendant had notice of the ownership, and never paid anything for the property. Plaintiff never sold or contracted to sell it to any one, and demanded of defendant its return, which was refused. *Held*, that plaintiff was not estopped to recover for its conversion by reason of having so intrusted it to another.

Appeal fom circuit court, Monroe county.

This is an action in the nature of trover, brought by the plaintiffs, who were copartners, to recover the value of a machine known and described as a "Pomeroy First Reduction Roller-Mill," which it is alleged the defendant unlawfully converted to its own use. The answer admits that the plaintiffs were copartners, and that the defendant is a corporation, as stated in the complaint. The cause was tried by the court without a jury. The facts are substantially as follows: The firm of Neeves & Podawitz was the owner of a flouring-mill at Grand Rapids. In April, 1883, this firm entered into a contract with one Pomeroy, in and by which, for a consideration therein named, Pomeroy agreed to change and convert the flouring-mill of the firm into a first-class mill, with a specified capacity to manufacture flour, and to that end to put in said mill a large quantity of machinery, particularly specified in the contract, among which was "one first-break Pomeroy machine," which is the same machine, under a different name, described in the complaint. The plaintiffs had just commenced the manufacture of that machine at Madison, Wisconsin, and sent one of the machines to Grand Rapids, consigned to themselves, in the care of Pomeroy. The testimony on the part of the plaintiffs is that they so sent the machine for the purpose of having it tested by Pomeroy in the mill of Neeves & Podawitz. Pomeroy put the machine in position for use. It stood on four legs, and was attached by screws to the floor, and connected by belts and pulleys to the main shafting, by which the machinery in the mill was operated. That about three weeks after such consignment, Mr. Ball, one of the plaintiffs, went to Grand Rapids, and had an interview with Neeves in relation to the machine, informing him of the purpose for which it was

[1] In *Michigan*, it is held that the most important test in determining whether machinery affixed to a building is personalty or a part of the realty, is the intention of the parties making the annexation. Manwaring v. Jenison, 27 N. W. Rep. 899, and note. To the same effect are the decisions in *Illinois*. Sword v. Low, 13 N. E. Rep. 828. But in *Ohio*, it is held that although the parties concerned may make a binding agreement that what would otherwise be a fixture shall be regarded as personalty, such agreement will not affect the rights of a subsequent mortgagee of the realty without notice of it, and that the delivery and filing of a chattel mortgage upon the property, which is the subject of the agreement, does not constitute the required notice. Manufacturing Co. v. Garver, 13 N. E. Rep. 493. In general, as to when machinery is regarded as a fixture, and the tests applied, see Schmitz v. Scheifele, (N. J.) 1 Atl. Rep. 698, and note; McNally v. Connolly, (Cal.) 11 Pac. Rep. 320, and note; Cooper v. Johnson, (Mass.) 9 N. E. Rep. 33, and note.

sent, and that the same had not been sold to Pomeroy. The parties came to no understanding about the machine,—Neeves insisting that he had purchased it of Pomeroy; Mr. Ball insisting that the machine was the property of the plaintiffs. After another and later interview between two of the plaintiffs, Mr. Ball and Mr. Main, with Mr. Neeves, which led to no results, the plaintiffs made a formal demand for the machine, and, the same not being delivered to them, they brought this action to recover its value. It should be stated that, soon after the first interview between Ball and Neeves, the defendant corporation was organized, and the mill and its appurtenances were conveyed to it by Neeves & Podawitz. Neeves was the secretary and manager of the business of the corporation. The court found as facts that, at the time of such demand, the plaintiffs were, and ever since have been, and now are, the lawful owners of the machine in controversy, and entitled to the possession thereof, and that ever since that time the defendant wrongfully converted the same to its own use, and detained it from the plaintiffs. The court also assessed the plaintiffs' damages at $231.32, and gave them judgment against the defendant therefor, with costs. The defendant appeals from the judgment.

Rogers & Hall, for respondents. *L. P. Powers* and *Bleekman, Tourtellotte & Bloomingdale*, for appellant.

LYON, J. The evidence is undisputed that the plaintiffs never sold or contracted to sell the machine in controversy to Pomeroy, or any one else. It is claimed, however, on behalf of the defendant, that because they intrusted the machine to Pomeroy, and he placed it in the mill of Neeves & Podawitz under a contract to put such a machine in their mill, and because that firm had no notice or knowledge, until it was so placed, that Pomeroy was not the owner of it, the plaintiffs should be estopped to claim the machine as their own property. Were it true that Neeves & Podawitz, before they had notice that Pomeroy was not the owner of the machine, and believing him to be the owner, had paid him therefor, or had they done any other act to their prejudice on the faith that Pomeroy was such owner, there would be great force in the claim thus made on behalf of the defendant. But such is not the case. When the machine was shipped to Grand Rapids it was consigned to the plaintiffs, and the firm knew that fact. This of itself was a circumstance which might well put the firm upon inquiry as to who was such owner. More than this, there is no testimony whatever tending to show that the firm ever paid Pomeroy any money, or did any act whatever, or in any manner changed their position on the faith that Pomeroy owned the machine, before they were notified to the contrary. It may be observed here that the testimony on this question of notice was conflicting; but manifestly the court found that such notice was given, as testified to by Mr. Ball. Notice to Neeves operates as notice to the defendant corporation, whose affairs were managed by Neeves from its organization, and of which he was an officer. We conclude, therefore, that the plaintiffs are the owners of the machine, and may recover its value in this action, unless some disposition has been made thereof which will defeat them. The principal ground upon which it is claimed that such a disposition has been made is that it has been so annexed to the mill as to become a permanent fixture, and therefore part and parcel of the freehold.

In *Taylor* v. *Collins*, 51 Wis. 123, 18 N. W. Rep. 22, Mr. Justice ORTON lays down the following rules or tests for determining whether articles of machinery are fixtures: "(1) Actual physical annexation to the realty; (2) application or adaptation to the use or purpose to which the realty is devoted; (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold." In the present case, the requirement of the third rule is entirely wanting. The machine was not furnished to Pomeroy by the plaintiffs to be made a permanent accession to the freehold,

unless some person interested should thereafter purchase it, and there is no evidence that Pomeroy had any such intention. He had no right to make the same a permanent accession to the freehold, and the legal presumption is that he did not. The fact that it was attached in the manner above stated to the building and freehold is not significant. It was not so incorporated with the building as to lose its identity, or to render it difficult or injurious to the building to remove it.

In the case of *Bank* v. *O. E. Merrill Co.*, 34 N. W. Rep. 514, it was held that a large amount of machinery in a foundry building, indeed all the machinery therein over and beyond the water-wheel, much of which was attached to the building more extensively and firmly than was the machine in controversy here, were not permanent fixtures, but personal property, which the tenant who placed the machinery there had a right to remove. This case illustrates of how little importance the mere fact of attachment to the freehold is, so long as the identity of the property remains, and its capacity to be removed and used elsewhere. The principal consideration in such cases is the intention of the party putting in the machinery.

Counsel for the defendant greatly rely upon the case of *Iron-Works* v. *Adams*, 37 Conn. 233. An examination of that case shows that it was decided upon the ground that the property in controversy was so attached to the building as to lose its identity. The same is true of the case of *Fryatt* v. *Sullivan Co.*, 5 Hill, 116, affirmed by the court of errors, 7 Hill, 529, also relied upon by counsel for defendant. The principle of these cases will apply where boards, timber, brick, or stone are incorporated in a building. They necessarily become a part of the building, and thus lose their identity as personal property. It should be observed that in both the above cases the owners of the freehold had paid their vendor or contractor for the articles thus made fixtures in good faith, and without notice that such articles belonged to other parties.

The case of *Railway Co.* v. *Busch*, 43 Mich. 571, 6 N. W. Rep. 90, as well as many other cases cited to the same proposition, belongs to this class. In the latter case it was held that ties used in the building of a railroad thereby lost their identity as personal property, and an action for their conversion could not lie. Other cases are cited on behalf of the defendant, in which the judgments were controlled by the consideration that the owners of the buildings in which the machinery in controversy had been placed by contractors had paid therefor in good faith, believing that such contractors owned the machinery, when in fact they did not. We have already seen that this is not such a case.

The foregoing considerations lead us to the conclusion that the machinery in question in this case remained the personal property of the plaintiffs, and that they are entitled to recover therefor in this action. The judgment of the circuit court is affirmed.

PLUMMER *v.* JOHNSON.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. LIBEL AND SLANDER—MALICE—EVIDENCE.
   In an action of slander it appeared that the defamatory words consisted in a charge of burglary, and were spoken to an officer, with the order to arrest plaintiff; that defendant afterwards refused to make complaint, but requested the officer to prefer a charge of vagrancy. The plaintiff introduced evidence to show how long he was kept in jail by reason of the charge, to which defendant objected. *Held*, that the evidence was admissible as tending to show malice on the part of the defendant.

2. SAME—MITIGATION—BELIEF OF CHARGE—MALICE.
   In an action of slander, where the defamatory words were a charge of burglary resulting in the arrest and imprisonment of the plaintiff, the court was asked to instruct the jury that if the arrest and imprisonment were justifiable and lawful,

they could not be evidence of malice. *Held*, that the instruction was improper, for the reason that it ignores whether the defendant believed the charge to be true and acted in good faith in making it.

3. SAME—BAD REPUTATION OF PLAINTIFF—NOMINAL DAMAGES—INSTRUCTIONS.
In an action of slander the court instructed the jury that if the plaintiff's general character and reputation was bad his compensatory damages would be thereby lessened, and should be measured by the injury actually suffered. *Held*, that this instruction was a substantial compliance with the request that in such case the jury might find only nominal damages.

4. SAME—EXCESSIVE DAMAGES.
In an action of slander, when the defamatory words consisted in a charge of felony resulting in the arrest and imprisonment of the plaintiff, the jury awarded $500 damages. *Held*, the damages were not excessive.

5. TRIAL—INSTRUCTIONS ABSTRACTLY CORRECT.
An instruction though abstractly sound, but not applicable to the facts in the case, should be refused.

Appeal from circuit court, Portage county.

O'Keife & Calkins and *D. Lloyd Jones*, for respondent. *Raymond & Haseltine*, for appellant.

ORTON, J. This is an action of slander against the defendant for speaking the words, "he (meaning the plaintiff) is the man who helped burglarize and rob my house." The answer is, in effect, that defendant's house had been burglarized, and property therein stolen, and that he believed the plaintiff did it, and if he spoke the words, they were true, and the speaking of them lawful. The answer then states the circumstances which justified the defendant's suspicion of the plaintiff in respect to that crime, and denies malice, and that the plaintiff was injured. The jury found for the plaintiff $500 damages.

The testimony on behalf of the plaintiff was that, on the occasion of the speaking of said words, the defendant, without warrant, ordered one Dunegan, a night policeman, to arrest the plaintiff and imprison him, and Dunegan did so, without warrant or other complaint, and detained him in prison several hours; and that the defendant not only made no complaint, but declined to make any when asked by the chief of police McDonald to do so, but asked said officer to make complaint against the plaintiff for *vagrancy*, and he refused to do so, and discharged him from the prison. The first error assigned by the appellant is the admission of the testimony of the plaintiff as to the length of time he was so imprisoned. It is contended by the learned counsel of the appellant that although the arrest and imprisonment of the respondent by his order might properly be shown to prove malice, yet, after he was so arrested and placed in prison he was no longer responsible, and the respondent was then in the hands of the officers of the law, and the length of time he was so imprisoned would not show malice on the part of the appellant. That might be true if the appellant had no longer concerned himself about it after the arrest; but after the respondent had been imprisoned several hours he tried to have him imprisoned still longer, by trying to persuade the chief of police to make a charge against him for the mere offense of vagrancy. The testimony tended to show malice on the part of the appellant, by the imprisonment, as much as by the arrest by his order, without complaint or warrant. The testimony shows that the respondent was arrested and imprisoned by the order of the appellant, was detained in prison several hours by his order, and he attempted to have him detained still longer in prison for an offense very different from that which was the pretext of his arrest, and, refusing to make any charge against him, he was released from prison. The testimony was clearly proper, and the language of the learned counsel of the appellant in their brief that, "so far as appears from the evidence or is claimed by any one, Johnson's connection with the affair terminated upon the arrest of the plaintiff," is scarcely borne out by the testimony. There were 10 special requests

made by the counsel of the appellant for the court to instruct the jury, and which were refused by the court, and only three of them are now insisted upon as not having been embraced in the general charge.

1. The court instructed the jury, in effect, that if the plaintiff's general character and reputation were bad his compensatory damages would be thereby lessened, and should be measured by the injury actually suffered. The special request is in effect the same, except that the jury were not instructed "that they were at liberty in such case to find a verdict for *nominal* damages only." This pretended exception is certainly embraced, at least substantially, in the general charge. The jury were charged that they might *measure* the damages by the character of the plaintiff. If it was bad the jury were not limited by any amount exceeding nominal damages. The authority cited by the learned counsel, of *Campbell* v. *Campbell*, 54 Wis. 90, 11 N. W. Rep. 456, is not in point. Very nearly the special instruction here asked was requested in that case, and the court had not instructed the jury upon that subject, but had told the jury "that they had the right to give nominal damages." It was held error that the special instruction that the damages ought to be measured by the good or bad character of the plaintiff was not given. The jury in this case were fully instructed on that subject. But it is extremely doubtful whether the court ought to have instructed the jury in this case that they were at liberty to find for the plaintiff only *nominal* damages, however bad his general character might have been proved to have been. Such a verdict would have been nearly equivalent to a verdict against him in the action. If the speaking of the words were not justifiable by their truth, and were expressly malicious, and had caused special damage to the plaintiff, it would seem that he ought to recover at least his actual damages. In such a case the jury ought not to have been instructed that the plaintiff was not entitled to recover anything. *Langton* v. *Hagerty*, 35 Wis. 151. But nominal damages were clearly included in the general instruction given, and that was in favor of the defendant, and he cannot complain.

2. The court was asked to instruct the jury that, if the arrest and imprisonment were justifiable and lawful, they could not be evidence of malice. In connection with this instruction the court was asked to instruct the jury when, and under what circumstances, an arrest and imprisonment by a private person, without warrant, were justifiable, by an abstract proposition of law, not specially relating to the case at bar, as follows: "A private person is justified in making an arrest without a warrant where a felony has actually been committed, and there is reasonable and probable cause for fairly believing the person arrested to be guilty thereof, although such person be in fact innocent, if the person so making the arrest acts without malice, in good faith, and actually relying upon such cause of belief." An instruction though *abstractly* sound, but not applicable to the facts of the case, should be refused. *Allen* v. *Chippewa Falls*, 52 Wis. 430, 9 N. W. Rep. 284. It was not proved "that there was reasonable and probable cause for fairly believing" the respondent guilty of the crime of burglary or robbery in the case stated. "It is seldom error to refuse to give an instruction which is only a statement of an *abstract rule of law*." *Berg* v. *Railway Co.*, 50 Wis. 419, 7 N. W. Rep. 347. But this abstract statement of what the law is, if applied to this case, is materially defective, in not having the qualification, that the appellant *believed*, and had reasonable grounds to believe, that the respondent was guilty. "A real belief and reasonable grounds for it must concur to afford a justification." "Good faith alone is not sufficient." *Farnam* v. *Feeley*, 56 N. Y. 451; 1 Amer. Lead. Cas. 265; *Merriam* v. *Mitchell*, 13 Me. 439; *Travis* v. *Smith*, 1 Pa. St. 234; *Burlingame* v. *Burlingame*, 8 Cow. 141; *Hall* v. *Suydam*, 6 Barb. 84. "An arrest cannot be made without warrant on causeless suspicion, and in the absence of *actual belief* of guilt, or actual facts that create probable cause." *People* v. *Burt*, 51 Mich. 199, 16 N. W.

Rep. 378. This rule would seem to be most reasonable. A private person ought not to arrest another without warrant, unless, at least, he believes such person to be guilty of the crime. Such belief on his part is the only real evidence of his good faith. It has been held by many respectable authorities that, to justify such an arrest, the person so arrested must be guilty of the crime, (*Burns* v. *Erbon*, 40 N. Y. 466, and cases cited;) but this may be going too far. There should at least be good cause to believe, and an actual belief, that the person arrested is guilty. What does it matter if there be good cause to believe, and the person making such arrest does not himself believe, that the person so arrested is guilty of the crime? In such a case he does not act honestly or in good faith. What may be good cause for others to believe is not the question. It is the good cause for his own belief that is material. This material element is wanting in the instruction asked by the appellant for his justification for the arrest. But in this case, the appellant's own belief in the guilt of the respondent is not asserted in this instruction asked, but he omitted and refused to make complaint against the respondent when requested by the chief of police to do so, but endeavored to have that officer make complaint against him, for another and inferior offense. The instruction was, therefore, at best, inapplicable to the facts. It was not error to refuse both of these instructions.

The only remaining objection to the judgment urged by the appellant's counsel is that the damages awarded by the jury are excessive. The jury must have found that there was no justification, excuse, or mitigation, for the slander, and probably that the respondent suffered special damage. The small sum of $500 damages, in such a case, is certainly not evidence of any bias, or prejudice, or motive of oppression, on the part of the jury. This sum would seem to be reasonable, if the plaintiff was entitled to any verdict. Justification was pleaded, but it was not proved, and the jury seemed to have found that there was little if anything proved in mitigation of the slander. The judgment of the circuit court is affirmed.

BOARD OF SUP'RS OF MILWAUKEE CO. *v.* SCHANDEIN and others, impleaded, etc.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. BONDS—COUNTY TREASURER—COURT-HOUSE FUNDS—BINDING ON SUCCESSOR.
P. & L. Laws Wis. 1871, c. 400, § 3, which provides that the county treasurer of Milwaukee county shall give a bond for the faithful performance of all duties required of him by the county board of supervisors with regard to the handling of the court-house funds, was obligatory not only upon the treasurer negotiating the court-house bonds, but also upon his successor, to whom the said special fund may be transferred.

2. SAME—LIABILITY OF SURETIES ON GENERAL BOND OF TREASURER—SPECIAL FUND.
The sureties on the general bond of the treasurer of Milwaukee county cannot be held responsible for the safe-keeping and disbursement, according to law, of the special court-house funds, for the proper handling of which a special bond was required by P. & L. Laws Wis. 1871, c. 400, § 3.

3. SAME—MISAPPROPRIATION OF FUNDS—BURDEN OF PROVING REPLACEMENT.
In an action upon the bond of a county treasurer, where the evidence shows a misappropriation of the funds in his care, and a shortage in his accounts, the burden of proof is upon the defendant to show that the funds have been subsequently replaced.

4. SAME—FORMAL TRANSFER OF FUND—LIABILITY OF SPECIAL SURETIES.
An action was brought on the special bond of the county treasurer of Milwaukee county given to secure the proper management of the court-house funds. The evidence failed to show that the funds misappropriated in February, 1874, were replaced at any time subsequent thereto. *Held*, that the transfer of the funds of the said account to the county general fund, made in pursuance of the act of March 27, 1874, was a mere formal transfer, and that the sureties on the said said special bond were liable for the deficit.

5. APPEAL—REVIEW OF TRIAL COURT'S FINDINGS OF FACT.
The appellate court will not reverse a finding of fact of the trial court unless the decided preponderance of the evidence is against it, or unless it be evident from the finding that it was based upon a mistaken view of the law.

6. SAME—EXCEPTIONS TO FINDINGS.
A separate exception, made in general terms, to each one of the findings of fact by the court, is sufficient whereupon to base a right to have the questions reviewed on appeal.

Appeal from circuit court, Milwaukee county.

J. W. Wegner and *Turner & Timlin*, for appellant. *Cotzhausen, Sylvester, Scheiber & Sloan*, for respondents.

TAYLOR, J. This action is brought to recover against the respondents as sureties upon the official bond of Edward Ehlers, deceased. The material facts in the case are the following: At the general election, in 1872, Edward Ehlers was elected treasurer of the county of Milwaukee, and he assumed his office in January, 1873; his term of office expired in January, 1875. Upon rendering his final account to the county it was found that he had converted something over $10,000 of the funds belonging to the county, and was unable to, and failed to, pay that amount to his successor in office, as required by law. When he assumed his office, in 1873, there came into his hands, as treasurer of said county, two separate funds. One fund was what is termed the general fund of the county, consisting of the moneys received from taxation and other sources, the custody and disbursement of which was, by the general laws of the state, committed to the treasurer of the county. The other fund was a special fund arising from a sale of the bonds of the county to raise money for the special purpose of erecting a court-house for the use of said county. When Ehlers assumed his office, in January, 1873, there was the sum of $94,073 in the hands of his predecessor in office, belonging to this special fund; and on the eighth day of January, 1873, this sum was delivered to the said Ehlers, as treasurer of said county, and by him deposited, on that day, in the Second Ward Bank of the city of Milwaukee, in said county, to his credit as treasurer of said county of Milwaukee, and an account opened by said Ehlers as treasurer of said county with said bank. On the bank-books the account was designated as "The Court-House Fund." Before entering upon the duties of his office, the said Ehlers gave his bond, with satisfactory sureties, required to be given by the treasurer under the general law of the state, and at the same time he gave a bond, as required by chapter 400 of the Private and Local Laws of 1871. Section 3 of said chapter 400, Laws of 1871, after providing how the bonds of the county should be issued, and how negotiated, provides "that the county treasurer shall keep and maintain all moneys received from the sale of the bonds, so to be issued, in a fund separate from all other moneys belonging to said county, and no part of the said bonds, or of the money arising from the sale thereof, shall be expended for, or applied to, any purpose, except to defray the expense of building a court-house for said county; and the said treasurer and his sureties shall be liable to said county for misapplication of the same, or any part thereof; and the said treasurer, before he shall receive said bonds for any purpose whatever, shall execute to the county board of supervisors of said county a bond, with three or more sureties, in the penal sum of double the amount of the bonds so to be received by him, conditioned that he will perform faithfully all orders and resolutions of said county board of supervisors which may be passed by virtue of the powers conferred upon said board by this act; that he will keep the bonds received by him safely; *that he will keep the moneys received by him, and arising from the sale of said bonds, safely and separately from all other moneys belonging to the said county of Milwaukee, and that he will not pay out the same, nor any part thereof, except in the manner herein prescribed.*" The act then provides for the approval of such

bond. Section 5 of said act provides that all county orders, drawn on the treasurer of said county, which are to be paid out of the moneys received on the sale of said bonds or any part thereof, shall contain the words following, to-wit: "On court-house contracts." And the treasurer shall pay no county orders, drawn on him or against the said county, out of moneys received by him in the sale of said bonds, or any part thereof, unless such order or orders shall contain the said words, "on court-house contract." And the chairman of said county board of supervisors is hereby prohibited from signing, and the clerk of said board from countersigning, any county order of said county which shall contain the said words, "on court-house contract," unless the consideration for such order be for work done, or materials furnished, or both, in the construction and erection of said court-house. When Ehlers assumed the office of treasurer, in 1873, the bonds had been sold by his predecessor in office, and there remained in his hands the said sum of $94,073 of the money received from the sale of said bonds, which had not been expended in the construction of said court-house up to that time, but was subject to the orders of the county board for that purpose. Before said predecessor paid over this $94,073 to Ehlers, his successor in office, said Ehlers executed his bond to the said county board of supervisors in the penal sum of $200,000, with the respondents as his sureties, conditioned as follows: "Whereas the above-bounden Edward Ehlers was, on the fifth day of November, A. D. 1872, elected county treasurer of Milwaukee county for the term of two years commencing on the first Monday of January, 1873, and whereas William Kennedy, the present county treasurer of said county, has in his hands certain moneys received by him, and being the proceeds of the sale of certain bonds issued by said county of Milwaukee, and sold for the purpose of raising money to build a court-house for said county: Now, therefore, the condition of this obligation is such that, if the said Edward Ehlers shall keep the said moneys received by him, and arising from the sale of said bonds, safely and separately from other moneys belonging to the said county of Milwaukee, and shall not pay out the same or any part thereof, except in the manner provided by chapter 400 of the Private & Local Laws of Wisconsin of the year 1871, then this obligation to be void, otherwise of full force, effect, and virtue." It is upon this bond this action is founded.

In 1874 the legislature passed an act in regard to this court-house fund, viz., chapter 178, Laws 1874. Section 1 of this chapter reads as follows: "That all moneys heretofore raised in the county of Milwaukee under and in pursuance of chapter 488 of the Private & Local Laws of 1870, chapter 400 of the Private & Local Laws of 1871, as amended by chapter 40 of the Private & Local Acts of 1872, entitled 'Acts to empower the county of Milwaukee to raise money to build a court-house,' or either of said acts, and not expended, be and the same is hereby turned over to the general fund of the treasury of said county, and made a part thereof; and that the treasurer and his sureties be and they are hereby made liable for said money, the same as any other money in said county." This was published March 27, 1874, and took effect on that day. The acts of 1870 and 1872, referred to in the acts of 1874, do not in any way change the provisions of chapter 400, Laws 1871, except that the act of 1872 allowed the issuing of bonds to a larger amount than the act of 1871. The evidence in the case shows that on the twenty-seventh of March, 1874, when chapter 178, Laws 1874, took effect, there remained of said court-house fund, unexpended, for the purposes for which it was raised, the sum of $12,814.84, and on the second day of May, 1874, the sum of $12,564.84; and that on this last-mentioned date the said Ehlers, county treasurer, made a formal transfer of said $12,564.84 then appearing to the credit of said court-house fund to the account of the general funds belonging to the county, and no further account was thereafter kept of said court-house fund separate from the general funds of the county.

It also appears from the records of this court, and from the evidence produced upon the trial of this action in the circuit court, that the said county board of Milwaukee had, previous to the commencement of this action, brought an action upon the general bond of said treasurer, against him and his sureties on such general bond, for the purpose of recovering the said sum of over $10,000 which remained unaccounted for by said treasurer. That case was referred to the Hon. A. R. R. Butler of Milwaukee, to hear, try, and determine the same; and after hearing the evidence in the case he found that, prior to March 27, 1874, Ehlers had converted, and appropriated to his own use, $10,150.30 of the said court-house fund, and that he did not convert or appropriate to his own use any other moneys of the county, except such as were a part of the sum of $94,073, being the money belonging to the said court-house fund; and he also found, as a matter of law, that the sureties on the treasurer's general bond were not liable to the county for the conversion of said court-house fund, if converted before the act of March, 1874, took effect. This opinion and decision of Mr. Butler was confirmed by the circuit court, and upon appeal to this court the judgment in that case was affirmed. See *Milwaukee Co.* v. *Ehlers*, 45 Wis. 281. The cases in 45 Wis. 281, and *Milwaukee Co.* v. *Pabst*, Id. 311, settled several questions of law which arise in this case. It was decided in these cases—*First*, that the law of 1871 required that the special bond therein specified should be given, not only by the county treasurer who was charged with the negotiation of the court-house bonds, but also by his successor in office during the existence of such fund, and that consequently the bond, upon which this action is brought, was given in pursuance of the statute; *second*, that the sureties on the treasurer's general bond were not to be held responsible for the safe-keeping and disbursement according to law of the special court-house fund in the hands of the treasurer. These questions of law, having been settled in the former case, there does not seem to be any question to settle in the present case, except one of fact. It is admitted that when the treasurer rendered his final account in January, 1875, he was short something over $10,000, which neither he nor his sureties have made good in whole, and that on the trial of this action there still remained due from the treasurer to the county the sum of $8,260.76, with interest thereon from the twentieth of January, 1875. The only question is whether this sum is chargeable to the sureties on the general bond, or to the sureties on the special bond, upon which this action is now brought.

The learned circuit judge who tried the case made his findings 10 in number. As to the first four findings there is no dispute. Ehlers was the treasurer, the defendants executed the bond in suit, the bond was approved on the eighth of January, 1873. William Kennedy, the predecessor in the office of Ehlers, paid over to him the said sum of $94,073, belonging to the court-house fund. The fifth finding, if it means that Ehlers did in part transfer the unexpended balance of the court-house fund to the account of the general fund, we think as hereinafter stated, it is not supported by the evidence; but if this finding simply means, as we are inclined to think the judge intended it to mean, that a formal entry was made on the treasurer's books, transferring such balance to the account of the general fund, then there is no dispute as to that finding. The sixth, seventh, and eighth findings are not questioned.

The following are the ninth and tenth findings: "That the general funds of the county, for a short time after entering upon his office, were kept by Ehlers on deposit in the Bank of Commerce; but soon thereafter, to-wit, on the tenth day of February, 1873, the official account as treasurer was discontinued, and the moneys belonging to the county were commingled by him with his private funds, and used indiscriminately for official and individual purposes; which state of things continued uninterruptedly until the end of his term. That the proofs do not demonstrate with sufficient certainty to satisfy the court in all instances to what fund moneys deposited or drawn belonged, nor to which ac-

count they should be charged, so that it has not been possible for it, having called in expert accountants to its aid, to state an account which will indicate when the deficiency arose, or to which fund it belongs. That the plaintiff, having the burden of proof, fails to overcome the effect of the testimony of Ehlers that the deficiency did not arise in the court-house funds, and the testimony of Chas. C. Schmidt, tending to show that from the twenty-seventh day of March, 1874, until the second day of May, 1874, there was on deposit in the Second Ward Savings Bank, to the credit of the 'Court-House Fund, Edward Ehlers, Treasurer,' moneys in excess of the amount then due and owing, and that the balance of this fund on May 1, 1874, was, on the second day of May, 1874, drawn out in two certificates of deposit, which were applied in discharge of interest on court-house bonds, and the school fund properly chargeable to county expenses. That it is not established by the evidence in this case, as presented, to the satisfaction of the court, and this court cannot find as a matter of fact from the proofs adduced, that, between the eighth day of January, 1873, and the second day of May, 1874, the said Ehlers had misapplied, or appropriated to his own use and benefit, any of the moneys to the credit of the court-house fund, as charged in the complaint." These findings of fact were each separately excepted to by the appellant. The learned counsel for the respondents urges that because the plaintiff excepted to each and every finding of fact, although there be a separate exception to each finding, this amounts in law to one general exception to all the findings; and he cites several decisions of this court which he claims sustain this contention. We do not think the authorities cited sustain the learned counsel in his proposition. All the cases referred to were cases in which the exception was a general one to several findings, and not separate exceptions to each finding. If the party is of the opinion that none of the findings of fact are sustained by the evidence, we can conceive of no other way in which he can bring the several findings before this court for review except by a separate exception to each of them. There can be no doubt, we think, but that the exceptions are sufficient to bring the question before this court as to the sufficiency of the evidence to sustain the findings. The only material findings, about which there is any question, are the ninth and tenth findings above quoted. The learned counsel for the respondents invokes the well-established rule in this court that a finding of fact by the trial court will not be reversed by this court on appeal, unless the decided preponderance of the evidence is against the finding. We are not disposed to question this rule. But if it be evident from the finding that the trial court based its findings upon a mistaken view of the law as to the legal effect of the evidence produced, or upon the question as to the party upon whom the burden of proof is cast at any stage of the trial, and his finding is controlled by such mistaken view of the case, then the rule above mentioned does not apply, and this court must find the fact upon the evidence without the aid of a finding by the trial court. It seems to us that the learned circuit judge based his ninth and tenth findings—*First*, upon the idea that it was necessary for the appellant to prove as a fact, that the treasurer had appropriated the court-house funds before the second day of May, 1874, "to his *own use and benefit*," in order to show that he had misappropriated it in a way to charge his sureties for such misappropriation; and, *secondly*, in the ninth finding, the learned circuit judge says: "That the proofs do not demonstrate with sufficient certainty to satisfy the court, in all instances, to what funds money deposited or drawn belonged, nor to which account they should be charged." And he also seems to give considerable weight to the simple statement, without any explanation made by Ehlers, that the deficiency was not in the court-house fund, and the opinion of Chas. C. Schmidt, the expert witness, that he thought the deficiency in the funds did not arise until the latter part of 1874. The assertion of Ehlers can have no weight, when not sustained by the evidence in the case, and the opinion of Schmidt is in plain contradiction

to the evidence of Ehlers, who testifies that he began to abstract the funds of the county for his own private purposes early in 1873.

Certain facts seem to us to be clearly established by the evidence: (1) That the court-house fund was deposited by Ehlers in the Second Ward Bank when it first came into his hands in January, 1873; (2) that he never had any of those funds in any other place until after the second day of May, 1874; (3) that only the sum of $81,508.16 was ever drawn out of said court-house fund upon orders which the treasurer was authorized to pay out of such fund; and (4) it is conclusively shown that part of the court-house fund had been paid out by said treasurer, at different times, before the fifth day of February, 1874, and on that day it was all paid out, by the order of Ehlers, to the state treasurer, in part payment of taxes due from the county of Milwaukee to the state, and his account at the Second Ward Bank was overdrawn $5,890.68. Although the account of the treasurer at the Second Ward Bank shows overdrafts upon his funds in that bank previous to the fifth day of February, 1874, there probably were no overdrafts of his whole account at that bank up to that date. It appears that this bank account was reduced the sum of $25,000 on the twenty-second day of April, 1873, but the evidence shows that this was not in fact a withdrawal of that amount of funds from the bank, but is charged in the bank account as bills payable, and, as explained by the testimony, was only a nominal withdrawal, for the purpose of the computation of interest. This sum was afterwards, and on the twenty-seventh day of October, 1873, again added to the credit of the treasurer, without any moneys being in fact paid into the bank at that time by the treasurer. Up to the said fifth day of February, 1874, Ehlers always had to his credit, in said Second Ward Bank, a large portion of the court-house fund, although at times drafts had been made on it, for general county purposes, to the amount of several thousand dollars. The evidence, we think, clearly establishes the fact that the treasurer, Ehlers, never at any time kept the court-house fund at any other place than in the Second Ward Bank. It also now appears, pretty satisfactorily, from the evidence, that all the money drawn from the Second Ward Bank was drawn in payment of orders properly drawn upon the court-house fund, to the amount of $81,508.16, and that the other order or claims, paid by the treasurer by check upon the Second Ward Bank, were drawn to pay claims, or were claims against the county of Milwaukee.

There are but two material questions in this case as the evidence now stands: *First.* On the fifth day of February, 1874, when Ehlers paid out the whole of this court-house fund to pay a general debt of the county, did he violate the conditions of the bond upon which this action is brought? *Second.* If such disposition of the fund was a violation of his bond, did he afterwards, and before the twenty-seventh day of March, 1874, when chapter 178, Laws 1874, took effect, or on the second day of May, 1874, when he formally transferred the court-house fund to the general fund, replace, with his own money, the amount of such fund which ought then to have been in his possession?

That the paying out this court-house fund for general county purposes, previous to the day when chapter 178, Laws 1874, took effect, was a breach of the special bond upon which this action is brought, there can be no chance for dispute. The statute creating this fund is very specific in its provisions; it expressly declares for what purposes it shall be used, and negatives the right to use it for any other purpose; requires the treasurer to keep it separate and apart from all other funds in his possession, and the bond given binds the treasurer to keep it separately, and not to use the fund, except in the manner and for the purposes mentioned in the statute. There was, therefore, a clear breach of the conditions of this bond on the fifth of February, 1874. The breach was a substantial breach, and can only be cured by showing that the funds so wrongfully used by the treasurer were returned to said fund by him previous to the day when the balance in the Second Ward Bank

was transferred to the general fund, or at some time thereafter, and before the end of his term of office. This was the effect of the decision of the former case of *Supervisors* v. *Ehlers*, 45 Wis. 281. It was substantially held in that case that, having shown a misappropriation in the special fund, February 5, 1874, it became the duty of those claiming that such misappropriation had been made good by the treasurer to show that he had, on or before the day that the general fund was credited with the balance that ought to have been on hand, made the fund good by replacing the amount, so misappropriated, to the credit of said fund. And it was also held in that case that the replacing to the credit of that fund the amount misappropriated, by placing to its credit the money belonging to the county for general purposes, did not cure the default. See pages 290–292 of said report. If the former decision did not go to that extent, it certainly went to the extent of holding that the treasurer could not make the default good by placing to the credit of that fund moneys he has received belonging to the general fund, unless he showed that he had in his possession, at the same time, money enough to make good the deficiency in the special fund in the Second Ward Bank, and also an amount equal to all the general funds of the county, not then legitimately paid out for general county purposes. See *State* v. *Mills*, 55 Wis. 229, 12 N. W. Rep. 359.

The evidence as presented to this court in this case is substantially the same as that contained in the former record, with the exception that in the former case checks or drafts upon the funds in the Second Ward Bank, drawn by the treasurer upon that fund to the amount of several thousand dollars, were not clearly shown to have been drawn by the treasurer for any public purpose, and therefore it might have been urged, and perhaps was urged, that such checks and drafts were drawn for the personal benefit of the treasurer, and not in payment of claims against the county. On the trial in this case most of these checks and drafts are shown to have been drawn to pay legitimate claims against the county. But this evidence does not change the fact that the special fund was entirely misappropriated, on the seventh day of February, 1874. In law it was as much a misappropriation of this special fund to pay it out in discharge of general claims against the county, as to pay it out for personal claims against the treasurer. That this deficiency was not made good in the special fund, after the seventh of February, and up to the second of May, 1874, when a formal transfer of the special fund was made to the account of the general fund, seems to be very clearly shown by the evidence, as contended for by the learned counsel for the appellant in their brief upon this point. The evidence shows that, after the seventh day of February, 1874, and previous to the second day of May, 1874, all the money deposited in the Second Ward Bank by the treasurer was money belonging to the general funds of the county, except two sums of interest, amounting in all to the sum of $569.18. The moneys belonging to the county, deposited in said bank during the same time, amounted in all to the sum of $60,796.47. The money drawn out of the bank in the mean time for all purposes was $38,356.43. The overdraft, on the seventh of February, was $5,890.68. This, added to the money drawn out, makes $44,247.11. This sum, deducted from the amount of county funds paid into the bank, leaves the sum of $16,549.36. Add to this the two items of interest, $569.18, and the balance remaining in the bank, May 2, 1874, is $17,118.54. The evidence shows that this amount of money was in the Second Ward Bank, to the credit of the treasurer, May 2, 1874, when the formal transfer was made to the general fund of the balance remaining unexpended of the court-house fund, namely: $12,562.88. It is evident, however, that none of this money was the private property of the treasurer, except the sum of interest above mentioned, $569.18. All the balance of the money in the bank was the money of the county, belonging to the general fund. There was nothing therefore in the bank account belonging to the treasurer which could be lawfully applied to make up the deficiency in the special fund

at that date, unless it was made to appear that he had, at that time, money on hand, over and above the public money in his hands, sufficient to make up such deficiency in said special fund. That he had no such money in his possession or under his control at that date, seems to be fully established by the evidence, as is also very clearly shown in the brief of the learned counsel for the appellant. The evidence shows that, on the second day of May, 1874, there should have been in the hands of the treasurer of the special and general funds the sum of $68,162.57. The evidence further shows that on said day the treasurer had, in the Second Ward Bank, to his credit, the sum of $17,118.54, in the Bank of Commerce the sum of $29,281.94; and it also appears that he then held a note of Aschermann & Co. for money loaned, $5,000, which was treated as public money. These several sums amount to $51,600.48, or $16,762.12 less than the actual balance of the funds not paid out by him at that time, and which he should have had on hand. The evidence is quite satisfactory that Ehlers had no other money at the time except, perhaps, a few thousand dollars, which the evidence tends to show was kept in the office for the payment of small claims without drawing upon his bank account. The evidence strongly tends to show that the sum so kept in the office did not usually exceed the sum of $3,500; many times it was much less, and at some times it may have been more; but the probabilities are against it exceeding that sum. There is some evidence in the case showing that at times checks were made on the bank accounts to replenish this office fund, but that such checks certainly did not exceed the sum of $3,500 at any one time. Giving the treasurer the benefit of this $3,500, and he was, on the second day of May, 1874, short in his accounts with the county about $10,100; this shows that on that day he had not made good the deficit in the special court-house fund. If it be urged by the respondents that the evidence does not conclusively show that the treasurer had not other funds, this objection is answered by the suggestion that the appellant, having shown a misappropriation of this special fund on the seventh of February, 1874, it was for the respondents to show that it had been made good on the second of May, 1874, and not for the plaintiff to show the negative. If the evidence is defective or uncertain, the fault is the respondents', and not the plaintiff's. See *Coons* v. *People*, 76 Ill. 383; *U. S.* v. *Earhart*, 4 Sawy. 245. The same result is reached in other ways as shown by the brief of counsel for appellant. If the treasurer did not have this money on hand, May 2, 1874, when he made a formal transfer of the same to his general fund account, then his sureties on that account are not liable for the default. The case is similar to the case of two sets of bondsmen for the same officer, when he is elected to succeed himself. The bondsmen for the first term are liable for all defaults during that term; the bondsmen for the second term are liable for all defaults during the second term, and a mere formal transfer of any balance which ought to have been on hand at the expiration of the first term to the account of the second term will not make the second bondsmen liable, when the fact is established that no funds were in fact on hand to transfer to the account of such second term. *U. S.* v. *Earhart*, 4 Sawy. 245; *Bruce* v. *U. S.*, 17 How. 437; *Vivian* v. *Otis*, 24 Wis. 518; *State* v. *Mills*, 55 Wis. 229, 12 N. W. Rep. 359. In the case at bar the general bondsmen are liable for any deficit in the general funds of the county; the bondsmen on the special bond are liable for any deficit in the special fund; but by the act of March, 1874, the special fund is transferred to the general fund, and after such transfer the general bondsmen became liable for the fund so transferred; but when it appears that such transfer was a mere formal one, and that no money from the special fund ever in fact passed to the general fund, it is clear, under all the authorities, that the bondsmen upon the general bond are not liable for the sum which ought to have been transferred to the general fund, but was in fact not transferred.

If the evidence be applied to the situation of affairs on the twenty-seventh

of March, 1874, when the act of the legislature declared the balance of the special fund should thereafter be considered as a part of the general fund, and that the general bondsmen should thereafter be responsible for the same, the evidence does not make any better showing in favor of the special bondsmen. The evidence having, as we think, satisfactorily shown that, when the formal transfer of the balance of the special court-house fund was made by Ehlers on his official books, on May 2, 1874, and on the twenty-seventh day of March, 1874, when the act of the legislature declared that this balance should thereafter be a part of the general funds of the county, and that the bondsmen for the general fund should be thereafter accountable therefor, there was, in fact, no balance of such special fund in the hands of the treasurer, and therefore none was transferred to the general account, either by the formal transfer, made on the treasurer's book, or by the act of the legislature of March 27, 1874; it is evident that, upon legal principles, the general bondsmen are not liable for such balance of the special fund, and that the special bondsmen are liable for its misappropriation, unless it has been clearly shown that, after said dates, said treasurer has paid out of his personal funds claims chargeable to the general funds of the county, an amount equal to the deficit in such special fund. Had this been shown, the default of the special bondsmen would have been cured, and the ultimate shortage would be chargeable to the general bondsmen. See *State* v. *Mills*, 55 Wis. 229, 244, 12 N. W. Rep. 359. Such payment out of his personal funds would have been an equivalent, so far as the county was concerned, to making an actual transfer of the money, at the dates mentioned, in the absence of evidence showing that the treasurer, after such dates, had actually converted to his own use any of the general funds of the county. There is no evidence in the case showing that any such thing was done by the treasurer. But the learned counsel for the respondents insists that there is evidence in the case which tends to show that this must have been done. He insists that the evidence shows that on the first day of November, 1874, the treasurer had deposited in the Bank of Commerce money to his credit, amounting to more than $10,000 more than the amount of the public funds then in his hands; and he therefore argues that he must have made up all deficiencies in his accounts with the county to that date, and had a surplus to his personal credit of over $10,000. If the fact was clearly established, as it is claimed by the learned counsel of the respondents, there would be great force in the claim that the deficit in the treasurer's account must have taken place after that date. But upon a consideration of all the evidence in the case, we think the fact is not established. The evidence, it is true, shows that, on the first of November, 1874, the credit of the funds in the treasurer's hands was only the sum of $3,754.84, and that on that date he had a credit of $13,715.64 in the Bank of Commerce. This would, as claimed and unexplained, show that the treasurer was not short on that particular day. But there is other evidence which pretty clearly shows that this apparent surplus of funds on that particular day was merely apparent and not real.

The evidence also shows that on the first day of October, 1874, the treasurer had to his credit only the sum of $4,174.07, and that, on the same day, the funds in his hands had a credit of $30,289.28; that on December 1, 1874, the treasurer had nothing to his credit in said bank, and had overdrawn his account $609.24, and that the funds in his hands had a credit of $13,743.83. This apparent surplus in the bank, November 1st, is, we think, accounted for by the learned counsel for the appellant. The evidence shows that at this time a loan of $25,000 was made by the county of the Bank of Commerce to meet the current demands upon the treasury. It is true that in his annual report the treasurer says that, on the second of November, 1874, he received the avails of this loan, viz., $24,316.70; but as the evidence in the case shows that his balance in the Bank of Commerce constantly decreased after the first

of November, 1874, until it was overdrawn, December 1, 1874, it is quite probable that he had the benefit of this $24,316.70 in his account with the bank on the first of November, instead of on the 2d, as stated in his report. There is no other plausible way of accounting for the apparent surplus of funds in the hands of the treasurer on the first of November, 1874, and this supposition will make it consistent with all the other evidence in the case, giving the county funds credit for this $24,316.70 on the first of November, 1874, and then the funds would have a credit on that day of $28,071.54, and his bank account, being but $13,715.64, leaving him short $14,354.90, which is consistent with all the other evidence in the case. It is urged by the learned counsel for the respondents that the shortage in the treasurer's account was undoubtedly created by his expenditures of the public funds in his attempt to be re-elected in 1874. We do not think this contention can be sustained, for two reasons: *First*, it is contrary to the direct evidence of Mr. Ehlers, who testifies that the misappropriation of the funds commenced early in his term of office, and continued until about the last of November, 1874; and, *second*, this claim would, upon the theory of the learned counsel for the respondents, that Ehlers had on hand, November 1, 1874, about $10,000 more than he was indebted to the funds in his hands, prove that, in the month of November, 1874, he expended for his personal purposes the said sum of $10,000, and the further sum of $14,000, or over $24,000; for the evidence shows that, on the first of December, 1874, Ehlers was short in his accounts with the county over $14,000. Of this shortage, the general bondsmen paid, in December, 1874, $3,500, leaving a balance of over $10,000 short at the expiration of his term of office, and being a less amount than the shortage of the special court-house fund, May 2, 1874. Notwithstanding the reputed liberality of candidates for county and other offices in the city of Milwaukee, we are not prepared to find, upon the uncertain evidence in this case, that Mr. Ehlers expended $24,000 in his attempt to be re-elected in November, 1874, but are rather inclined to believe that the sum of $3,500 which was immediately afterwards contributed by his general bondsmen towards making up the shortage in his accounts, was a nearer approach to his expenditures in that contest.

There is nothing which has been done by the county board of supervisors which should estop the county from enforcing its claim against the respondents. See *Jefferson Co.* v. *Jones*, 19 Wis. 51; *Kewaunee Co.* v. *Knipfer*, 37 Wis. 496; *Supervisors* v. *Birdsall*, 4 Wend. 453. After a careful consideration of all the evidence in the case, we see no reason for changing the opinion we came to in the former case, viz., that the shortage in the account of the treasurer, to the extent of at least the balance remaining unaccounted for, was in the court-house fund, and not in the general fund.

The judgment of the circuit court is reversed, and the cause is remanded, with direction to that court to enter judgment in favor of the appellant, and against the respondents, for the sum of $3,260.27, with interest on said sum at the rate of 7 per cent. per annum, from the twentieth day of January, 1875, to the date of the entry of such judgment.

MAGILL and another *v.* STODDARD.

(*Supreme Court of Wisconsin.* November 22, 1887.)

1. EVIDENCE—PAROL—WRITTEN CONTRACT.
   Plaintiffs sued to recover the agreed compensation for procuring a purchaser for certain land of defendant. The written contract stated the amount for which the land was to be sold, and that plaintiffs were authorized to execute a contract for the sale thereof, but did not state the terms of sale. *Held*, that parol evidence was admissible to show a verbal agreement as to such terms.
2. PRINCIPAL AND AGENT—REAL-ESTATE AGENTS—COMMISSIONS.
   Plaintiffs, real-estate agents, agreed, for a certain per cent. on the price, to procure a purchaser for defendant's land. The evidence showed that plaintiffs procured

a purchaser for the land on the terms agreed upon, and that defendant then refused to sell, but wanted a higher price. *Held*, that the evidence warranted a verdict for plaintiffs for the agreed compensation.

Appeal from circuit court, La Crosse county.

Fruit & Bundley, for respondents. *Prentiss, Hughes & Miller* and *Morrow & Masters*, for appellant.

ORTON, J. This action was brought in a justice's court to recover the per cent. or compensation alleged to have been promised by the defendant to the plaintiffs for procuring a purchaser for certain lands of the defendant, upon the terms agreed upon by them. The defendant recovered judgment before the justice, which was appealed to the circuit court, and in that court the plaintiff obtained a verdict for the said compensation and interest. There was a motion for a new trial on the sole ground that the verdict was contrary to the law and the evidence, which was overruled, and exception taken. From the judgment on this verdict this appeal is taken.

There are some exceptions to the ruling of the court in admitting certain evidence, and to the charge of the court in some particulars, but the main question is upon the legal effect of the facts proved, or whether the verdict is contrary to the law or evidence. We have examined the whole charge, and particularly the parts thereof excepted to, and can find nothing objectionable, if the evidence admitted was competent. There is only one exception to evidence urged in the brief of the appellant's counsel, or that need be considered. Whether the contract proved is valid, will be considered with the legal effect of all the evidence to warrant the verdict.

The contract is as follows, viz:

"LA CROSSE, WISCONSIN, August 18, 1885.

"*To Magill Brothers, La Crosse, Wisconsin* — GENTLEMEN: You are hereby to sell, or procure a purchaser for the sale of the following real estate and premises, [described] at any time within one year from date, for the consideration of $1,600, and you are authorized to execute a contract for such sale to such purchaser or purchasers in our name, upon the foregoing terms; and for the selling of or procuring a purchaser for such premises, I agree to pay you five per cent. commission upon said $1,600. In case said premises are sold by us, though not through your procurement within such time, we agree to pay you ——— per cent. commission on the purchase money.

[Signed] "CHAS. L. STODDARD."

It will be observed that the terms, whether cash down or some of it on time, are not given, but perhaps it might be assumed that such terms must be cash down.

1. There was testimony offered on behalf of the plaintiff to show that the terms were fixed, by parol agreement, to be $600 cash, and the balance to be secured by mortgage upon the premises. This was objected to by the defendant's counsel, on the ground that parol evidence could not be admitted to vary or alter the written contract. On the ground that the written contract shows only part of the transaction, and is silent as to the terms of the sale, such evidence is competent to supply the defect. *Frey* v. *Vanderhoof*, 15 Wis. 397; *Bank* v. *Bank*, 16 Wis. 120; *Jones* v. *Keyes*, Id. 562; *Hahn* v. *Doolittle*, 18 Wis. 196; *Peterson* v. *Johnson*, 22 Wis. 21; *Jilson* v. *Gilbert*, 26 Wis. 637; 1 Starkie, 267; 2 Pars. Cont. 66. It would seem that the terms upon which the sale might be made were not expressed in the written contract, or implied therefrom, from the fact that the plaintiffs were authorized to *execute a contract* for the sale, which would not be necessary if the terms were cash down. What should be the terms of the contract of sale seem to have been omitted. But if the written contract was doubtful or obscure on this point, parol evidence would be competent to make it certain. *Musgat* v. *Pumpelly*, 46 Wis. 660, 1 N. W. Rep. 410. But on the ground that the contract expressed or

implied cash terms, then the testimony was equally proper to show a change of the contract, or a new one in that respect. *Brown* v. *Everhard*, 52 Wis. 205, 8 N. W. Rep. 725; *Goss* v. *Lord Nugent*, 5 Barn. & Adol. 58. The contract was, therefore, that the plaintiffs should find a purchaser of the premises for $600 cash, and the balance on time secured by mortgage upon the premises.

2. Did the evidence warrant the verdict? Edwin B. Magill, one of the plaintiffs, testified substantially that about eight weeks after the date of the contract, he procured a purchaser for said land in the person of one James Canterbury on said terms. It is argued by the learned counsel for the appellant that such terms were not agreed upon between the witness and said Canterbury, but that the latter offered only $400 cash down. The learned counsel omits to notice the testimony of the witness upon this point. After testifying that Canterbury wished to get the land if he could, by paying only $400 down, the witness was asked to state the conversation, and he answered: "He said he would take the farm; that was settled." He was then asked: "At what?" and answered: "At $1,600, and $600 down." It is true that Canterbury wished to get the land if he could by paying only $400 down, and the witness tried to have the defendant so modify the terms, but he refused to do so. He testified further that the next morning he told the defendant he had a purchaser for the farm, and he seemed pleased with it, and that he went to Canterbury to get some money to settle the bargain, and found him sick and unable to do business. In two or three days afterwards, the witness received a note from the defendant, which was then mislaid or lost, saying that he had received a letter from his wife, who was east, saying that she was unwilling to sell the farm for $1,600, and would not sign the deed. The defendant, therefore, refused to carry out the bargain on those terms. The witness thereupon demanded said commissions that he had earned, and the defendant refused to pay them until the farm was sold upon the new terms they might thereafter fix, and the witness told the defendant that they would have nothing more to do with it, and he saw said Canterbury as soon as he was able to be seen, and told him that he could not sell him the farm, and the above reasons why he could not do so. The said James Canterbury, as a witness for the plaintiffs, testified, substantially, that Edwin Magill, one of the plaintiffs, came to him in September, 1885, and proposed to sell him said premises for $1,600, $600 down, and the balance on mortgage, and that he agreed to purchase the same on those terms, and was able and willing to comply with said terms. This evidence, under the authorities, most clearly establishes the defendant's liability to pay the plaintiffs said commission of 5 per cent, upon the $1,600. The plaintiffs had fully performed the contract upon their part of furnishing a purchaser of said premises, on the terms agreed upon, and the defendant prevented the consummation of the sale to such purchaser on his own responsibility. The plaintiffs did all they agreed to do or were able to do. This would seem to be a very plain case, without any doubt or difficulty. The plaintiffs produced the purchaser ready and willing to purchase on the terms fixed, and the defendant revoked their authority to sell on those terms, and refused to carry out the sale, as in *Kelly* v. *Phelps*, 57 Wis. 425, 15 N. W. Rep. 385. The plaintiffs performed their contract, and were as entitled to receive their compensation as the plaintiff in *O'Connor* v. *Semple*, 57 Wis. 243, 15 N. W. Rep. 136; or as the assignee of the middleman in *Orton* v. *Scofield*, 61 Wis. 382, 21 N. W. Rep. 261. See, also, as in point, *Delaplaene* v. *Turuley*, 44 Wis. 31; *Stewart* v. *Mather*, 32 Wis. 344; *McGavock* v. *Woodlief*, 20 How. 221; *Fraser* v. *Wyckoff*, 63 N. Y. 448. There was evidence that the parties made another contract in November, following, for the plaintiff to sell the premises or procure a purchaser for the same, for $2,000 at a less per cent. But from the testimony of the plaintiffs, this was a new and independent agreement, and was not in any sense a modification of the first one, and the

plaintiffs always insisted upon their compensation according to the terms of the first one. The instruction of the court that this new arrangement to sell on different terms, would not destroy the plaintiffs' right to recover the commissions they had already earned, unless they agreed that the new privilege of selling it should be a payment and satisfaction of the first contract, was clearly correct, and the testimony for the plaintiff was that there was no such agreement, and so the jury must have found. The new contract, therefore, cuts no figure in the case on this appeal. The evidence warranted the verdict, and there was no error in the record. The judgment of the circuit court is affirmed.

MASSUERE v. DICKENS.

(Supreme Court of Wisconsin. November 22, 1887.)

1. LIBEL AND SLANDER—CALLING PLAINTIFF A "SKUNK"—ACTIONABLE PER SE.
Defendant published an article in the newspaper calling the plaintiff a "skunk." *Held*, that it was libelous *per se*.[1]

2. SAME—MITIGATION OF DAMAGES—EVIDENCE.
Plaintiff published a card in relation to defendant in reply to which the latter published a libel on plaintiff. Defendant on the trial offered the card in evidence, also to show a conversation between plaintiff and a third party prior to the publishing of the original card, but not known to defendant when he published his libel. *Held*, that the card could be introduced in mitigation of damages, but the conversation could not be shown.

3. SAME—REPUTATION OF PLAINTIFF.
Defendant published a libel on plaintiff in reply to a card published by him, and on the trial defendant offered to show plaintiff's reputation "for meddling and making insinuations in regard to his competitors in business." *Held*, that as there was nothing in either publication to call for such proof, it was properly refused.

4. SAME—MEANING OF WORDS—INSTRUCTIONS.
In an action for libel, the jury were instructed that to publish in a newspaper that a man is a skunk, "if it is intended, as it ordinarily would be * * * to render him ridiculous and odious," is libel. *Held*, that the words "as it ordinarily would be" were not error, as the jury were left to decide whether that was the intention of the publication.

5. SAME.
Defendant in a published article called the plaintiff "a skunk,—a thing as repulsive to the finer sensibilities of a man as your low insinuations and business practices are to your fellow-townsmen." *Held*, that as the article was libelous *per se*, the court, in assuming in his charge that the defendant called plaintiff a "skunk" and "disreputable in his business practices," did not depart sufficiently from the facts to call for a reversal.

6. SAME—INSTRUCTIONS—EXPRESSION OF OPINION BY COURT—REMISSION OF VERDICT.
Defendant introduced a card published by plaintiff. The court in his charge spoke of the card as "a mere piece of egotism." On direction of the court one-half of the verdict was remitted by plaintiff. *Held*, that even if such an expression of opinion by the court was error, the remission was sufficiently large to remove all grievance of the defendant, as the card was introduced only in mitigation of punitive damages.

Appeal from circuit court, Trempealeau county.

This is an action for damages by means of the publication of the following alleged libel:

"MASSUERE'S 'CARD' ANALYZED. I noticed in the Republican and Leader of November 26th a 'card' (?) from W. P. Massuere, referring to the recognition for the heroic services of John Kline in the late fire, in which he ungentlemanly and maliciously reflects upon the honor and manhood of myself. In self-protection I desire to state that the proximity of my buildings and lumber to the fire and other business houses, necessitated the saving of my property to protect the town. Had my buildings burned, no power at our

[1] As to what words are held to be actionable *per se*, see Pledger v. State, (Ga.) 3 S. E. Rep. 320, and cases cited in note; Funk v. Beverley, (Ind.) 13 N. E. Rep. 573.

command could have saved the entire village from destruction. One of the very first to have gone is the concern in which Mr. Massuere is interested. Hence the fight was made for very many others and not for me alone, as Mr. M. seems unprincipled enough to reflect. In regard to raising money to replace the coat said to have been lost by Mr. Kline, it appears that Mr. Kline went to Mr. Massuere to purchase a coat immediately after the fire; no coat could be found suitable in his stock, and they together went over to Bohrie Bros. & Maurer's, where one was obtained. The presentation of the coat to Mr. Kline, *gratis*, was only a just recognition of his services, and creditable to the gentlemen who contributed. But the solicitation was done by some one, probably by Massuere, very silently. He never solicited from me nor even mentioned the subject to me in any way, hence I had no chance to contribute to that particular fund. But I feel confident that upon a comparison of time it will be found that I had handed to Mr. Kline a money consideration, before a cent was subscribed by any man for the coat, and I think a sum very nearly the value of the coat; hence not wholly devoid of appreciation for valiant services. This much to the public in defense of my honor, and I know 'tis sufficient to the fair-minded, certainly to those who may know the situation. Now to Mr. Massuere, I desire to frankly say your stab is unprovoked and unmerited. I resent it as an act on your part devoid of principle, honor, and manhood. In no respect do I stand in your shadow, or that of any other man in this community in response to merited charity or public enterprise. Considering your low, mean, dirty, uncalled-for thrust, you must lose all self-respect, and I denounce you as only fit to be classed with that repulsive order of creation, the *Mephitis Americana*. If your ignorance is as limited as your sense of manhood, honor, and decency appears to be, you will be unable to comprehend the appellation applied to you, and to save you the further humiliation of seeking light from your neighbors, I will translate for your benefit: SKUNK,—a thing as repulsive to the finer sensibilities of man as your low insinuations and business practices are to your fellow-townsmen. [Signed] "R. L. DICKENS."

The card therein referred to is as follows:

"A CARD. Mr. J. Kline, of Waumandee, happened to be in town at the time of the fire, and took hold like a good fellow, and during the time lost his coat. He stood in the intense heat, and through his help with others, saved the hardware store of R. L. Dickens. Through the contributions of Proctor Bros., John Maurer, Emil Maurer, Dr. G. N. Hidershide, John Dressesdorfer, Peterson, Massuere & Co., Tim Selk, and J. M. Fertig, a coat was bought and thanks returned to John for his help.

[Signed] "W. P. MASSUERE."

The answer consists, in effect, of denials, admissions, and matters in mitigation of damages. On the trial the jury returned a verdict in favor of the plaintiff for $1,000. Thereupon, the defendant moved upon the minutes of the court to set aside the verdict, and for a new trial. On the plaintiff's filing a remission of $500 from the verdict, the court overruled said motion. Thereupon judgment was entered in favor of the plaintiff for damages, costs, and disbursements, amounting in all to $567.29, from which the defendant brings this appeal.

E. V. Nye, for respondent. *H. M. Lewis*, *S. Richmond*, and *Thomas Simpson*, for appellant.

CASSODAY, J. 1. This action is for damages by reason of publishing the plaintiff as a "skunk," with accompanying epithets. We think the article published by the defendant must be regarded as libelous *per se*, within the repeated decisions of this court, even when construed in connection with the card mentioned in it. It is unnecessary to restate the rule as to what constitutes such libel.

2. There was no error in excluding the conversation of the plaintiff with the witness Hensel, when he asked him to subscribe for the fund to buy the coat mentioned in the two publications. It is said to have been offered for the purpose of showing the spirit in which the plaintiff inaugurated the attack upon the defendant, which appeared in the card. The plaintiff's publication of the card, however, cannot, as we think, be regarded as a justification of the libel. It was, however, proper to be regarded in mitigation of damages, as it tended to provoke a reply. But what the plaintiff said to Hensel could have no such tendency, for it does not appear that, at the time of publishing the libel, the defendant knew or had any information of such conversation; and neither publication refers to it. Certainly the card cannot be regarded as libelous *per se*. The question here is not whether the plaintiff was moved to publish the card by actual malice, but how far it should go in mitigation of damages.

3. The defendant was allowed to prove the plaintiff's "reputation as to his business practices," in order to meet what was said about "business practices" in the libel. But error is assigned because the court did not also allow the defendant to prove by the same witness, what the plaintiff's reputation was "for meddling, making insinuations in regard to competitors in business." But there is nothing in either publication to make it the duty of the court to allow such additional proof. Besides, the defendant was allowed to make, substantially, such proof by two other witnesses.

4. Error is assigned because the court said to the jury: "Now to say of a man in writing, and to publish it in a newspaper that he is a skunk, *if it is intended, as it ordinarily would be* when such words are used, to render him ridiculous or odious in the eyes of the people who read the article, is libel." The court here merely states that such publication as therein mentioned when standing alone, if made with such intent, would be libelous, with the addition that it would ordinarily be so intended. Such addition is the only ground of criticism, but it was not said of the publication in question, certainly not of it as a whole, nor even of what was therein mentioned, if published with a different intention as the jury were at liberty to find.

5. Exception is taken because the court told the jury that "to publish in a newspaper of any one that he is guilty of low business practices, *meaning to have it understood* that in his business he is unfair, and disreputable, or dishonest, is libelous. *So if you believe* that by the publication of this article the *defendant intended* to represent the plaintiff as being disreputable, dishonest, and low in business transactions, and in the transaction of his business, *or* by calling him a skunk that he meant to make him ridiculous and offensive in the eyes of the people who should read the article, then it is a libel." What has just been said as to the other extract from the charge, seems to be equally applicable to both of these. It is said that the language thus used by the court is, by way of intimation, a departure from the language of the article. But, like the other quotation from the charge, they were each put hypothetically, or by way of illustration, with the qualification "meaning do have it understood" believing "the defendant intended," etc. In view of the fact that the article was libelous upon its face, and other portions of the charge submitting to the jury the question of mitigating circumstances, we do not feel authorized to conclude that the jury were liable to be misled by these portions of the charge.

6. On the subject of damages, the court, among other things, charged the jury: "If there was an adequate and sufficient provocation for it in the publication of the article, calculating to produce a prejudice against the defendant among his neighbors, it would go to mitigate the damages; so the publication of Mr. Massuere's is competent and proper to be considered in relation to this question whether the plaintiff is entitled to punitive damages. You want to examine that question, and see whether there is anything in

that article which ought to provoke a reasonable man to call his neighbor, even if he did not like him, such names as these. Evidently the article which Massuere published was in bad taste on the face of it. It looks like a piece of egotism, advertising his generosity in making a present to the man who had done well at the fire, *and I think it is difficult to see much more of it.* It does not say that Mr. Dickens was not there and that he did not give the man a present or anything of that kind. But on the face of it, it looks like *a mere* piece of egotism, and in bad taste on the part of the plaintiff, nor was there anything about all these circumstances that appear in evidence that would justify a reasonable, careful man to publish an article in which he used opprobrious names, in calling his neighbor a skunk and *disreputable in his business practices.* If there was, that circumstance should be considered by you as going in mitigation of punitive damages, and not of real or substantial damages, which the law mentions."

Exception is taken to all of this portion of the charge except the first and last sentences. It is said the court did not instruct the jury to consider the article as a whole, but dwelt upon "isolated words, sentences, or portions." But a large part of the article was confessedly harmless, and was treated by the court as "a very good reply" to what had been published by the plaintiff. It was the "calling names," and the characterizing the plaintiff in the defendant's article that the court was dealing with. Besides, the defendant made no request for the court to charge the jury to consider the article as a whole, for the presumable reason that it was at the time regarded as satisfactory. We do not think the court here misled the jury in assuming that the defendant called the plaintiff a "skunk" or "disreputable in his business practices." It is true that at first he merely denounced the plaintiff "as only fit to be classed with that repulsive order of creation the *Mephitis Americana.*" But this is immediately followed by a reference to the plaintiff's "ignorance" being such as to render him "unable to comprehend the appellation *applied to you,*" therefore, he said: "I will translate for your benefit: SKUNK,—a thing *as repulsive* to the finer sensibilities of man as your *low* insinuations, *and business practices are to your fellow-townsmen.*" To say that a man is "repulsive" and "low" in his "business practices" is, in effect, to say he is "disreputable" in such practices. At all events, the departure is not such as to call for a reversal in a case where the article is libelous *per se;* and hence the only question is one of damages, which was fairly submitted.

7. It is true, the court rather belittled the significance of the plaintiff's card, in giving the opinion that it was not "much more" than "a piece of egotism" or "a mere piece of egotism." This feature of the charge has generated more doubt in the minds of some of us than any other, but, after all, the question of fact upon which such opinion was given was squarely submitted to the jury for their determination. Many courts hold that such expression of opinion on a mere question of fact, which is finally submitted to the jury for determination, is not error. *Railway Co.* v. *Putnam,* 118 U. S. 553, 7 Sup. Ct. Rep. 1; *Porter* v. *Seiler,* 23 Pa. St. 424, 62 Amer. Dec. 341; *Kirkwood* v. *Gordon,* 7 Rich. Law, 474, 62 Amer. Dec. 418; and the cases cited in these references. But here the fact upon which such opinion was given related wholly to the mitigation of the punitive damages; and it appears from the record that, under the direction of the court, one-half the verdict returned by the jury was remitted by the plaintiff. This remission seems to have been sufficiently large to remove all grievance of the defendant by reason of such expression of opinion, even if it was error. Certainly we cannot say that the damages are now excessive. The judgment of the circuit court is affirmed.

McCaul, Assignee, etc., v. Thayer and another.

(*Supreme Court of Wisconsin.* November 22, 1887.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — JUDGMENT NOTE EXECUTED MORE THAN 60 DAYS PRIOR TO.

The provisions of Laws Wis. 1883, c. 349, § 2, that "every execution levy made under a judgment confessed against any such insolvent debtor within sixty days prior to an assignment for the benefit of creditors, or under a judgment entered on a judgment note by any such debtor within sixty days prior to any such assignment, and the lien of any such judgments upon real estate, shall be void and of no effect," do not apply to executions levied under judgments entered upon judgment notes executed more than 60 days prior to such assignment. CASSODAY and TAYLOR, JJ., dissenting.

Appeal from circuit court, Monroe county.

Finches, Lynde & Miller, Geo. Graham, and *Pinney & Sanborn,* for appellant. *Morrow & Masters* and *Jenkins, Winkler, Fish & Smith,* for respondents.

ORTON, J. The facts of this case are briefly these: On May 9, 1884, J. T. Bears and T. S. Powers made their joint and several notes, payable to the defendant Thayer in 90 days from date, for $6,809.70, with interest at 10 per cent. after maturity. "And, to secure the payment of said amount," the makers executed "an irrevocable power of attorney" to enter judgment and issue execution to collect the amount due on said note. On the same day the same parties made another note payable to the defendant Thayer within 90 days, for $18,677, with interest at 10 per cent. after due, which was secured by a like power of attorney. On January 24, 1887, judgment was entered, by virtue of said power of attorney, on the first said note for $7,789.70, the amount due thereon, with costs taxed at $6.87, and on the second said note for $23,268.42, the amount due thereon, with costs. On the same day executions were issued on said judgments to the defendant Angle, as sheriff, who, by virtue thereof, levied and seized upon the property of said Powers, consisting of a large stock of merchandise, hardware, and miscellaneous goods, contained in two stores and one warehouse of said Powers, at the city of Tomah, in this state. On the twenty-eighth day of January, 1887, said Powers duly made a voluntary assignment in writing of all his property, for the benefit of his creditors, to the said plaintiff McCaul, according to the statute. The said plaintiff McCaul, as such assignee, brings this suit against the defendants Thayer and Angle, alleging in his complaint the above facts, and also that, at the time of the entry of said judgments and the issuing of said execution, the said defendant Thayer knew, or had reasonable cause to believe, said Powers insolvent, and prays that said judgments and execution levies be set aside, and adjudged void; and that said defendant Thayer account, etc. The defendants demurred to the complaint, on the ground that it stated no cause of action, and the demurrer was sustained.

The said judgments having been entered upon powers of attorney, and the executions thereon having been levied within 60 days before the making of said assignment, the suit is predicated upon the last clause of section 2, c. 349, of the General Laws of 1883, which gives to an assignee the power necessary to institute any action or proceeding to set aside and avoid any levy named in the first part of said section, which reads as follows: "Every execution levy made under a judgment confessed against any such insolvent debtor within sixty days prior to any assignment for the benefit of creditors, *or under a judgment entered on a judgment note by any such debtor within sixty days prior to any such assignment,* shall be void, and of no effect." The only question in this case presented on the appeal is whether the levy of the executions upon these judgments is void within the meaning of the last clause above quoted. It is not contended by the learned counsel of the appellant

that this levy is void under the first clause, as a levy made under a judgment confessed against the assignor as an insolvent debtor, although the language is broad enough to include all judgments confessed in person, by *cognovit* or by an attorney under a power from the defendant. If the last clause above quoted did not exist, such would undoubtedly be the construction held, and this levy would be void as being under a judgment confessed against an insolvent debtor within 60 days prior to his assignment. What, then, is the use, meaning, and construction of the last clause. Do the words "by any such debtor," qualify the entry of the judgment or the judgment note? Is it the judgment note by any such debtor or the entry of judgment by any such debtor within 60 days? It must be confessed that this language is defective and uncertain, and perhaps strictly incorrect, and yet I think this clause is not void for uncertainty, but may be construed according to the ordinary rules of statutory construction.

It may be some light may be thrown upon the question as to what the words "by any such debtor" mean by the legislative history of the bill, which finally became the law. The first bill made the judgment note given within 60 days of the assignment void, and also any judgment entered upon any judgment note, by amendment, made within six months prior to such assignment, void. Then the scheme was changed by substitute, and every execution levy under such a judgment was made void, and two kinds of judgments are mentioned: one of judgments *confessed* in the first clause, and the other of judgments *entered* by power of attorney or on judgment notes in the second clause. This substitute was amended by inserting between the words "confessed" and "within sixty days" the words "by any such insolvent debtor." Then this amendment was further amended by striking out the word "by" in that clause, and inserting the word "against," as the law now is. The second clause was amended by adding after the word "note" the words "by any such debtor," as it now is. It would seem that it was intended to make the bill, as to judgments entered upon judgment notes, like the original bill as first amended, when the word "made" was inserted. In other words, the substitute, which finally became the law, changed the first bill by including judgments confessed against such insolvent debtor within 60 days, and making the levy under the judgments void, and striking out judgment notes given within 60 days, and retaining the clause as to judgments entered upon judgment notes "made by such debtor within sixty days," etc., omitting the word "made" in the confusion of amendments. It was evidently the intention of the legislature that execution levies under judgments entered upon judgment notes made more than 60 days prior to the assignment should be exempt from the operation of the act, as in the original bill. There does not seem to have been any design to change that clause, for the amendments are principally aimed at other parts of the section. The word "against" cannot be inserted in the place of "by" in this clause without violating the rule of construction that all the words must be retained that have meaning, and the maxim *expressio unius est exclusio alterius*. For the word "against" was inserted *ex industria* in the first clause, as to judgments confessed, and left out of the second clause, when the attention of the legislature was on that special subject.

It is evident that not very much aid can be derived from the history of the bill which finally became the law, but whatever significance there is in it is in favor of the construction that there is an ellipsis to be supplied by the word "made," or "given," or some equivalent word, before the word "by," and that the clause "by any such debtor" refers to the giving of the judgment note. When judgments confessed were made the subject of the first clause, there was no need of any other provision, for judgments confessed by an attorney under a power or on a judgment note were clearly included; so that there was no other reasonable use of any other provision, unless the legisla-

ture intended to limit the operation of that clause, and exclude judgments which, although confessed, were entered within 60 days prior to the assignment on judgment notes, if the judgment notes were made more than 60 days prior thereto. All other judgments entered on judgment notes made within the 60 days fall within the first clause, or they are not provided for at all. The only use, therefore, of the second clause is to make a limitation of, or an exception to, the first clause. To do so, this construction must have been intended. One cardinal rule of construction of a new act, and this act was new, is to have in view "the mischief to be cured." What was the mischief or evil to be cured by this act? It is well expressed in the title, "An act to prohibit debtors from *giving preference to creditors*," etc. Before this act was passed preferences were allowed by the assignment itself, and by judgments confessed by debtors, and by sales, mortgages, hypothecations, liens, and other securities "made, given, or executed by an insolvent debtor." These were thought to be evils to be cured by a new act. All these were *acts of the debtor*, by which *he preferred* creditors, and prevented "the equal distribution of [his] property among all [of his] creditors." This was the only mischief to be cured. The first bill, however, made the giving of judgment notes within 60 days prior to the assignment an evil practice of the debtor, to be prohibited. But this was omitted in the bill, unless saved by the words "or other security." But the acts of the debtor himself were the evils to be cured, and the whole scheme of the bill, with the amendments, and of the law, seems to be to cure these evils, and nothing more. The entry of the judgment, at the instance of the plaintiff or creditor alone, upon a judgment note given, as these notes were, many years before the debtor became insolvent or thought of making an assignment, is in no sense his act at the time of making such entry. He is entirely passive. He can do nothing to aid it or prevent it. He has given a power of attorney, which is irrevocable because coupled with an interest. The entry of judgment on such note by the creditor is not one of the evils or within the mischief to be cured, or named in the title, or within the purview of the law, without a strained and unreasonable construction of words used, together with words not used, but supplied.

But again, in connection with the mischief to be cured, the giving or receiving of judgment notes before the 60 days prior to an assignment, and the entry of judgment thereon within such 60 days, were not a mischief or evil. The rights of the parties had become fixed by the giving of such a note when it was lawful and could not possibly change the condition of the debtor as to his creditors, or prevent the equal distribution of his property among them. The entry of the judgment is a mere legal consequence of the giving of the judgment note. It is not a new act by the debtor, but a natural and legal result, beyond his control. The judgment, so to speak, is embodied within the note, and a necessary part and essential element of it, and the note naturally changes its form into a judgment of record, under the statute. But instead of such notes and the facilities of entering judgments thereon being an evil or mischief, such a construction of this act as would utterly discredit and destroy this class of mercantile and commercial securities in the business world would be an evil and a mischief of incalculable extent. A judgment note is a *security*, and a valuable one, to the holder, and it is so recited in the power of attorney. This method of business has grown into the very necessities of our business of banking, merchandizing, commerce, and of buying and selling in all forms, and of exchange. It is the most common as well as the most valuable method of security in connection with commercial paper, and to destroy or discredit it would derange and unsettle the business of the country, and seriously affect the public interests. Will it answer to attribute such a design or intention to the legislature in the enactment of a law to cure a mischief of far less magnitude than that which it creates? Another rule

of construction, among others, sanctioned by this court, in *Harrington* v. *Smith*, 28 Wis. 43, is "that every part of the statute must be viewed in connection with the whole, so as to make all parts harmonize, if practicable, and give a sensible and intelligible effect to each, and not to place one portion in antagonism to another."

The construction sought by the appellant's counsel would break the harmony of the whole act, which consists in grouping together the acts of an insolvent debtor, which shall be void in view of his assignment. This exception to the whole of an act of a creditor, warranted and justified by his contract, and strictly lawful when made, would be antagonistic to all other parts of the act. Another rule is that "if possible, no clause, sentence, or word shall be superfluous, void, or insignificant," and "every clause and word shall be presumed to have been intended to have force and effect." What possible effect could the words "by any such debtor" have, if not in connection with the making of the judgment note? It would be absurd to apply it to the entry of judgment, for the debtor does not, and cannot, enter it. This being so, we are forced to supply the ellipsis by some proper word to give clear effect to the obvious meaning of words which have meaning, and which we may not reject, and this rule is well established. *Nichols* v. *Halliday*, 27 Wis. 406. With such a construction as is contended for by the appellant's counsel, the act would be a palpable fraud upon the rights of such a creditor. The debtor cannot revoke his power of attorney, which is inseparable from the note, and by which judgment upon the note when due is secured against all contingencies, or prevent the entry of judgment thereon in any *direct* way, but he can do so *indirectly* by making an assignment. It cannot be that the legislature ever intended that the act should have such an effect, and work such a violation of the contract rights of the creditor. The power of attorney to enter judgment upon the note when due, and which gives the note the name and character of a *judgment* note, adds value to the note in the market as well as intrinsically, like any other security, and that value neither the debtor nor the legislature has any right to lessen by prohibiting its use in entering judgment by any pretext of technical or legal fraud, or by anything less than actual fraud, which would avoid anything by which it is tainted. But again, and lastly, it is not unreasonable to suppose that the legislature, in devising this law to prevent insolvent debtors from making a preference among creditors, and to make void certain acts of the debtor affecting his property, which would effect such preference, within 60 days prior to his making an assignment, did not intend to elaborate a new and original legislative scheme that had never had any former test or trial, but that the legislature had in view some law of similar objects and provisions which had been sanctioned by experience, and that the last general bankrupt law of the United States of 1867 was such a law. It contained analogous provisions as to the acts of preference made by the bankrupt within a certain time before filing his petition in bankruptcy. It was only such acts as were committed or suffered by the debtor that were made void. *Wilson* v. *Bank*, 17 Wall. 473; *Clark* v. *Iselin*, 21 Wall. 360.

We are therefore of the opinion that the second clause of section 2, c. 349, of the General Laws of 1883, should be construed as if it read: "Or under a judgment entered on a judgment note made by any such debtor within sixty days prior to any such assignment," and that the execution levy, made January 24, 1887, under the said judgments entered on the same day on said judgment notes made by the said Theodore S. Powers and J. T. Bears May 9, 1884, or more than 60 days prior to said assignment, is not void or within said act. It might have been as well to have adopted the able and lucid opinion of the learned judge who decided the demurrer in this case, for it was eminently satisfactory and conclusive, and I have perhaps added but little to its effect.

I have not noticed the argument based upon the use of a comma between the words "note" and "by," for I do not know who put it there. The demurrer was properly sustained.

The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

CASSODAY, J., (*dissenting.*) January 24, 1887, the defendant Thayer, by virtue of two several promissory notes and warrants of attorney, all bearing date May 9, 1884, entered up judgments against said Powers, and others, for an amount in the aggregate of $31,090.86; and immediately thereafter issued executions thereon to the defendant Sheriff Angle, who thereupon levied upon, seized, and took into his possession a large amount of personal property belonging to said Powers, who was then insolvent and indebted to other parties, and continued to hold the same. January 28, 1887, Powers made a voluntary assignment of all his property for the benefit of his creditors to the plaintiff, McCaul, who, as such assignee, brings this action to set aside said judgments, executions, levies, and seizures, and recover the property so seized, or the value thereof.

The question for determination is whether the preference obtained by such judgments, levies, and seizures, only four days before the completion of such assignment, is valid or void, under chapter 349, Laws 1883. The right to maintain this action in case they are void is not questioned. Id. The whole case turns upon the construction to be given to the first sentence of the second section quoted in the majority opinion. In construing the language of that sentence it becomes an imperative duty to first recognize the well-established rules of construction applicable to such a statute, and then to apply them to the language thus employed. As indicated in the majority opinion, the sentence is certainly not free from ambiguity. Even if it were, yet as the words employed are general, and not precise and definite, they are to be restrained by reference to the subject-matter of the act, except in so far as a different intention may be therein expressed. *Hanson* v. *Eichstaedt*, (Wis.) 35 N. W. Rep. 30. This is in accordance with the saying of Lord BACON, which became a maxim in the law, that "all words, whether they be in deeds or statutes or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person." *Webster* v. *Morris*, 66 Wis. 395, 28 N. W. Rep. 353, and cased there cited; *Lessee of Brewer* v. *Blougher*, 14 Pet. 198. But here all agree that the language employed in the act is ambiguous, and hence open to construction. In such case it is said by PARKE, B., that "it is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, *in which case the language may be varied or modified so as to avoid such inconvenience, but no further.*" *Becke* v. *Smith*, 2 Mees. & W. 195. To the same effect, *Turner* v. *Railway Co.*, 10 Mees. & W. 434.

This question is characterized by an English author of distinction as the embodiment of the "golden rule." Wilb. St. 111. It is there said: "This rule applies most forcibly when there is any ambiguity in the language employed by the legislature. In that case we are more especially bound to consider *what is the object* of the whole act, and what is the light thrown *upon that object* by every part of the statute. We may look chiefly at the preamble as stating 'the ground and cause of making the statute,' and as being 'a key to open the minds of the makers of the act, and the *mischief which they intended* to redress.' But we must also examine *the context and the other clauses of* the act, for words which are obscure and ambiguous in one sentence may have a definite meaning in another." See cases cited on pages 108–116, Id. As said by BEST, C. J.: "The meaning of the words of an act of parlia-

ment is to be ascertained from the subject to which it refers, so that the same words receive a very different construction in different statutes. The intent of the legislature is not to be collected from *any particular expression*, but from a general view of the whole act of parliament. These are not merely technical rules established by lawyers for the determination of questions arising on statutes, but they are maxims of common sense, the observance of which is necessary to conduct us to a right understanding of every kind of written instrument." *East India Interest*, 3 Bing. 196. So it was said by Lord TENTERDEN, C. J.: "In construing acts of parliament we are to look, not only at the language of the preamble, or of any particular clause, but at the language of the whole act. And if we find in the preamble or *in any particular clause an expression not so large and extensive in its import* as those used in other parts of the act, and upon a view of the whole act we can collect, from the more large and extensive expressions used in other parts, the real intention of the legislature, it is our duty to give effect to the large expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause." *Doe* v. *Brandling*, 7 Barn. & C. 660. See *Ryegate* v. *Wardsboro*, 30 Vt. 746; *Ogden* v. *Strong*, 2 Paine, 581–588. The same rules, in substance, have received the repeated sanction of this court. *Williams* v. *McDonald*, 3 Pin. 333, 334; *Nazro* v. *Insurance Co.*, 14 Wis. 319; *Haentze* v. *Howe*, 28 Wis. 295; *Attorney General* v. *Railroad Co.*, 35 Wis. 557; *State* v. *Timme*, 56 Wis. 425–427, 14 N. W. Rep. 604.

These rules are strictly applicable to that portion of chapter 349, Laws 1883, here involved. The object and purpose of the act were twofold: *First*, to prevent the giving of any preference to one creditor over another in any assignment, except for wages; and, *secondly*, to avoid preferences obtained by creditors within the 60 days next prior to the making of any assignment. The first of these objects was definitely secured by the first section of the act, which declares that "any and all assignments hereafter made for the benefit of creditors, which shall contain or give any preference to one creditor over another creditor, except for * * * wages, * * * shall be void." The second object mentioned was manifestly sought to be secured by the second section of the act. Passing, for the moment, over the first sentence of that section, which is the one here particularly applicable, and we come to the second sentence, which declares that "every sale, mortgage, hypothecation, *lien, or other security of any name or nature, made, given, or executed* of or upon *his* property, real or personal, *by an insolvent debtor, within sixty days* prior to the making of any such assignment, and in contemplation thereof or of insolvency, *shall be void, and of no effect*, provided * * * the person benefited thereby, or receiving the same, knew or had reasonable cause to believe such debtor insolvent." Every one of the things thus "made, given, or executed" *by the "insolvent debtor"* within the 60 days mentioned are things done by, with, or to some of his property, and in a way to give a preference to one or more of his creditors over others. This portion of the section, thus avoiding certain securities given *by the debtor* within the 60 days prior to his making an assignment, is quite similar to the acts of bankruptcy by the bankrupt mentioned in the cases cited on the argument from the supreme court of the United States. It was more particularly this portion of the section of which the writer hereof was speaking in the sentence quoted on the argument from *Backhaus* v. *Sleeper*, 66 Wis. 72, 27 N. W. Rep. 409.

But, if the first sentence of the second section of the act in question is confined to levies or liens under such judgment notes, and notes with warrants of attorney to confess judgments, as are made or given by such insolvent debtor within 60 days prior to his making of an assignment, then it is entirely without significance, since they are fully covered by the sentence just quoted, which expressly avoids "every * * * lien or other security of any name or nature," so "made, given, or executed" by the "insolvent debtor" within

the time named. Since such narrow construction would strip the first sentence of all significance, except as a mere repetition of certain things mentioned in the second sentence, it may be fairly inferred that a broader meaning was intended to be given to the language of the first sentence, unless restricted by the context or the object and purpose of the act. Had the object of the act been to secure preferences to such creditors as held judgment notes or warrants of attorney to confess judgments made more than 60 days prior to the making of such assignment by the debtor, then, to secure that object, there would have been very plausible, if not controlling, reasons for modifying the language employed by giving the narrow construction contended for. But such was not the purpose of the act. On the contrary, as this court has frequently declared, the object of the act was to prevent and avoid preferences within 60 days prior to an assignment, as above indicated. *Anstedt* v. *Bently*, 61 Wis. 634, 635, 21 N.W. Rep. 807; *Batten* v. *Smith*, 62 Wis. 98, 99, 22 N. W. Rep. 342; *Wachter* v. *Famachon*, 62 Wis. 123, 22 N. W. Rep. 160; *Lang* v. *Simmons*, 64 Wis. 527, 25 N. W. Rep. 650.

In the language of the title, it was and is emphatically "An act to *prohibit debtors* from giving preferences to creditors, *and* to secure *the equal distribution* of property among *all* creditors." The rules of law stated require the sentence in question to be so construed as to secure such equal distribution of property among *all* the creditors of the debtor, unless such construction would do violence to the language actually employed. As observed, to secure that object the language of the sentence may be varied or modified. The sentence reads: "*Every execution levy* made under a judgment confessed against any such insolvent debtor *within sixty days prior to* any assignment for the benefit of creditors, *or* under a judgment entered on a judgment note by any such debtor *within sixty days prior to* any such assignment, *and the lien* of any such judgments *upon real estate*, shall be void, and of no effect." As indicated in the majority opinion, the word "against," in the phrase "under a judgment confessed *against* any such insolvent debtor," and the word "by," in the phrase "under a judgment entered on a judgment note *by* any such debtor," are each inaptly used, or rather misplaced, through some inadvertence or want of accurate knowledge of the things spoken of, as shown by the history of the bill in the legislature. No lawyer would speak of a judgment being "confessed *against* any such insolvent debtor," nor of a judgment "entered * * * *by* any such debtor;" still, whether confessed by the debtor or entered by the creditor, yet the judgment would be against the debtor. But a mere change in phraseology in these respects would not clarify the sentence. The legislature has certainly declared that something therein mentioned, if made or acquired "within sixty days prior" to any such assignment, "shall be void, and of no effect." What is the thing thus avoided and made of no effect? Manifestly, the thing which gave the preference, and not something which in itself gave no preference.

The mere making of a judgment note, or the giving of a warrant of attorney to confess a judgment, secures no preference, and hence the time of making the one or the giving of the other is not within the scope or purpose of the act, and presumably not within the particular contemplation of the legislature in making the enactment; for such object of the act, in the language of one of the authorities cited, is the "key to open the minds of the makers of the act, and the mischief which they intended to redress." As observed, that mischief was the acquisition of a preference within such 60 days, and hence the sentence was, presumably, framed with the intention of suppressing it. "Every execution levy made under a judgment confessed" or entered, "within sixty days prior to any such assignment, and the lien * * * upon real estate," thereby acquired, necessarily gives a preference, and hence such levy and lien are declared "void and of no effect." But the debtor has no agency in the entry of at least one class of such judgments, which gives such lien and

is the foundation of such levy. It is that class which we are here dealing with. The seeming confusion as to the meaning of the sentence grows out of the fact that it includes execution levies and liens under two different classes of judgments, or rather judgments obtained in two different methods, with a lengthy description, and a bungling arrangement of each. The statutory purpose is thus obscured, and hence weakened by such enumeration; but it is ascertainable, and therefore not destroyed. To secure the object of the act thus sought to be attained, however, the arrangement and punctuation may be varied to the extent of dispelling the obscurity without doing violence to the language. It will be found, by a close analysis of the sentence, that in order "to secure the equal distribution of property among *all* creditors" of the debtor, the legislature has, in effect, declared, that, "every execution levy made under a judgment confessed [against] by any such insolvent debtor within sixty days prior to any assignment for the benefit of creditors, * * * and the lien * * * upon real estate" thereby acquired, "shall be void, and of no effect;" and also that "every execution levy made * * * under a judgment entered on a judgment note, [by] against any such debtor within sixty days prior to any such assignment, and the lien * * * upon real estate" thereby acquired, "shall be void and of no effect;" but the question may fairly be propounded, why extend the words "within sixty days" to "*every* execution levy made" under a judgment confessed or entered within that period "and the lien * * * upon real estate" thereby acquired, instead of confining them strictly to levies and liens under such judgment notes and warrants of attorney to confess judgment only as are made or given by the debtor within the time named? The answer is twofold: ***First***, the context of the sentence seems to extend it to "every" such levy and lien; and, ***secondly***, in no other way can "the equal distribution" of the property of the debtor be secured "among *all* his creditors," which is the declared object of the act. This being so, "it is our duty," if we may adopt the language of Lord TENTERDEN, C. J., above quoted, "to give effect to the larger expressions, notwithstanding the phrases of less extensive import * * * in any particular clause," as only by so doing can we effectuate "the real intention of the legislature," as collected "upon a view of the whole act;" whereas, to give the words "within sixty days" the more narrow and restricted application, is to defeat the declared object of the act, in thereby securing an unequal distribution of the debtor's property, and giving to some of his creditors preferences over others.

Being firmly convinced that the true construction of the sentence in question is as above indicated, I am forced to the alternative of respectfully dissenting from the decision and opinion of the majority of the court.

TAYLOR, J. I concur in the opinion of Justice CASSODAY.

JUMP RIVER LUMBER CO. *v.* MOORE and another.

(*Supreme Court of Wisconsin.* November 22, 1887.)

VENDOR AND VENDEE—CONDITION AGAINST SALE OF LIQUORS ON PREMISES—RECEIPT.

An action of ejectment was brought to recover land on the ground that defendants had violated the conditions against the sale of intoxicating liquors on the premises. It was shown that one of the defendants paid part of the purchase money down, and agreed to pay the balance on or before 90 days from date, and that no written contract was made except a receipt as follows:

"PRENTICE, May 1, 1886.

"Received of Mrs. M. J. Moore, twenty-five dollars, to apply on purchase of lot 22, block 4, village of Prentice; deed, with our restrictions in regard to intoxicating liquors, to be given on completion of payment, in all fifty dollars, on or before ninety days from date. [Signed] JUMP RIVER LUMBER COMPANY."

Held, that the suit was premature, inasmuch as the deed had not yet been given, and that there was no restriction or condition that could affect the bargain or the conduct of the defendants before the giving of the deed.

Appeal from circuit court, Price county.

Willis Haud, for respondent. *Schweppe & Foster*, for appellants.

ORTON, J. The first count of the complaint is in the common form of ejectment. The second count sets up the contract between the respondent and the defendant Moore for the sale of the premises in controversy to her, by virtue of which she went into possession thereof, and under which the defendant Stitt became half owner with said Moore by assignment, and alleges that said Stitt, with the consent of Moore, for several weeks last past has been engaged in selling beer and whisky, and other intoxicating liquors, at retail on the said premises, in violation of a certain condition of said contract, by reason whereof the plaintiff declared a forfeiture of said premises, and demanded the possession thereof. That condition was "that the grantee, M. J. Moore, and her heirs and assigns, should not sell, barter, exchange, or deal in, on the said premises, any beer or whisky, or other intoxicating liquors, for a period of eight years from the date of such sale, under penalty of forfeiture of said premises to the grantor; and that in case of a violation of such condition by [the said] M. J. Moore or her heirs or assigns, the grantor might declare a forfeiture, and the title to the said premises should revert to the grantor." The answers deny that there was any condition to said sale, and admit that the said Stitt has been selling liquors upon said premises, and procured a license so to do, and allege that said Stitt has built on said premises two buildings, in one of which he has been selling liquors, as he had a right to do. This is all that need be said about the pleadings or issue in the case to make the decision intelligible. The jury, by direction of the court, found that the plaintiff was the owner in fee of the premises, and entitled to the immediate possession thereof, and that the defendants unlawfully withheld the same, and assess the damages for such unlawful withholding at six cents. There are no special findings upon the facts of the forfeiture. The defendants made a motion to set aside the verdict, and for a new trial, on the ground that the verdict is contrary to the law and the evidence, which was overruled and exception taken. There were many exceptions to the admission of evidence reserved by the court, but the main question in the case may as well be decided upon the effect of the evidence, or on the merits of the case.

To prove the contract the plaintiff's counsel introduced the following receipt in evidence, subject to objection: "PRENTICE, May 1, 1886.

"Received of Mrs. M. J. Moore twenty-five dollars, to apply on purchase of lot 22, block 4, village of Prentice. Deed, with our restrictions in regard to intoxicating liquors, to be given on completion of payment, in all fifty dollars, on or before ninety days from date.

[Signed] "JUMP RIVER LUMBER COMPANY."

In offering this receipt, the counsel of the plaintiff said: "We offer it for the purpose of showing the transaction that actually occurred between the parties, for the purpose of showing the kind of contract that was made, and not perhaps as a legal contract under the statute, but as a memorandum of a contract that was made at that time, being the only writing that was given showing the terms of the contract. It is the only competent evidence in regard to the matter, and it is offered for that purpose." C. R. Galiett, the superintendent of the plaintiff company, who, as a witness, testified that he gave that receipt, testified further "that there was no other contract made in reference to the lot besides the receipt in evidence." This same witness testified that he had conversations with the defendants about this restriction that the company had been in the habit of inserting in their deeds, and there

was one of such deeds introduced in evidence containing the condition set out in the complaint, but this evidence was received subject to the objection of the defendants' counsel. The witness further testified: "I don't remember that there was anything said at the time he paid the money and the receipt was given in regard to restrictions, because the conversations and the negotiations had been previous to the making of the receipt." The witness testified further that he never showed the defendants any deed containing such a condition. When asked to state fully what he told the defendants in regard to the restrictions which would be incorporated in the company's deed in reference to the sale of intoxicating liquors, the witness, among other things, stated that he told him "he would not allow any liquors sold there. When the sales were made the restrictions were put in the deed, and the penalty was a forfeiture of the property, if they violated the terms." The word "him" is used in this evidence because the husband of the defendant Moore was the person who made the bargain in her behalf.

First, it is very clear from this evidence on behalf of the plaintiff that there was no other contract made except what was embodied in this receipt; and, *second*, that the condition or restriction was to be contained in the deed when made, in accordance with the tenor of this receipt. According to this evidence this suit was premature. There was no condition or restriction that could affect the bargain or the conduct of the defendants before the giving of the deed. As to what the defendants might do or not do with the premises in the mean time, there was no contract. This is the effect of all the evidence introduced by the plaintiff. The defendants, as witnesses, denied that there was any such condition in the contract, or that there was to be any such in the deed. It is very certain that there was no proof of any other condition than that contained in the receipt, and that condition is to be embodied in the deed. Whether that can be enforced, in consequence of its defective terms or ambiguities, is not to be answered in this suit; or whether it may be reformed in a court of equity. But there is yet no deed, and therefore no condition of forfeiture. It is the fault alone of the plaintiff if it has not made a bargain with such terms and certainty that it can be enforced against the evil traffic so injurious to their general interests, and, according to the evidence, they have made no contract whatever that reaches the present condition of things.

There was no evidence to warrant or support the verdict, and of course no such clear evidence as to justify the direction of the court to render it, and therefore the motion to set it aside ought to have been granted. There was an injunction granted to restrain the defendants from violating such pretended condition of the sale, and a motion to dissolve it was overruled.

The principal ground for the motion seems to have been that, in a case for enforcing a forfeiture for the breach of such condition, the injunction ought not to have been allowed. This ground need not be considered. The injunction, however, was superseded by the judgment. The judgment now being reversed on its merits, the injunction predicated on the same ground of the action ought now to be dissolved, inasmuch as an appeal was also taken from the order denying the motion to dissolve it.

Said order is therefore reversed, and the judgment of the circuit court is reversed, and the cause remanded for a new trial, and with direction to dissolve the injunction.

CHUBBUCK *v.* CLEVELAND.

(*Supreme Court of Minnesota.* November 25, 1887.)

1. FRAUD—MISREPRESENTATIONS—RESULTS CONTEMPLATED.
Where false and fraudulent representations are made to one person with the expectation and purpose that they should be communicated to another, and they are

so communicated to and acted on by him to his prejudice, the result of the fraud must be deemed to have been contemplated by the party making such representations, and he is liable therefor.

2. SAME—LAWFUL ACT DONE BY UNLAWFUL MEANS.
The law will not lend its sanction to an act, otherwise lawful, which is accomplished by unlawful means.

3. SERVICE OF PROCESS—PROCUREMENT BY FRAUD—COURT WILL DISMISS—EFFECT OF APPEARANCE.
Where the service of process, as an attachment against the property of a non-resident, is procured by fraudulent devices, the court, on the discovery thereof, will refuse to exercise its jurisdiction, and turn the plaintiff out of court; and the facts disclosing the fraud may be set up by answer. An appearance by an answer which simply sets up facts showing want of jurisdiction, and protests against its exercise, and claims no other right, is not such an appearance as waives the objection.[1]

(*Syllabus by the Court.*)

Appeal from municipal court, city of Stillwater; MANWARING, Special Judge.

Fayette Marsh, for Chubbuck, respondent. *Clapp & Macartney*, (*Ray S. Reice*, of counsel,) for Cleveland, appellant.

VANDERBURGH, J. The parties are residents of Wisconsin, and the defendant is the owner of a team alleged to be exempt under the laws of that state. This action was commenced by attachment issued out of the municipal court of the city of Stillwater, and levied on the team while temporarily in that city. The defendant answered by attorney, and at the trial the court ordered judgment for plaintiff upon the pleadings, and the defendant appeals from the judgment. It is alleged in the answer, in substance, that the plaintiff caused the attachment to be issued through the agency of one Kelly, acting for him, and levied on the team, and that he has ever since caused the team to be kept from the defendant; that defendant was induced to come over into the city with his team by the deceit and false representations of Kelly, and with the purpose and object of effecting such levy; and that, while the property was so held under the first attachment which Kelly and his attorney refused to release on defendant's solicitation, a second attachment, the one issued in this action, was caused to be levied on the property by plaintiff. The suit was commenced by attachment, and the defendant filed the answer as a plea in abatement of the action, on the ground that the jurisdiction of the court had been procured by fraud.

1. The different parts of the transaction are sufficiently connected to fix the responsibility upon the plaintiff, who, by insisting upon the enforcement of the attachment, ratifies and adopts the acts of his agent in procuring it.

2. The representations were not, as it appears, made directly to defendant, but to one McGuire and were repeated to him, "and induced this defendant to come within the jurisdiction of this court, and that said Kelly made said representations for the sole purpose of getting this defendant within the jurisdiction of this court with his team." Defendant further alleges "that the false and fraudulent representations made by said Kelly consisted in the statements that the said Kelly had some coal in Stillwater that he would turn over to the said McGuire, on account, if he would send a team after it, whereas in truth and in fact the said Kelly had no coal at said place, as he well knew,

[1] Where a person by fraud and deceit inveigles another into the jurisdiction of the court, for the purpose of obtaining service of summons upon him, the service should be set aside. Van Horn v. Manuf'g Co., (Kan.) 15 Pac. Rep. 562. The remedy is not given on the ground that the court does not obtain jurisdiction of the person of the defendant, but upon the ground that the court will not exercise its jurisdiction in favor of a plaintiff who has obtained service by unlawful means. And although the defendant may enter a general appearance, the court ought not to be precluded thereby from vindicating the integrity of its process by granting such relief. Townsend v. Smith, (Wis.) 3 N. W. Rep. 439.

but that he made the said representations to the said McGuire knowing that, from the relations existing between the defendant and the said McGuire, that the latter would employ the defendant to go after it, and thus come within the jurisdiction of this court." The representations were therefore made with the expectation and purpose that they should be communicated to and acted on by the defendant; and the result of the fraud to defendant, as the one injured by it, must be deemed to have been contemplated by the guilty party. *Levy* v. *Langridge*, 4 Mees. & W. *338; *Iasigi* v. *Brown*, 17 How. 183; Bigelow, Fraud, 90.

3. Where the service of process is procured by fraud, that fact may be shown, and the court will refuse to exercise its jurisdiction, and turn the plaintiff out of court. The law will not lend its sanction or support to an act, otherwise lawful, which is accomplished by unlawful means. *Townsend* v. *Smith*, 47 Wis. 623, 3 N. W. Rep. 439; Bigelow, Fraud, 166, 171, and cases; *Ilsley* v. *Nichols*, 12 Pick. 276; *Sherman* v. *Gundlach*, 33 N. W. Rep. 549.

4. The law will operate restrospectively to defeat proceedings fraudulently inaugurated, though done under the color of lawful authority, and hence we see no reason why the facts may not be pleaded in an answer on the ground that the service of the process under which jurisdiction was obtained was unlawful. The party does not in such case waive his objection, simply by setting up the facts disclosing it. As said by the court in *Townsend* v. *Smith*, *supra*: "Such a case is entirely unlike one where there has been a failure of proper service of process, for there the failure affects only the defendant, while here the fraud affects the integrity of the process of the court." *Larned* v. *Griffin*, 12 Fed. Rep. 590; *Gilbert* v. *Vanderpool*, 15 Johns. 243; 1 Wait, Pr. 562. An appearance by an answer which simply protests against the exercise of jurisdiction, and claims no other right, is not such an appearance as waives the objection. *Sullivan* v. *Frazee*, 4 Rob. (N. Y.) 620. Again, the objection, strictly, is not that the court has not jurisdiction of the person, but that it ought not, by reason of the alleged fraud, to take or hold jurisdiction of the action. *Wheelock* v. *Lee*, 74 N. Y. 498; *Higgins* v. *Beveridge*, 35 Minn. 286, 28 N. W. Rep. 506.

The judgment should be reserved, and case remanded for trial.

DAVIS *v.* BOARD OF COUNTY COM'RS OF LE SUEUR CO.

(*Supreme Court of Minnesota.* December 8, 1887.)

SHERIFF—FEES—MILEAGE—FAILURE TO SERVE WARRANT.

A sheriff or constable is entitled to mileage for traveling to serve a criminal warrant, although if, by no fault of his, he fail to serve it.

(*Syllabus by the Court.*)

Appeal from district court, Le Sueur county; EDSON, Judge.

C. R. Davis, for Davis, respondent. *Cadwell & Parker*, for Board of County Com'rs of Le Sueur Co., appellant.

GILFILLAN, C. J. The question is here presented, is a constable entitled to mileage at the rate of 10 cents a mile traveled by him in endeavoring to serve a warrant issued by a justice of the peace for a criminal offense, where he fails to arrest the person charged? When such a warrant is delivered to a constable for service, it is his duty to execute it. Section 141, *c.* 65, and section 2, *c.* 106, Gen. St. 1878. And for willful neglect or refusal to perform such duty he is guilty of a misdemeanor. Sections 104, 105, Penal Code.

The statute regulating the fees of constables does not expressly allow mileage whether the warrant be served or not. Section 14, *c.* 70, Gen. St. 1878. But section 42, same chapter, provides that "when a fee is allowed to one officer, the same fees shall be allowed to other officers for the performance of the

same services, when such officers are by law authorized to perform such services." To sheriffs is allowed, for "traveling in making any service upon any writ or summons, 10 cents per mile, for going and returning." Section 11, c. 70. Under section 42, a constable is entitled to like traveling fees for the same service; so that the question is whether a sheriff or constable is entitled to mileage for traveling to serve a criminal warrant when, without his fault, he fails to make the arrest. The last clause of section 11 provides: "For any services not herein enumerated which a sheriff may be required to perform he shall receive the fees herein allowed for similar services." As he is required to make diligent endeavor to serve any warrant placed in his hands, his duty is not to be measured by his success. Traveling in making such endeavors when he is unable to make service is a similar service to traveling when he succeeds, and it is just as much his duty to perform it, and when performed in good faith he is in justice as much entitled to compensation for it. This seems to have been the view of the court, though it was not directly decided, in *Thomas* v. *County Com'rs*, 15 Minn. 324, (Gil. 254.)

We think such services are covered by the last clause of section 11, and that the failure to arrest, when not due to any fault of the officer, does not affect the right to mileage. Order affirmed.

HUMPHREY v. MERRIAM.

(*Supreme Court of Minnesota.* December 9, 1887.)

ACTIONS—JOINDER—SAME TRANSACTION—DEMURRER.

Demurrer for misjoinder of causes of action will not lie where the complaint clearly indicates, as in this instance, that the alleged acts arise out of, and relate to, a single transaction.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county; WILKIN, Judge.

J. B. Brisbin, for Humphrey, respondent. *C. B. & A. G. Otis*, (*Geo. B. Young*, of counsel,) for Merriam, appellant.

COLLINS, J. The complaint in this action sets forth the purchase by plaintiff from defendant of certain shares of the capital stock of a corporation, the real value of which depended upon the value of a mine then owned by said corporation in Dakota; that said defendant, by his agent, for the purpose of inducing plaintiff to make the purchase, with intent to cheat and defraud plaintiff, did falsely and fraudulently represent and warrant certain things (fully detailed) about said mine, which were in fact untrue, and so known to be by defendant; and did also, upon the same day, in person, by an instrument in writing, falsely and knowingly, with the aforesaid intent, represent and warrant that no assessments had been made, or were soon to be made, against said stock, which was also untrue. Further allegations follow, as to plaintiff's reliance upon said representations, and that upon discovery of their false and fraudulent character he offered to return, etc. To this complaint said defendant demurred, upon the ground of misjoinder of causes of action, viz., a cause of action for deceit, and a cause of action for breach of warranty.

Under the first subdivision of section 118, c. 66, Gen. St. 1878, the plaintiff is permitted to unite several causes of action "when they are included in the same transaction or transactions, connected with the same subject of action." And under this subdivision an action upon contract, and one sounding in tort, may be united. *Gertler* v. *Linscott*, 26 Minn. 82, 1 N. W. Rep. 579. It follows that if several causes of action are stated in this complaint, but it is also evident that they are included in the same transaction, they are not improperly united, and a demurrer for misjoinder will not lie. In this instance the pleader sets forth what he claims were the facts surrounding his purchase of the shares of stock,—a single transaction. It is true that the

pleading may be faulty, and if so the defendant has a remedy, but it is not the one pursued. The order overruling the demurrer is affirmed.

MITCHELL, J., being absent during the argument, took no part in the decision of the case.

COATES *v.* CAMPBELL and others.

(*Supreme Court of Minnesota.* December 8, 1887.)

1. CONSTITUTIONAL LAW—TAXATION FOR PRIVATE PURPOSE—IMPROVING PRIVATE WATER-POWER.
   An act authorizing the issue of bonds of a village corporation to aid in the construction of a dam for the purpose of improving a private water-power is unconstitutional as providing for public taxation for a private purpose.
2. SAME—PURPOSE PARTLY PUBLIC AND PARTLY PRIVATE.
   When the purposes for which an act provides for taxation are partly public and partly private, and the amount to be raised for each cannot be distinguished and severed, the act is invalid.

(*Syllabus by the Court.*)

Appeal from district court, Benton county; COLLINS, Judge.

Taylor & Calhoun, for Coates, respondent. *R. J. Bell*, (*Hall & Kirkpatrick*, of counsel,) for Campbell and others, appellants.

GILFILLAN, C. J. An act of the legislature approved February 25, 1887, entitled "An act to authorize the village of Sauk Rapids, in the county of Benton, to issue bonds in aid of the improvement of the Mississippi river at said Sauk Rapids," provided: "Section 1. The village council of the village of Sauk Rapids, in Benton county, is hereby authorized and empowered to issue the bonds of said village, to the amount not exceeding the sum of forty thousand dollars, for the purpose of aiding in the construction of a dam across the Mississippi river at Sauk Rapids, and for the purpose of improving the water-power of said river, at the said village of Sauk Rapids, and for such other purposes as are hereinafter specified." * * * "Sec. 4. The said village council of the village of Sauk Rapids is hereby authorized to secure for the use of said village, in consideration of the issue of bonds herein authorized, such water-power for the use of the public fire department as may be deemed proper." * * * "Sec. 6. The piers of the said dam shall constitute the foundation of a public wagon bridge."

There is no principle of constitutional law better settled than that taxes cannot be imposed for a private purpose. *State* v. *Foley*, 30 Minn. 350, 15 N. W. Rep. 375, and cases cited. "The right to tax depends upon the ultimate use, purpose, and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it." *Sharpless* v. *Mayor, etc.*, 21 Pa. St. 169. It is upon this proposition that courts sustain the imposition of taxes for the purpose of constructing railroads. For although railroad companies are, so far as their rights of property are concerned, private corporations, yet railroads are public highways, constructed and maintained for public use, and which the public have a right to use, so that in this case it is not conclusive, as to the right to tax, that the title to the water-power to be improved is or will be in some private person or corporation, or that the village is not to have any direct control over the management of it. As it is entirely manifest that the general and chief purpose of the act is to improve the water-power, and without which purpose the act would not have been passed, the question necessarily arises, what is to be the character of its use when improved? Is it to be public or private? To the consideration of this question it is important that the water-power is not the property of the village corporation or the public, and that there is no public control over the management of the property or the expen-

diture of the fund; that the village corporation has no authority to own or manage water-powers. The water-power must belong to some private person or corporation, and the public has no more right or interest in it, or right in its use, than in any other water-power owned by a private person or corporation. The public has a right in the use of a railroad, for any one of the public may of right use it, under reasonable rules and regulations, and upon reasonable terms; but there is no such right with respect to a water-power. The owner may exclusively use it himself, or grant the right to use it to such persons as he may select, to the entire exclusion of everybody else. No one of the public may of right insist on having any use of it. The public has no interest in its improvement, and derives no benefit from it, beyond the incidental benefit arising from any person improving his own property. That is not an interest that will justify taxation. Certainly no one would claim that funds may be raised by taxation to aid a private person in constructing a private building on his own lot, although, incidentally, it will enhance the value of all the lots in the city or village. That this water-power is private in its ownership and use puts it beyond the legitimate objects for which taxes may be imposed.

An endeavor seems to have been made in drawing this law to give color of a public use, for which the funds were to be raised. Manifestly, this was the purpose of inserting section 4, authorizing (but not requiring) the council to secure, in consideration of issuing the bonds, water-power for the use of the public fire department. The council would have authority without that section to secure water-power for the fire department, if it has authority to organize a fire department and supply it with water. The same may be said of section 16, which, without providing that there shall be any bridge, provides that the piers of the dam shall constitute the foundation for a public wagon bridge; but the main purpose of the act is to improve a private water-power. The provisions looking to a public use are merely incidental to its main object. Such an incidental public use could not rescue the act from the charge of being unconstitutional. If an act should in terms authorize a city council to raise funds by taxation to be used in constructing a private building on a private lot, it would not be enough to save the act that it authorized the council to stipulate that street lamps might be suspended from the front of the building, or that one of its walls might be used as a party-wall in constructing a public building. If such provisions could make the act valid, the constitutional principle we have referred to would be very little protection to the citizen.

It may be stated that, where the purposes for which taxes are authorized to be imposed are partly private and partly public, the act must wholly fall, unless, perhaps, where the part to be raised for the private purpose can be distinguished and severed from the other.

The act is unconstitutional and void. Judgment affirmed.

DRAKE v. AUERBACH and others.

(*Supreme Court of Minnesota.* December 9, 1887.)

1. TROVER AND CONVERSION—PAPERS FURNISHED FOR INSPECTION.
   Pending a dispute over the cost of constructing a building, plaintiff, at defendant's request, furnished them with certain vouchers, a general statement of expenditures, and an affidavit of its correctness made by his book-keeper. *Held*, that these papers were so furnished for inspection only, and that defendants did not become owners thereof.

2. SAME—MEASURE OF DAMAGES—OWNER'S ESTIMATE.
   In claim and delivery, the value of such property cannot be determined by the ordinary rule of market value. It is not error to permit a jury to consider the owner's estimate of its worth to him.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county; KELLY, Judge.

Young & Lightner, for Drake, respondent. *Warner & Lawrence*, for Auerbach and others, appellants.

COLLINS, J. Plaintiff contracted with defendants to erect, for their use, a business house in the city of St. Paul, for which defendants were to pay, as rent, a certain per cent. of its cost. After taking possession of the premises, a dispute arose between the parties as to the cost of construction, and defendants demanded that plaintiff furnish to them his vouchers. This plaintiff claimed he could not do, alleging that they had been destroyed by fire, but he complied—so far as he could—by procuring and delivering seven new or duplicate vouchers, a general statement of expenditures, (which had been in defendants' possession before,) and an affidavit by one Zollman, who had kept plaintiff's books, as to its correctness. Thereafter, and pending the controversy over the rent, plaintiff demanded a return of all these documents, which was refused. He then brought an action of claim and delivery.

The appellants' counsel urges that these papers were simply information demanded by defendants for their exclusive use, of which they cannot be deprived; but the position cannot be maintained. They were already in possession of information as to the cost of the structure, but insisted upon something more tangible, upon examining plaintiff's vouchers, receipts, written evidences of his alleged expenditures. These were furnished, and when delivered were plaintiff's property, and to him of more or less value, dependent wholly upon circumstances. The letter accompanying said delivery was one of transmittal only, in which we find no indication of plaintiff's intention to part with the exhibits, except for inspection and to further a settlement of the controversy over the rent.

But one further point need be discussed. The appellant claims that the testimony is wholly insufficient to warrant the jury in fixing the value of the property at the sum specified in the verdict. These papers have no market value, and the customary rule in replevin cannot be adopted when measuring their worth. They have a peculiar value to plaintiff, governed largely by his needs and the purposes for which they may be utilized. In such cases, as in actions for conversion of property of a like character, much must be left to the sound discretion of the jury, and it is not error to allow the owner to recover their value to him, even if they are of trifling value to others. *Bradley* v. *Gamelle*, 7 Minn. 331, (Gil. 262;) *Stickney* v. *Allen*, 10 Gray, 352.

We see no reason to criticise the conclusion of the jury upon this point, especially when we reflect upon the fact that, when presented with the execution, defendants can satisfy its demands by surrendering possession of the property and paying the costs. The order denying a new trial is affirmed.

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[1] COLLINS *v.* DODGE.

(*Supreme Court of Minnesota.* December 9, 1887.)

1. NEGLIGENCE—CONTRIBUTORY—ORDINARY CARE.
   Negligence of the plaintiff in an action for damages will not be inferred from the fact that he attempted to cross an unimproved street in the night-time, at a place other than a regular crossing; nor is such an act of itself evidence of want of ordinary care.
2. SAME—PLEADING—EVIDENCE—DAMAGES—MONTHLY EARNINGS.
   The complaint in such action *held* sufficient to permit testimony tending to show the amount of plaintiff's monthly earnings as a professional man, and prior to the time the alleged injuries were received.
3. SAME—GENERAL DAMAGES.
   And also *held* sufficient to warrant the jury in awarding general damages.

(*Syllabus by the Court.*)

Appeal from district court, St. Louis county; STEARNS, Judge.

White, Shannon & Reynolds, for Collins, respondent. *Allen & Parkhurst*, for Dodge, appellant.

COLLINS, J. This action is brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. The latter left unfenced and uninclosed, except as hereinafter stated, a ditch dug by him for sewer purposes from the cellar of his building, in the city of Duluth, to the outer edge of the gutter line of Third avenue, and from thence parallel with the sidewalk, and but a few feet distant, south to Superior street. No lights were maintained by him, but he had caused scantling to be placed across the sidewalk, both north and south of that part of the excavation between the avenue and the cellar, and but a few feet therefrom. There were no barriers between the walk and that part of the ditch parallel thereto. The greater portion of the ditch on the avenue had been filled, but that part beside the walk, for a few feet south of where it turned towards the cellar, was about nine feet deep. On the night of September 2, 1885, plaintiff had occasion to go from his office to his sleeping apartments, some blocks distant. It had been raining, and was very dark. He passed along the walk mentioned in a northerly direction, until he reached the scantling placed across the same, south of the excavation, which prevented his further progress upon the sidewalk. He then turned to the left, with the intention of crossing the avenue, stepped from the walk to the gutter, and, upon attempting to go further, was precipitated to the bottom of the ditch, sustaining, as he claims, serious injuries.

In leaving the excavation without proper barriers and safeguards for the protection of the public the defendant was negligent, and this seems to be conceded by his counsel; but they urge that plaintiff contributed to such negligence by attempting to cross an unimproved street, naturally rough and uneven, except at a regular crossing, to which he should have retraced his steps. It is not negligence for a pedestrian to use the carriage path, but he must exercise care in so doing. *Coombs* v. *Purrington*, 42 Me. 332; *Raymond* v. *Lowell*, 6 Cush. 524; *Brusso* v. *Buffalo*, 90 N. Y. 679.

Of necessity, the degree of care required must vary, but it is very certain that the traveler has the right to suppose that he has to meet and overcome the natural obstacles and irregularities of surface only, and that no one has prepared a pit in his way without a railing to prevent his walking into it, or a light to warn him of its existence. No distinction in this respect can be made between the completely worked and improved thoroughfare and one in its natural condition. The traveler by day or night is entitled to protection from dangerous excavations in either. The plaintiff herein states in his complaint that, by reason of the alleged injuries, he has been unable to attend to his business and professional duties, from which he had before been able to earn a "comfortable living." Under such allegations,—having also stated his profession,—it is clearly competent to show what his earnings professionally were per month. *Bierbach* v. *Goodyear R. Co.*, 54 Wis. 208, 11 N. W. Rep. 559; *Wade* v. *Leroy*, 20 How. 34.

But one more assignment of error need be noted. The complaint avers special damages sustained to the amount of $245, coupled with an allegation of plaintiff's *estimate* of his total damages. This in addition to the demand which is by statute made an essential of a complaint. The allegations are sufficient to warrant general damages, the elements of which are never susceptible of exact computation. The order refusing a new trial is affirmed.

McDONALD v. PEACOCK.

(*Supreme Court of Minnesota.* December 12, 1887.)

1. CONTRACT—CONSTRUCTION—FRAUD—INSTRUCTIONS.
An instruction to a jury that a peculiar contract (embracing the terms of a lease of land to the plaintiff) constituted a *sale* to the plaintiff of a crop of grain grown on the land, *held* not prejudicial to the defendant, even if inaccurate; the effect of the instrument, however, construed, being to vest in plaintiff the title of the grain, and the question whether it was made for a fraudulent purpose (the real question involved) being properly submitted to the jury.
2. FRAUD—EVIDENCE.
Evidence *held* sufficient to justify the verdict upon the question of fraud.
3. EVIDENCE—WRITTEN INSTRUMENT—OBJECTION—PROOF OF EXECUTION.
An objection that a written instrument offered in evidence is incompetent, irrelevant, and immaterial, does not involve the point that preliminary proof of its execution had not been made.
4. SAME—ORDER OF PROOF—DISCRETION OF COURT.
The court may, in its discretion, control the order of proof.

(*Syllabus by the Court.*)

Appeal from district court, Pope county; BAXTER, Judge.

Barto & Barto, for McDonald, respondent. *Bruckart & Reynolds*, for Peacock, appellant.

DICKINSON, J. The defendant, as sheriff of Pope county, under writs of attachment and execution against Thomas McDonald, levied upon and sold a field of grain growing, at the time of the levy, upon the land of the said Thomas McDonald. This plaintiff, James B. McDonald, claiming to be the owner of the grain, brings this action to recover for the alleged conversion. The plaintiff's right respecting the property was acquired under a written contract between Thomas McDonald and the plaintiff. By the terms of this instrument Thomas "demised, leased, and let" to the plaintiff the land upon which this grain was grown, "to have and to hold * * * for the term of six months, or until the grain is secured for the rents and upon the terms hereinafter specified." The plaintiff agreed to pay Thomas $300 to buy seed, feed, provisions, etc., or to furnish the same in whole or in part on the farm as might be most convenient; also to apply $300 upon an indebtedness of Thomas to the plaintiff. Thomas agreed to cultivate the land, sow, harvest, and thresh the grain, and deliver two-thirds of it to the plaintiff.

The court instructed the jury that this was a sale of the grain to the plaintiff, valid as between the parties; but left it the jury to say, upon the evidence, whether it was made in good faith, or to defraud the creditors of Thomas McDonald; the jury being further instructed that this bare transaction, without any explanation, would raise the presumption of fraud. It seems to be unnecessary to consider whether the court properly denominated this peculiar agreement as being, upon its face, a contract of sale. Under any possible construction of the agreement, assuming it to have been made in good faith, the plaintiff became and was the owner of the grain in question. Beyond the fact that the agreement was such as to vest the title in the plaintiff, it was only important to determine whether the agreement was made for a fraudulent purpose, or in good faith, and for the actual consideration of $600, as indicated in the instrument. The instruction to the jury that *prima facie* it was presumptively fraudulent, stated the law touching its validity as favorably to the defendant as could have been asked upon any possible construction of the contract. The evidence supporting the *bona fides* of the parties was sufficient to justify the verdict of the jury.

The objection to the introduction of the written agreement in evidence, viz., that it was incompetent, irrelevant, and immaterial, did not suggest the fact, as a ground of objection, that preliminary proof of its execution and de-

livery had not been made; and that objection is not now available. See *Stillman* v. *Railroad Co.*, 34 Minn. 420, 26 N. W. Rep. 399; *Wood* v. *Weimar*, 104 U. S. 786. The order in which the evidence was presented was properly controlled by the discretion of the court. So, too, was the receiving of evidence going to establish the plaintiff's case after the defendant had rested.

The order refusing a new trial is affirmed.

MEYENBERG v. ELDRED and others.

(*Supreme Court of Minnesota.* December 12, 1887.)

1. INFANCY—ACTION BY NEXT FRIEND—PROOF OF INFANCY.
In an action prosecuted by an infant through his next friend, the answer denying the alleged infancy, the plaintiff need not prove that he is an infant; his right of action not depending upon that fact.
2. EVIDENCE—VALUE—HARMLESS ERROR.
Improper evidence of value *held* not prejudicial, the verdict being within the value as fixed by other and undisputed evidence.

(*Syllabus by the Court.*)

Appeal from district court, Chippewa county; BROWN, Judge.

Smith & Fosnes, for Meyenberg, respondent. *T. F. Knappen*, for Eldred, appellant.

DICKINSON, J. This action is to recover for services rendered by the plaintiff for the defendant. The answer put in issue the alleged minority of the plaintiff. His right to sue and to recover did not depend upon his being a minor, and it was quite unnecessary for him to prove his infancy upon the trial.

There is a reasonable ground for questioning the admissibility of the evidence as to the value of the services, excepting as to that of the witness Falkenhagen, who testified that he was employing the plaintiff at the time of the trial, and was paying him $18 a month. This was error, but it did not in fact prejudice the cause of the defendant; for the other evidence in the case, which was wholly undisputed and unopposed, showed this service to have been worth a sum fully as large as that allowed by the jury. Judgment affirmed.

D. M. OSBORNE & CO. v. WILLIAMS.

(*Supreme Court of Minnesota.* December 12, 1887.)

1. TRIAL—DISCRETION OF COURT—AMENDMENT OF PLEADING—LEADING QUESTIONS.
The allowing of an amendment to a pleading at the trial, and of leading questions to a witness, *held*, to be within the discretion of the court.
2. APPEAL—OBJECTIONS NOT RAISED BELOW—ISSUES.
After having litigated a question of fact without objection, it is too late to claim that the pleading of the adverse party did not sufficiently cover the fact in controversy.
3. SAME—SUFFICIENCY OF EVIDENCE.
Evidence considered as justifying the verdict.

(*Syllabus by the Court.*)

Appeal from district court, Grant county; BAXTER, Judge.

Russell, Emery & Reed, for D. M. Osborne & Co., appellant. *J. W. Reynolds*, for Williams, respondent.

DICKINSON, J. We will consider the appellant's assignments of error in the order in which they are presented.

1. There was a proper exercise of the discretion of the court in allowing the defendant, at the commencement of the trial, to amend his answer in respect

to the value of the use of the property taken from the defendant from the time of its taking to the time of the trial. No prejudice was shown, and none is to be presumed.

2. The examination of witnesses by leading questions, allowed for the most part without objection, was not error.

3. Under an averment in the answer that a machine was wholly worthless and valueless, "either as a harvester or binder, or both," evidence was received without objection, as appears from the amended return, that the machine was wholly worthless. The parties evidently litigated without objection the question whether the machine had any value, and if it is now too late to urge the point that the answer, in the qualified terms above recited, was insufficient to justify the proof.

4. The assignment that it was error to receive testimony as to the value of the use of the horses is not available, for there was no objection to the evidence.

5. The only point presented by the appellant upon which there can be any doubt is as to whether the evidence justified the finding that the machine was wholly valueless. Not without some hesitation, we have come to the conclusion that the verdict in this particular was justified. We deem it unnecessary to recite the somewhat voluminous evidence bearing upon this question.

Order affirmed.

STEVENS and another *v.* MCMILLAN.

(*Supreme Court of Minnesota.* December 12, 1887.)

1. PLEADING—SHAM ANSWER.
   In an action by a mortgagee of personal property to recover the same, an answer denying the plaintiff's alleged right, and setting up title in the defendant, *held* properly stricken out as sham; it appearing by the defendant's own showing that such defense was based upon the facts that the mortgage was made to avoid the claims of creditors of the mortgagor, and that the defendant thereafter purchased the property from the mortgagor with notice of the facts.
2. SAME—ANSWER CONTAINING GENERAL DENIAL—SHAM.
   An answer containing a general denial may be stricken out as sham.
3. REPLEVIN—ALTERNATIVE JUDGMENT—WAIVER.
   In an action in the nature of replevin, the plaintiff may waive the right to have included in the judgment for the recovery of the property the usual alternative provision for the recovery of its value.
4. APPEAL—REVIEW—CLERK'S TAXATION OF COSTS.
   Alleged errors in the clerk's taxation of costs will not be reviewed here, where no relief has been sought in the court below.

(*Syllabus by the Court.*)

Appeal from district court, Wilkin county; BROWN, Judge.

Lyman B. Everdell, for Stevens and another, respondents. *Hartshorn & Coppernoll*, for McMillan, appellant.

DICKINSON, J. This action is for the recovery of personal property; the complaint alleging generally the plaintiffs' ownership and right of possession. This is denied by the answer, the defendant further alleging title in herself. Upon these pleadings, and upon affidavits presented upon a motion to strike out the answer as sham, the same was stricken out as irrelevant, and judgment was ordered for the plaintiffs. From the affidavits presented on the part of the plaintiffs in support of the motion, it appeared that their asserted rights in the property were based upon a chattel mortgage executed to them by the former owners of it, as security for money loaned. By the opposing affidavits on the part of the defendant it was averred that she purchased the property from the mortgagors subsequent to the mortgage, and with actual notice thereof; but that she was informed by the person from whom she purchased, one of the mortgagors, that the mortgage was given without consideration, and

for the purpose of protecting the property from the claims of creditors of the mortgagors, and that it would not be enforced contrary to their wishes; that she purchased believing such representations; and that she expected upon the trial to establish the truth of these representations as to the fraudulent character of the mortgage. The real nature of the defense was thus disclosed by the defendant, in resisting this motion; and, for the purposes of the motion, it may be considered that the facts upon which the defendant based her denial in the answer of the plaintiff's asserted title and right of possession, and upon which her own claim of title rests, were such as are here disclosed.

The facts thus alleged would not, if established, avail the defendant to avoid the effect of the mortgage, the execution of which is in effect admitted. The mortgagors could not have defeated the title of their mortgagees by proof that the mortgage had been given for the fraudulent purpose here disclosed, nor can this defendant, as purchaser from the mortgagors with notice of the mortgage, do so. *Tolbert* v *Horton*, 31 Minn. 518, 18 N. W. Rep. 647; *Yallop De Groot Co.* v. *Railway Co.*, 33 Minn. 482, 24 N. W. Rep. 185.

Such being the admitted facts of the case, the legal conclusion follows that the plaintiffs were entitled to the property under their mortgage, and the answer of the defendant, denying the plaintiffs' asserted right, was not true. Its falsity is apparent and unquestionable upon the admitted facts, and, in view of these admitted facts, there was really no issue of fact between the parties to be tried, excepting as to the value of the property. The insufficiency of the facts relied upon as a defense having been determined by the decisions above cited, the defense was in this particular sham. The plaintiffs, having waived, as they might do, (*Morrison* v. *Austin*, 14 Wis. 601,) any right to recover the value of the property, were entitled to have the answer stricken out as sham, and to have judgment for the possession of the property. Although the court in its order designated the answer as irrelevant, instead of sham, yet this should not affect the result. At most, this erroneous designation only indicated an untenable reason for a conclusion which was right as a matter of law.

It has been repeatedly considered in this court that a verified answer, upon its face constituting a defense, may be stricken out as sham. There is no reason, in our judgment, notwithstanding some decisions to the contrary, for expecting from this course of procedure answers consisting of or including a general denial. Such an answer was held properly stricken out in *Nelson Lumber Co.* v. *Richardson*, 31 Minn. 267, 17 N. W. Rep. 388.

The point that no notice was given of the taxation of costs will not avail the appellant here, no remedy having been sought in the court below. *Jensen* v. *Crevier*, 33 Minn. 372, 23 N. W. Rep. 541, and cases cited; *Fay* v. *Davidson*, 13 Minn. 298, (Gil. 275.)

The order and judgment are affirmed.

STATE v. JOHNSON.

(*Supreme Court of Minnesota.* December 8, 1887.)

1. INDICTMENT AND INFORMATION—HOMICIDE—MURDER IN FIRST DEGREE.
   An indictment for murder in the first degree, in the form given in chapter 108, Gen. St. 1878, is good, under the Criminal Code.
2. SAME—AGAINST SEVERAL—CHARGING JOINT COMMISSION OF ACT.
   An indictment against two or more persons may charge the act to have been done by them collectively.
3. SAME—DATE AND PLACE OF FINDING.
   Putting the date when and the place where found, at the end of an indictment, after the words "against the peace and dignity of the state of Minnesota," does not vitiate it; such date and place are no part of the indictment.
4. HOMICIDE—EVIDENCE TO SUSTAIN VERDICT.
   Evidence *held* sufficient to sustain the verdict.

5. SAME—APPEAL—ASSIGNMENTS OF ERROR.
Divers assignments of error upon exceptions to evidence and refusals to admit evidence overruled.

6. SAME—MANSLAUGHTER IN FIRST DEGREE.
Requests to charge *held* not to present the question whether one who does not himself strike the blow may be convicted of manslaughter in the first degree.

7. SAME—REASONABLE DOUBT.
A request to charge that if a single fact, proved to the satisfaction of the jury, was inconsistent with defendant's guilt, he should be acquitted, rightly refused.

8. SAME—REASON OF RULE AS TO REASONABLE DOUBT.
In its charge to the jury the court need not state the reason for the rule that guilt must be proved beyond a reasonable doubt, if it state the rule correctly.
MITCHELL, J., dissenting.

(*Syllabus by the Court.*)

Appeal from district court, Dakota county; CROSBY, Judge.

M. E. Clapp, Atty. Gen., and *Albert Shaller*, for the State, respondent.
H. L. Williams, for Johnson, appellant.

GILFILLAN, C. J. The defendant was indicted with two others for murder in the first degree, and was convicted of manslaughter in the first degree. Several exceptions are taken to the indictment: *First*. It does not allege that the killing was done "with a premeditated design to effect the death" of the person killed, which words are used by the Criminal Code in defining the crime. Crim. Code, § 152. It follows the form given in section 2, *c.* 108, Gen. St. 1878, which, instead of the foregoing words, used the words "without the authority of law, and with malice aforethought." The definition of murder in the first degree in the Criminal Code is in substance the same as in Gen. St. *c.* 108, prescribing forms for indictments, is not expressly repealed by the Criminal Code. It is still in force, except so far as inconsistent with the provisions of the latter. A form of indictment prescribed by that chapter for an offense defined in the same manner, in both the General Statutes and Code, is not inconsistent with the latter; so that where the definition of the offense is the same the form prescribed in chapter 108 may be used. *Second*. The indictment charges the act to have been done by the three persons collectively, instead of charging it to have been done by them severally. There is nothing in that exception. As charged, the act was that of each and all. *Third*. That the indictment does not conclude with the words "against the peace and dignity of the state of Minnesota," as required by the constitution. This is claimed because at the bottom of the indictment are the words: "Dated at Hastings, in the county of Dakota, this twenty-first day of January, A. D. 1887." These words are no part of the indictment; their presence adds nothing to it, their absence would take nothing from it; it is concluded before those words are reached. The exception is not well taken.

The evidence in the case was mainly circumstantial. The killing occurred at about 11 o'clock of a Saturday night. The evidence shows that Morrow, the person killed, had been drinking during the evening, and evidently he was partially drunk, and in a quarrelsome mood. The defendant and the other two with whom he was indicted had apparently been drinking during the evening, and were, as the evidence indicates, going about together. It also indicates that there had been something like a quarrel between them and Morrow, though by whom incited does not appear. At about 11 o'clock a witness (Rogan) saw defendant, and the two others indicted with him, and another walk from a saloon into the street. The witness entered the saloon, took a drink and came out, and saw the four men standing together in the street talking among themselves, and Morrow also in the street, 12 or 14 feet from and facing them; the latter was evidently intent on quarreling with the four. To them, or in their hearing, he expressed a desire to fight them, applying to

them a most insulting and opprobrious epithet. The four men then ran up to Morrow, and one of them (Anderson) struck him with his fist; one of the four men (the one not indicted) then appears to have gone away, and the witness calling Swenson the two started to go home, leaving defendant and Anderson standing near Morrow. As they were leaving, the witness heard defendant say something in Swedish which the witness did not understand, which caused Swenson to turn around, and start to go back. The witness also turned around, and saw Morrow in the act, apparently, of falling, though he did not stop to see whether he actually fell. At the time, defendant and Anderson were five or six feet from Morrow, Anderson being nearer to him than defendant. Within a very few minutes afterwards, the jury might find immediately after, Morrow staggered against the door of a saloon near which the parties had been standing, and on those within opening the door they found him lying on the ground with a deep gash, evidently made by a sharp knife, or some similar instrument, in the left side of his neck, from which he died in a very short time.

From this evidence, which the jury might credit instead of that of defendant and Swenson, they might well find that the fatal blow was struck by defendant or Anderson. There are some circumstances from which they might find that it was struck by defendant. In the first place, although by itself it was not a strong circumstance, yet it might be considered, it was proved that about two weeks before, he had in his possession a jack-knife which, from its description, was capable of inflicting such a wound as that on Morrow; then it appears that, after what Rogan saw, Anderson and defendant immediately left, the former going home, and the latter in the same direction, and while those from the saloon were looking at the body of Morrow, immediately after he fell at the door of the saloon, defendant and Swenson came up to where they were, the defendant holding his right hand behind him in such a way as to attract the notice of the witness; and the next morning when the officers arrested him, (he was in bed at the time, and arose and dressed,) on being brought out of doors, as one of the witnesses testified, "he kind of looked at himself all around, and noticed something on his hands." I thought it was blood, and he stooped down, and I took hold of his hands, and said: "This fellow has got blood on his hands, and is trying to rub it off." The witness also testified that defendant picked up a handful of sand; that the spots of what he thought was blood were on the right hand only, and that there was a spot on his coat that looked like blood. Another witness testified that he came up when defendant was brought outside, and proceeded: "When I came up, he was stooping down and trying to get some sand or dirt in his hands, and he held it there, and I said: 'What are you trying to wash the blood off for?'" He also testified that he thought the spots on defendant's hand were blood. Another witness, who was present when defendant was brought out, on being arrested, testified: "When he came out he put his hands on the ground, just as if he was going to wash them off."

The fact that after Rogan saw Morrow, Anderson, and defendant standing near each other, the latter and Swenson started off, and then turned back and came to where Morrow was lying when those in the saloon had come out and were looking at Morrow, was proved beyond question; yet the next morning, when asked if they had done so, they denied it. Some of these circumstances the defendant in his testimony denied, other of them he attempted to explain, as that the red spots on his hand were spots of paint which he got on it in the course of his occupation during the day. It was for the jury to determine how much weight to give to these denials and explanations, as it was with respect to the other testimony in the case. There was enough evidence to leave the case to the jury.

The evidence of the witness O'Connell, as to the conversation by the parties in the street, was proper, for, though he could not identify them, they

were identified by Rogan, defendant being one of them. The exhibition of the clothes which deceased wore at the time of his death could furnish but slight evidence, but, especially in view of the suggestion of the defense that it was a case of suicide, it was competent. The evidence, to introduce which the defendant requested that the case might be reopened after the testimony was closed, was mere hearsay.

After the court had charged the jury, the defendant excepted to its refusal to define manslaughter in the second degree. It defined murder in the first and second degrees, and manslaughter in the first degree, but we do not find in the case any request to define manslaughter in the second degree. Had the defendant supposed such definition would be of any benefit to him he ought to have requested it to give such definition, and not having done so, there was no ground for the exception.

The defendant's request to charge referred to in his ninth, and the first referred to in his tenth, assignment of errors, assume that, unless defendant himself struck the fatal blow, or if the evidence implicated some one else, the defendant must be acquitted. The requests were entirely inadequate to present the question raised here on the argument, to-wit, that there cannot be an accessory in manslaughter. There was no request nor exception that presented the point. The requests we refer to were to the effect that if any one else struck the blow, or if the evidence pointed as much to the guilt of some one else as of defendant, he should be acquitted. As applied to the evidence in the case, the requests were erroneous; for, whether there may be an accessory in manslaughter or not, there certainly may be in murder, the crime charged in the indictment, and of which, upon the evidence, the jury might have convicted. The requests called for an acquittal, even though the killing were with a premeditated design to effect death, and though defendant were present, inciting, aiding, and abetting the act, provided he did not with his own hand strike the blow, or provided the evidence applied as well to another person as to defendant. Had the jury found that it was murder, surely no one would claim that defendant, if aiding and abetting, or if only equally guilty with another, could not be convicted.

Two of the requests were to the effect that if a single fact, proved to the satisfaction of the jury, was inconsistent with the defendant's guilt, he should be acquitted. The jury were to try the case upon all the evidence, not on the evidence merely as to single facts. Where the evidence is, as in this case, mainly circumstantial, there may be isolated facts proved, which of themselves are, or seem, inconsistent with guilt, while other facts may seem inconsistent with innocence. The jury must arrive at a conclusion by weighing and comparing all such facts. The requests were erroneous. The court charged correctly that, to authorize a conviction, the circumstances should not only be consistent with the prisoner's guilt, but they must be inconsistent with any other rational conclusion. The charge of the court as to the effect of the absence of apparent motive was correct, and so was its refusal to state the reason for the rule requiring that guilt must be proved beyond a reasonable doubt. The evidence was such as to justify the verdict. Order affirmed.

MITCHELL, J. I dissent for the reason that, in my judgment, the evidence was not sufficient to warrant a conviction. It would subserve no good purpose to refer to the testimony, further than to say that it seems to me that the opinion of the court does not give a full and accurate statement of the facts as they appear from the whole case.

HALL v. WHEELER.

(*Supreme Court of Minnesota.* December 13, 1887.)

COMPROMISE—VALIDITY—MISTAKEN BELIEF THAT RIGHT TO REDEEM FROM TAX SALE HAD EXPIRED.

H. was the owner of certain land. It was sold for taxes, and W. became the purchaser. After the right to redeem had, as the parties supposed, expired, and the tax title became absolute, the parties made an arrangement, in accordance with which H. quitclaimed a part of the land to W., and W. quitclaimed the remainder; there being no fraud nor mistake of facts. *Held*, to be a compromise of their respective rights in the land, and that it will be upheld, although a subsequent judicial decision shows the rights of the parties to have been different from what they supposed.

(*Syllabus by the Court.*)

Appeal from district court, St. Louis county; STEARNS, Judge.

J. A. Payne and *C. E. Shannon*, for Hall, appellant. *White & Reynolds*, for Wheeler, respondent.

GILFILLAN, C. J. Plaintiff was, except for the tax sales, the owner of about 37 acres of land in St. Louis county. In 1880 the lands were sold for taxes, and defendant became the purchaser, and received the proper certificates. In 1883 defendant claimed title to the land under such certificates. Plaintiff consulted legal counsel, and was advised that the time for redemption from the tax sales had expired, and that defendant had good title under the tax sales. Defendant also consulted counsel, and was advised to the same effect. In August, 1883, the parties came together, and plaintiff made a money offer for defendant's title, which was rejected. Some further negotiations were had, and the parties finally made an agreement in accordance with which plaintiff and wife executed to defendant a quitclaim deed of part of the land, and defendant and wife executed to plaintiff a quitclaim deed of the remainder. At this time, according to the decision subsequently made by this court in *State* v. *Smith*, 35 Minn. 257, 28 N. W Rep. 241, the time to redeem from the tax sales had not expired, because no notice had been served on the owner. Plaintiff brings this action to avoid his deed to the defendant.

Although neither the pleadings nor the stipulations of facts call it so, it is clear beyond all question that the arrangement between the parties was intended to be a settlement and compromise of whatever rights or interests they might respectively have or claim in the land. By the arrangement each derived a benefit from, and each conferred a benefit on, the other. The defendant abandoned all right to assert any claim under the tax sale to the land which he quitclaimed to plaintiff, and plaintiff abandoned all right to question the tax sale as to the land which he quitclaimed to defendant. Whether he believed he had or had not a right to redeem, he secured the land quitclaimed to him without redeeming. As there was no fraud, no misrepresentations, nor mistake of fact, and as the parties had equal means of ascertaining what their respective rights were, the courts must uphold any compromise of such rights, "although a judicial decision should afterwards be made showing that these rights were different from what they supposed them to be, or showing that one of them really had no rights at all, and so nothing to forego." *Perkins* v. *Trinka*, 30 Minn. 241, 15 N. W. Rep. 115.

Judgment affirmed.

ROCKWOOD v. DAVENPORT.

(*Supreme Court of Minnesota.* December 13, 1887.)

1. JUDGMENT—RENDITION AND ENTRY—DOCKETING—JUDGMENT BOOK.

To constitute a judgment for the purpose of docketing, it must be entered in the judgment book. A docketing without such entry is of no avail, even though a "judgment roll" be filed with what purports to be a copy of a judgment in it.

2. SAME—POWER OF CLERK TO ENTER NUNC PRO TUNC.
In such case the clerk cannot, without an order of the court, enter a judgment *nunc pro tunc.*

3. SAME—INJUNCTION TO RESTRAIN CLERK—DISCRETION OF COURT.
But *held*, that the refusal of the court to grant a temporary injunction to restrain the clerk from entering the judgment *nunc pro tunc* in such a case was within the sound legal discretion of the court.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; REA, Judge.

A. B. Jackson, for Rockwood, appellant. *Dobbin & Hanley*, for Davenport, respondent.

GILFILLAN, C. J. Section 273, *c.* 66, Gen. St. 1878, reads: "The judgment shall be entered in the judgment book, and specify clearly the relief granted or other determination of the action." By section 275 the clerk is required, "*immediately after entering the judgment*," to attach and file, as the judgment roll, certain papers, among them a *copy* of the judgment. Section 277 provides for docketing the judgment "*on filing the judgment roll.*" These acts follow in regular sequence: *First*, the entry of the judgment; *second*, the making up and filing the judgment roll; *third*, the docketing. To support either a judgment roll or docketing, there must be a judgment entered. As this court said in *Williams* v. *McGrade*, 13 Minn. 46, (Gil. 39:) "If a copy of the judgment constitutes a part of the judgment roll, the *original* must exist." There can be no judgment capable of being docketed or enforced in any manner till it is entered in the judgment book. Until that is done, it does not matter that the party is entitled to judgment, either by default of defendant, or upon a decision or direction of the court. It has frequently been decided that an order or direction for judgment by the court, or by a referee, is not a judgment, so that an appeal can be taken from it. That to constitute a judgment it must be entered in the judgment book, as the statute directs, has always been held by this court. *Brown* v. *Hathaway*, 10 Minn. 303, (Gil. 238;) *Williams* v. *McGrade*, 13 Minn. 46, (Gil. 39;) *Washburn* v. *Sharpe*, 15 Minn. 63, (Gil. 43;) *Hodgins* v. *Heaney*, 15 Minn. 185, (Gil. 142;) *Thompson* v. *Bickford*, 19 Minn. 17, (Gil. 1;) *Hunter* v. *Stove Co.*, 31 Minn. 505, 18 N. W. Rep. 645.

The filing of the roll and docketing in this case, there being no judgment to authorize them, were of no avail. The omission of the clerk to enter the judgment before performing those acts was apparently a gross violation of official duty.

Whether the court, with the proper parties before it, and upon a proper showing, might direct the clerk to enter the judgment *nunc pro tunc*, we need not consider. Certainly the clerk cannot lawfully do it without such order. But although the unauthorized act of the clerk in entering judgment as of the date of the docketing would put an apparent cloud upon plaintiff's title, yet, as the granting a temporary injunction rests in the sound legal discretion of the court, the refusal to grant it was not necessarily error. The plaintiff does not lose any right by the refusal. If the judgment be entered *nunc pro tunc*, he has his remedy against the party claiming under it, and in the prosecution of that remedy both of the parties interested would be before the court, instead of there being but one of them, as in the case here. To refuse the temporary injunction when such a ground for it exists, is not beyond a sound legal discretion. Order affirmed.

POTULNI v. SAUNDERS.

(*Supreme Court of Minnesota.* December 13, 1887.)

1. MASTER AND SERVANT—TRESPASS BY SERVANT—SCOPE OF EMPLOYMENT.
Defendant employed a servant to drive his team, (it not appearing whether the employer made provison of hay for servant to feed the team,) and the servant, without express authority from the defendant, took, by trespass, plaintiff's hay, and fed to the team. *Held*, that it was within the line of the servant's employment, and defendant is liable for the trespass.

2. SAME—TREBLE DAMAGES—MASTER NOT LIABLE FOR.
Also that sections 269, 270, *c.* 66, Gen. St. 1878, imposing treble damages for such trespasses, do not apply against one who is in law deemed guilty only by reason of his relation to the actual trespasser.

(*Syllabus by the Court.*)

Appeal from municipal court, city of Duluth, St. Louis county; MARTIN, Judge.

L. H. Zastrow, for Potulni, respondent. *Jaques & Hudson*, for Saunders, appellant.

GILFILLAN, C. J. Action for a trespass in taking hay from plaintiff's barn. The taking was not by defendant in person, but by his servant, and the proofs show that the latter was not expressly authorized by defendant to take it; and the defendant is not liable unless there was implied authority,—that is, unless the act of taking the hay was within the scope of the servant's authority. The facts are that the servant was driving a team for defendant on the road and in the woods, which was all that he was employed to do. Near plaintiff's barn defendant had a logging camp. The servant, without any express direction from defendant, and without his knowledge, stopped at plaintiff's house, near the barn, several nights, and while there took the hay from the barn, and fed it to the horses that he was driving for defendant. The evidence was silent as to whether defendant had made any provision of hay for the servant to feed to the horses. On being informed by plaintiff of what the servant had done he promised to pay the damage if it was not too much.

We see nothing in this like a ratification of the act of the servant, if it was unauthorized. A majority of the court are of opinion that, from the facts above stated, it might fairly be found providing food for the team was an act contemplated by the servant's employment; and, if so, that the defendant would be liable for the use by the servant of unlawful means to accomplish that end, and that the taking of the hay for the purpose of feeding to the horses was within the line of his employment. But I do not see anything in the case to indicate that providing food for the horses was any part of the servant's business, and therefore I am of opinion that taking the hay was an act for which his employer was not liable.

The majority of the court are of opinion that the statute (sections 269, 270, *c.* 66, Gen. St. 1878) imposing treble damages for trespasses upon certain kinds of personal property, being highly penal in its nature, ought not to apply in a case like this, where defendant is deemed in law to have committed the trespass only by reason of his relation to the actual trespasser.

The court below will modify its judgment so as to render judgment only for the single damages found.

HARRIS v. KERR.

(*Supreme Court of Minnesota.* December 13, 1887.)

1. NEW TRIAL—WHEN GRANTED—NOMINAL DAMAGES.
Where nothing else is involved, the court will not order a new trial to enable a party to recover only nominal damages.

2. APPEAL—SETTLED CASE—MATTER OMITTED FROM.
Where a court, in the course of a trial, denied a motion to amend a pleading, in part because of what the counsel for the moving party said in his opening to the jury, what was said by him must be made part of the settled case before the court will review the decision.
(Syllabus by the Court.)

Appeal from district court, Washington county; CROSBY, Judge.
C. H. Wilson, for Harris, respondent. *Fayette Marsh*, for Kerr, appellant.

GILFILLAN, C. J. Action to recover the price of a horse sold, and also for the board of the horse. The answer denied the allegations in the complaint as to the board of the horse, and, as a defense against the claim for the price, alleged that, at the purchase, plaintiff made certain representations as to the soundness of the horse, and warranted it to be as he represented, and alleged the falsity of the representations, and, in effect, that the horse was not as warranted. No damages for the breach of warranty were alleged, and the allegations of the answer were insufficient to make a charge for false and fraudulent representations; for it does not allege any fraudulent intent, nor any reliance on the representations. The answer alleges that defendant returned the horse to plaintiff, on the ground that he had been deceived by said false representations. The reply put in issue the new matter in the answer.

At the trial plaintiff made a *prima facie* case to recover on both claims alleged in the complaint, showing a sale of the horse, and that, when afterwards defendant sent it back, by her agent, without stating any reason for it, plaintiff refused to receive it, except as a boarder, for which he informed the agent he would charge defendant the same as any one else, $18 a month. Thereupon the horse was left with plaintiff. Defendant introduced evidence, in the course of which he asked leave to amend the answer by inserting allegations to the effect that the representations of plaintiff set forth in the answer were false and fraudulent, and made with intent to cheat and defraud defendant, and were relied on by her. The court declined to allow the amendment, saying that in so doing he should be governed very largely by the opening of defendant's counsel to the jury as to what the testimony would be. The most that can be said for defendant's testimony under the answer is that it tended to make a case of warranty, but no damages were shown. When the defendant rested, she requested the court to state, and make a part of the record, the language claimed by the court to have been used by counsel in opening the case on which the court based the exercise of its discretion in refusing the amendment. There does not appear to have been any ruling on this request. The court thereupon directed a verdict for plaintiff for the amount claimed in the complaint.

If it can be said that this was technically wrong, because, on the evidence, the case ought to have gone to the jury on the issue of warranty, still, as there was no proof of damages, the error, if any, was of no substantial prejudice to the defendant; for, if the jury had found a warranty, they could have allowed only nominal damages. A new trial would not be allowed to give a party an opportunity to recover only nominal damages,—one cent or five cents,—when nothing else was involved.

The matter of amending the answer was in the discretion of the court, and there is nothing in the record to enable us to review it. What defendant's counsel said in his opening is not in the record, and he did not take the right course to have it put on the record. If he desired that done, he should have set forth what he said in his opening in his proposed statement of the case, for that is the proper mode of making what takes place in the course of a trial part of the record. Order affirmed.

VAN AERNAM and others v. WINSLOW.

(Supreme Court of Minnesota. December 13, 1887.)

1. WRITS—SERVICE BY MAIL—PLACE OF MAILING.
   To constitute proper service of a paper in an action by mail, it must be mailed at the place of residence of the attorney or party serving it.
2. JUDGMENT—SETTING ASIDE—DISCRETION OF COURT.
   Held, that the discretion of the court below, in refusing to set aside a judgment on the ground that it was taken through inadvertence, surprise, or excusable neglect, was properly exercised.

(Syllabus by the Court.)

Appeal from district court, Otter Tail county; BAXTER, Judge.

Searle & Lamb and *Reynolds & Stewart*, for Van Aernam and others, respondents. *R. R. Briggs*, for Winslow, appellant.

GILFILLAN, C. J. This was an appeal from an order refusing to set aside a judgment entered by default of defendant to answer. The grounds on which the motion was made, and they are the only grounds which can be considered on this appeal, were that an answer had been duly served within the time allowed by law, and that the judgment was taken against defendant through his inadvertence, surprise, and excusable neglect. The latter ground was within the sound discretion of the court below; the former presented a question of legal right. As to the service of the answer, the facts were: The plaintiffs' attorneys resided at St. Cloud; the defendant's attorneys, at Moorhead. The summons was served personally on November 17, 1883. On December 7th following, the attorneys for defendant caused a copy of the answer to be mailed at St. Paul, directed to the plaintiffs' attorney at St. Cloud, and the latter received it the following day, and on that day returned it for the reason that it was not mailed at the place of residence of the defendant's attorneys. The answer was received the day after the last day for personal service, so that there was no service, unless it was a proper service by mail. The statute (section 75, c. 66, Gen. St. 1878) provides: "Service by mail may be made when the person making the service and the person on whom it is made reside in different places, between which there is a regular communication by mail." A similar statute, and a rule of court to the same effect, have been construed by the courts in New York to require that the paper to be served must be mailed at the place of residence of the person serving it. *Corning* v. *Gillman*, 1 Barb. Ch. 649; *Schenck* v. *McKie*, 4 How. Pr. 245; *Peebles* v. *Rogers*, 5 How. Pr. 210; *Hurd* v. *Davis*, 13 How. Pr. 57.

When the paper is properly mailed, the service is deemed complete. The risk of failure of the mail is on the person to whom it is addressed. *Radcliff* v. *Van Benthuysen*, 3 How. Pr. 67. He has a right, therefore, to insist on strict compliance with the statute. The statute requires, to make the service regular, that there shall be a regular communication by mail between the places where the person serving and the person served reside, which necessarily implies that the service is to be by means of that "regular communication by mail," and no other. The requirement of such communication would be senseless if the person serving might mail the paper at any other than the place where he resides. When the paper actually comes to the hands of the person to be served within the time required for personal service, it is immaterial where it is mailed; for then it is equivalent to personal service. But, if it be mailed at any other than the proper place, the person adopting that mode of service must take the risk of its reaching the person to whom sent within the proper time. In such case there is no service unless it do reach the latter within such time. The service in this case was not good.

On the other ground of the motion we see no reason to think the court below did not exercise its discretion judiciously. Had the defendant made timely

application for leave to serve his answer, no doubt the court would have granted it. Although for a time after the attempt to serve the answer the defendant's attorneys may have supposed, from conversations between them and the plaintiffs' attorneys, that the latter would receive the answer, yet they were distinctly informed by the latter as early as May, 1884, that it would not be received. The judgment was not entered till August, 1885, and the defendant made no more in the matter till August, 1886. There is no sufficient excuse given for the delay. The case is, very likely, a hard one, but the defendant has himself only to blame for the situation his own laches has placed him in. Order affirmed.

COLLINS, J., took no part in this decision.

ANDERSON *v.* SOWLE ELEVATOR CO.

(*Supreme Court of Minnesota.* December 13, 1887.)

MASTER AND SERVANT—NEGLIGENCE OF MASTER—EVIDENCE.

Evidence *held* not sufficient to charge a master with negligence, in an action by an employe for a personal injury sustained while coupling cars at the master's elevator.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; YOUNG, Judge.

Arctander & Arctander, for Anderson, appellant. *Hart & Brewer*, for Sowle Elevator Co., respondent.

GILFILLAN, C. J. Action for a personal injury received by plaintiff while coupling cars. After the plaintiff had rested his case, the court below dismissed the action, on the ground that he had not made out a cause of action. The plaintiff was employed by defendant at its elevator, and while so employed was required by it to go between two empty railroad cars and couple them. While he was doing this, a loaded car was, by other of defendant's servants, moved along the track against one of the empty cars, driving it against the other, so that, as plaintiff was inserting the coupling-link, his hand was caught between the bumpers and injured.

It is claimed that the evidence tended to show negligence on the part of defendant in several particulars: *First*, that it set plaintiff to do work more hazardous than that for which he was employed,—work in which he was unskilled, as defendant knew. It does not appear that any special skill is required in coupling cars when they are standing still, and are to be brought together by hand as these were. And the danger of injury from the hand being caught between the bumpers if the cars are brought too suddenly together, while coupling with the hand, must be obvious to any ordinary mind, however unskilled. It must be presumed that, when plaintiff went in to couple cars, he knew the danger as well as his employer, and he was not called on to do it suddenly, so as to prevent thought of the danger. But, although plaintiff testified that he was employed only to load and unload cars, and that coupling cars was outside of such employment, it is entirely apparent from his whole testimony that, while loading and unloading the cars was the main thing which he was to do, there were other things incidental to that which he was to do, and did do without question, such as bringing loaded cars into place, pushing unloaded cars out of the way, and coupling them whenever necessary.

The only other particulars in which negligence of defendant is claimed, which we need specially notice, may be reduced to this one: That it was negligent in defendant not to prevent the loaded car being pushed against the car which plaintiff was coupling, or, if it did not do that, it was negligent in not giving plaintiff, who was where he could neither see nor hear it coming,

notice of its approach. The testimony was to this effect: The manner of doing the work of unloading cars was this: A loaded car was brought along the track to the proper place, and the grain taken up into the elevator, and the empty car was pushed along the track out of the way, and when there were more than one they were coupled. Loaded cars were brought into place for unloading by fastening to the rear end a rope, the other end of which was turned over a windlass worked by the engine of the elevator. When the rope was attached, the power was applied to the windlass, and the car drawn slowly forward to the desired place,—so slowly that, when the power was turned off, the car would stop in a distance of three or four feet. A car was stopped at the exact place desired by putting a plank on the rails in front of the wheel. In coupling cars, they were brought together by means of an iron bar, called a "pinch-bar," held in the hands and applied as a lever to one of the wheels. Just before the injury to plaintiff, there were some unloaded cars standing west of the elevator, and some loaded cars east of it. The plaintiff and another employe were engaged in pulling the rope from the windlass, for the purpose of bringing up the loaded cars, when the general manager of defendant came to them and asked if the unloaded cars had been coupled, to which plaintiff answered that he did not think they were. Thereupon the manager said: "Never mind that. Let us go down and couple them cars before we shove in the others." He and plaintiff then went to the empty cars. The plaintiff got in between two of them to do the coupling, while the manager undertook to push one up to the other with the pinch-bar. The men had been instructed by the foreman, in the hearing of plaintiff, to use a stick in handling the link when coupling,—not to put the hand in between the bumpers, or they would possibly get caught. The plaintiff testified that on this occasion the link was out of the draw-bar, and lay on top of the bumper, so he had to put it in with his hand; that it was bent, and he had some trouble to put it in, and, while he was trying to push it in, the cars came together, and his hand was caught between the bumpers. There is nothing in the evidence to indicate that the manager had any reason to think that the loaded car would be moved down against the empty car.

After what he had said to those who were preparing to move it, he had reason to believe it would not be moved till the coupling was done,—had as much reason to believe it as plaintiff had. It does not appear who set the car in motion, nor why it was not stopped at the place for unloading, as was the custom; not that the manager had any reason to suppose that, if set in motion, it would not be stopped as had always been done. The only danger, so far as appears, there could be from the one car running against the other, was of the hand getting caught in coupling. It does not appear that the manager had reason to suppose, what the plaintiff knew, that it would be necessary to do the coupling with the hand instead of with a stick, as was customary, and as the men had been instructed to do it. Upon this state of facts, no negligence could be charged upon the manager, either in not preventing the loaded car being moved, or in not anticipating the danger to plaintiff, and warning him against it. So far as appears, the act from which the danger arose was that of a co-employe.

The action was rightly dismissed. Order affirmed.

SMITH v. BOARD OF COUNTY COM'RS OF NOBLES CO.

(*Supreme Court of Minnesota.* December 13, 1887.)

BOUNTY—FOR PLANTING TIMBER AND SHADE TREES—REPEAL OF STATUTE.

Chapter 19, Gen. Laws 1873, entitled "An act to encourage the planting and growing of timber and shade trees," was intended to supersede chapter 30, Gen. Laws 1871, with the same title, and so operate to repeal it.

(*Syllabus by the Court.*)

Appeal from district court, Nobles county; PERKINS, Judge.

Daniel Rohrer, for Smith, appellant. *L. M. Lange*, for Board of County Com'rs of Nobles Co., respondent.

GILFILLAN, C. J. In 1871 the legislature passed an act (chapter 30) entitled "An act to encourage the planting and growing of timber and shade-trees." In 1873 it passed another act (chapter 19) with precisely the same title. Each act provided for paying a bounty for the planting and growing of trees. The second act was almost a transcript of the other,—so nearly so as to suggest that it was drawn from the other. The only difference in the substance of the two acts (and the differences in phraseology were only such as the differences in substance required) was that by the first the bounty was to be paid out of the county treasury, and the proofs required to be filed by the claimant with the county auditor were by the latter to be laid before the county commissioners, who were to pass on their sufficiency, and by the second the bounty was to be paid out of the state treasury, and the county auditor was to make and send to the state auditor a certified list of all lands and tree-planting reported and verified to him; and the state auditor was to determine whether the provisions of the act had been complied with; and the second act contained a provision (there being no similar one in the first) that, if the aggregate of the bounties applied for in any one year should exceed the sum of $20,000, then the auditor should distribute $20,000, and no more, *pro rata* among the claimants. The second act contains no clause repealing the first. But notwithstanding that, and that repeals by implication are not favored, it is pretty clear that the second act was intended to be a substitute for and to supersede the first, and so to be a repeal of it. In each the state gave the bounty. True, in the first, it provided that the bounty for trees planted and grown in any county should be paid out of the treasury of that county; still it was given by the state to carry out a state policy. The county officers had no discretion in the matter.

It would seem strange that the same sovereign should give two precisely similar bounties for precisely the same thing. It would be more natural to suppose that a second law, providing the same bounty for the same thing, was intended to take the place of the former law, and not to be in addition to it. Here are two acts, having the same object and purpose in view, to be accomplished by the same means, having the same title, and using almost throughout the same terms; the only change being that in the second the state treasury, instead of the county treasury, is named as the one out of which the bounty should be paid, and placing a limit to the aggregate of the bounties, and such change in the phraseology as was necessarily incident to those two changes in substance. There can be little question that the act of 1873 was intended as a revision to some extent of the state policy in the matter of encouraging the planting and growing of trees, and that as such it was to take the place of the law of 1871. Judgment affirmed.

SHAFFER v. STATE.

(*Supreme Court of Nebraska.* November 30, 1887.)

1. HOMICIDE—MURDER—INTENT—INDICTMENT.
   Intent or purpose to kill is essential to constitute the crime of murder in the first or second degree, as defined by sections 3 and 4 of the Criminal Code, and this intent must be specifically and directly averred as part of the description of the offense in every indictment for either of those crimes.

2. SAME—SUFFICIENCY OF INDICTMENT.
   An averment that the accused "feloniously, purposely, and of deliberate and premeditated malice," did make an assault on the deceased, and that he then and there "feloniously, purposely, and of his deliberate and premeditated malice did shoot" the deceased with a gun loaded, etc., inflicting a mortal wound of which

the deceased then and there died, does not satisfy the requirements of the law; for though the accused may have purposely and of deliberate and premeditated malice assaulted the deceased, and shot him, it does not follow that the shooting was with the design and purpose to produce death.

3. SAME—DEFECT NOT AIDED BY FORMAL CONCLUSION.
Where the purpose to kill is not averred by way of description of the offense, the omission cannot be aided by the ordinary formal conclusion of the indictment which avers that "so" the jurors do find and say that the accused "did in manner and form aforsaid, feloniously, purposely, and of his deliberate and fraudulent malice, kill and murder" the deceased. Such allegation, being nothing more than a legal conclusion arising from the facts previously stated, cannot cure any defects in the premises on which it assumes to be predicated.

4. SAME—INSTRUCTIONS CRITICISED.
Instruction numbered 13, copied from instruction numbered 9 in *Williams* v. *State*, 6 Neb. 334, and printed therein at page 336, criticised, and the concluding words thereof held unnecessary.

(*Syllabus by the Court.*)

Error to district court, Kearney county; GASLIN, Judge.

Greene & Hostetter and *J. E. Shepman*, for plaintiff. *The Attorney General* and *J. L. McPheeley*, for defendant.

REESE, J. Plaintiff in error was convicted of the crime of murder in the first degree, and sentenced to be hanged. He alleges error, and brings the cause into this court for review. The indictment is as follows: "*The State of Nebraska, Kearney County—ss.:* Of the November term of the district court of the Eighth judicial district of the state of Nebraska, within and for Kearney county in said state, in the year of our Lord one thousand eight hundred and eighty-six, the grand jurors, chosen, selected, and sworn in and for the county of Kearney aforesaid, in the name and by the authority of the state of Nebraska, upon their oaths present: That John Shaffer, late of the county aforesaid, on the eighth day of November, in the year of our Lord one thousand eight hundred and eighty-six, in the county of Kearney and state of Nebraska, aforesaid, did feloniously, purposely, and of his deliberate and premeditated malice, make an assault on one William H. Smith, then and there being, and a certain gun which then and there was loaded with gunpowder and thirty leaden shot, and by him, the said John Shaffer, had and held in both his hands, he, the said John Shaffer, did then and there feloniously, purposely, and of his deliberate and premeditated malice shoot off and discharge at and upon the said William H. Smith, and thereby and by thus striking the said William H. Smith with the said thirty leaden shot, inflicting on and in the head of him, the said William H. Smith, one mortal wound, of which said mortal wound the said William H. Smith then and there instantly died, and so the grand jurors aforesaid, on their oaths aforesaid, do find and say that the said John Shaffer did, in manner and form aforesaid, feloniously, purposely, and of his deliberate and premeditated malice, kill and murder the said William H. Smith, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska." (Signed by the district attorney.)

The question here is, does this indictment charge the crime of murder in the first degree, under the statutes of this state? Section 3 of the Criminal Code is as follows: "If any person shall purposely and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or if any person by willful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction of an innocent person—every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death." The provisions of this section, as applicable to the case at bar, are that, if any person shall purposely, and of deliberate and premeditated malice, kill another, every person

so offending shall be deemed guilty of murder in the first degree, etc. The killing must be done purposely, and of deliberate and premeditated malice; that is, there must be an intent or purpose to kill at the time of the commission of the act, and the killing must be deliberately and premeditately done. This is the plain and obvious meaning of the statute. Applying this statute to the indictment, we find an entire want of any allegation of an intent or purpose to kill. It is alleged that the assault was purposely made and that the gun was purposely discharged, but with what intent or purpose these acts were done is nowhere alleged. The pleader has followed a precedent for an indictment for murder under the common law, and this would have been sufficient had not the legislature by the enactment of the section above quoted changed the essential ingredients or constituent elements of murder. At common law there were no degrees of murder, and there were but two degrees of felonious homicide. These were murder and manslaughter. By the statute we have two degrees of murder—the first and second—and manslaughter. At common law murder is defined to be the unlawful killing of any reasonable creature, in being and under the king's peace, with malice aforethought, either expressed or implied. 4 Bl. Comm. 198. In Russ. Crimes, 482, it is defined as the unlawful killing of a human being under the king's peace, with malice prepense or aforethought, either express or implied by law.

A purpose or design to kill is not an essential ingredient. But the rule of the common law has been changed, and the purpose, design, or intent to kill must now be alleged. In Maxw. Crim. Proc. 176, it is said: "It is essential to the sufficiency of an indictment for murder in the first degree, under the statute, that it contain a direct and specific averment of the purpose or intention to kill, or intention to inflict a mortal wound, in the description of the crime."

This question was before the supreme court of Ohio in *Fouts* v. *State*, 8 Ohio St. 98, in the year 1857, under a statute from which the section above quoted has since been copied, and it was there held by a majority of the court, on an indictment substantially like the one in this case, that it was essential to the sufficiency of an indictment for murder in the first degree, that it contain a direct and specific averment of the purpose or intention to kill, or intention to inflict a mortal wound in the description of the crime. So, also, in *Robbins* v. *State*, Id. 131, where the accused was convicted of murder in the first degree, by the administration of poison, it was held that the conviction could not be sustained where there was no allegation of the purpose or intent to kill the deceased. In *Kain* v. *State*, Id. 306, which was a conviction of murder in the second degree by shooting, as in this case, and where the indictment was in all essential respects like the one in this case, the judgment was set aside owing to the want of an allegation of the purpose or intent to kill; it being held that such purpose was an essential element of the crime as defined by the statute. In *Hagan* v. *State*, 10 Ohio St. 459, the same question was before the same court, and resulted in a like decision. We quote from the first and second points in the decision: "*First.* Intent or purpose to kill is essential to constitute the crime of murder in the first or second degree, as defined by the statutes of Ohio; and this intent must be specifically and directly averred as a part of the description of the offense in every indictment for either of these crimes." "*Second.* An averment that the accused, 'purposely and of deliberate and premeditated malice, did strike' the deceased, thereby inflicting a mortal wound, of which the deceased afterwards died, does not satisfy the requirements of the law; for though the accused may have purposely and maliciously struck the deceased, it does not follow that the stroke was given with a design to produce death."

In *State* v. *Brown*, 21 Kan. 38, "where an indictment for murder charged substantially that the defendant deliberately and premeditatedly committed an assault and battery upon the deceased, by shooting him with a pistol loaded

with gunpowder and leaden balls, and thereby inflicted a mortal wound, from which wound the deceased died, but did not anywhere charge that the defendant committed the assault and battery, or did the shooting or killing with the deliberate and premeditated intention of killing deceased," it was held, under a statute similar to ours, that the indictment did not allege murder in the first degree.

The case of *Leonard* v. *Territory*, 7 Pac. Rep. 872, was where the plaintiff in error was indicted for the crime of murder in the first degree, and upon trial was found guilty as charged, and sentenced to be hanged. The section of the territorial statute under which he was prosecuted was as follows: "Every person who shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be administered, kill another, every such person shall be deemed guilty of murder in the first degree," etc. The indictment was almost identical with the indictment in this case, so far as the charge of killing was concerned, it being alleged that the accused, "in and upon one Ambrose Patton, feloniously, purposely, and of deliberate and premeditated malice, did make an assault, and that the said Andrew Leonard, with a certain gun then and there loaded, and charged with leaden bullets, then and there feloniously, purposely, and of deliberate and premeditated malice, did discharge and shoot off to, against, and upon the said Ambrose Patton," etc.; and it was held that the indictment was insufficient to sustain the conviction. See, also, *Fouts* v. *State*, 4 G. Greene, 500, and *State* v. *McCormick*, 27 Iowa, 402.

It may be suggested that the latter clause or conclusion of the indictment, "and so the grand jurors aforesaid on their oaths aforesaid, do find and say," etc., brings the case within the rule here stated. This cannot be held to cure the defect, and it has been so decided in *Leonard* v. *Territory*, *Hagan* v. *State*, and *Fouts* v. *State*, *supra*. See, also, Maxw. Crim. Proc. 185; and *Smith* v. *State*, 4 Neb. 277.

Objection is made to instruction numbered 13 given by the court to the jury. This instruction need not be here set out at length, as it is copied from the ninth instruction given in *Williams* v. *State*, 6 Neb. 334, and is there printed at page 336. While this instruction appears to have had the approval of this court in the very able opinion written by Chief Justice LAKE in that case, yet it is apparent that it was not before the court in that case, and was only referred to by the writer of that opinion as a correct statement of the law giving the right to defend against threatened personal violence. I think the instruction is, perhaps, objectionable, by reason of the words "if you are fully satisfied that he was fully excused or justified under the circumstances in taking the life of the deceased." As I read it, the instruction would be complete without those words, and their addition could only serve to unnecessarily impress upon the jury the fact that they must find that the accused "was fully excused or justified" in taking the life of the deceased. While it is possible that the error, if any, would not be so far prejudicial as to call for a reversal of the judgment, yet I think the words quoted might with safety and propriety be omitted.

Other objections to the judgment of the court below are presented, but as they will not likely arise on the next trial, they need not here be noticed.

The judgment of the district court is reversed, and the cause remanded for further proceedings. Judgment accordingly.

(The other judges concur.)

DOWNIE v. LADD.

(*Supreme Court of Nebraska.* November 30, 1887.)

1. VENDOR AND VENDEE—DEFECTIVE TITLE—MEASURE OF DAMAGES.
Where, in an action on a promissory note, the defendant set up in his answer a contract entered into between the parties for the conveyance of certain property in full satisfaction of the debt, and alleged a performance in compliance with the contract, and there was testimony tending to sustain the answer, *held* that, in case of defect of title of, or incumbrance on part of, the property so conveyed, the measure of damages was not the amount of the note less the value of the property conveyed, but the amount of the incumbrances or value of the property to which the title had failed.

2. TRIAL—FORM OF ACTION—ISSUE—WAIVER.
Where parties have made up the issues in a case without objection to the particular form of the action, they will be held to have waived any errors in that regard.
(*Syllabus by the Court.*)

Error to district court, York county; NORVAL, Judge.
France & Harlan, for plaintiff. *Sedgwick & Power*, for defendant.

MAXWELL, C. J. This action was brought in the district court of York county upon the following promissory note:

"On or before one year from date, for value received, I promise to pay John Ladd or bearer (484.83) four hundred and eighty-four and 83-100 dollars, with use at eight per cent. per annum until paid.

"*Dated Sharon, Walworth Co., Wisconsin State, June* 18, 1880.

[Signed] "GEORGE F. DOWNIE."

The defendant below in his answer admits the making and delivery of the note, but alleges that after the execution of the same he entered into the following contract with the plaintiff: "YORK, NEBR., June 12, 1882.

"Whereas, John Ladd and Scott M. Ladd hold a certain contract and note against George F. Downie, on which contract there is due $1,000, and int., and on which note there is due $448.83 and interest; and, whereas, said Downie has this day turned out and sold to said J. and S. M. Ladd, upon said indebtedness, all his property in New York, Nebraska, and other property: Now if the said Ladd gets full title unincumbered, in and to the following property to-wit: Lot 15, and north half of lot 14, in block 32, in the village of New York, in said York county, Nebraska, and the two buildings north of B. F. Marshall's blacksmith shop, 1 iron lathe, 1 blower, counter-shaft, scales, sledge, three riddles, flasks, sand cupola, wagon-drill, note of Kilner & Olcott, on which there is due $250 and int., the said John Ladd paying $130 to redeem said note, one bake-oven and emery stand used as counter-shaft,—then the said note of said Downie and said contract are to be canceled, and the said property taken in full liquidation of said indebtedness.

"J. and S. M. LADD,
"By SEDGWICK & POWERS, Attys.
"GEO. F. DOWNIE."

Downie claims to have fully performed said contract on his part. The plaintiff in his reply "admits the making of the agreement set forth in the defendant's answer, but denies that said defendant performed all the conditions of said contract and agreement on his part to be performed, and denies that the said Ladd, nor John Ladd, got full title unincumbered in and to the property conveyed to him, and described in said agreement; and plaintiff denies that he or John Ladd has ever got full title unincumbered to lot 15, and north half of lot 14, in block 32, in village of New York, Nebraska; and, except as hereinbefore expressly admitted, this plaintiff denies each and every allegation of new matter in said answer contained." On the trial of the cause the court found for the plaintiff below, and rendered judgment for the sum of $675.43.

The testimony shows that Ladd obtained all the property set forth in said

contract, except a part of lots 14 and 15, and that the value of such interest was about $150. It will be observed that the contract provides that the property therein described, if unincumbered, was to be accepted in full satisfaction of the debt. The plaintiff below is shown to have retained all the property obtained under the contract, and can only recover for such damages as he may have sustained by reason of defects of title or incumbrances on the property. The court below seems to have computed the amount due on the contract set forth in the answer, and also the amount due on the promissory note set forth in the petition, and deducted therefrom the sum of $1,200 as the value of the interest of Downie in the property conveyed to Ladd, and rendered judgment against Downie for the balance. In this we think the court erred.

2. The plaintiff in error contends that the action should have been brought on the contract, and not on the note. This objection, however, is unavailing, as the plaintiff practically assented to this mode of procedure in the court below, by failing to object in making up the issue, and cannot be heard now to complain on that ground.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

(The other judges concur.)

DORSEY v. CLAPP.

(*Supreme Court of Nebraska.* November 30, 1887.)

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE.
   In an action for malicious prosecution it was claimed by the defendant, who was a constable, that he had sufficient cause for making the complaint against the plaintiff, charging him with the crime of burglary—his information being the confession of a youth whom he had previously arrested for the same crime, which confession was voluntarily given, and by which he implicated the plaintiff as being a confederate and accomplice; these facts being testified to by defendant. On his cross-examination he was asked if, prior to the confession, and while the youth was in custody, he did not, in the hearing of the party under arrest, tell another constable to take him to jail, and by the time he had laid there long enough he would confess, or language to that effect. Objection was made and the objection sustained. *Held* error.
2. EVIDENCE—GENERAL REPUTATION OF PARTY—SPECIFIC ACTS.
   The general reputation of a party to an action cannot be established by the proof of specific acts.

(*Syllabus by the Court.*)

Error to district court, Buffalo county; MORRIS, Judge.

Calkins & Pratt, for plaintiff. *E. M. Cunningham*, for defendant.

REESE, J. This action was instituted in the district court of Buffalo county. The petition contained two causes of action,—the first for false imprisonment; the second, malicious prosecution. The allegations of the second count in the petition are, in substance, that on the eighth day of October, 1884, defendant falsely and maliciously, and without reasonable or probable cause therefor, charged this plaintiff, before a justice of the peace of Buffalo county, with having on or about the eighth day of October, 1884, in the county aforesaid, committed an offense of burglary and larceny, and thereupon caused the issuing of a warrant and arrest of the plaintiff; that such proceedings were thereafter had, which resulted in the acquittal and discharge of plaintiff, and the prosecution was ended. The usual allegations of injury and damage, and demand for judgment follow. The defendant in his answer, in substance, admitted the arrest and conclusion of the prosecution, but alleged that at the time of the arrest he was a constable in the town of Kearney, Buffalo county, and that there was a burglary committed on the night of the seventh day of October, 1884, and on the eighth day of the same month, on due investigation, the defendant, with one Kavanaugh, was led to apprehend one Frank Dayton, on

charge of committing said crime; and that Dayton, without any coercion, or favor or promise of any reward whatever, made to the defendant and Kavanaugh a confession, wherein he said that he, in company with the plaintiff herein, and one Jacob Cornelius, had broken into the store building at the time and in the manner charged. It is further alleged that the defendant submitted the facts stated by Dayton, impartially, fully, and freely, to a respectable attorney, who advised defendant that the facts constituted sufficient cause for the arrest of plaintiff. It is denied that the complaint was made falsely, maliciously, and without probable cause. The reply consisted of a denial of the allegations of new matter contained in the answer. A trial was had resulting in a verdict and judgment in favor of defendant. Plaintiff prosecutes error to this court.

Upon the trial plaintiff offered in evidence transcripts from a justice of the peace and county judge, showing that a complaint had been made before a justice of the peace on the date alleged, charging the plaintiff with the crime of burglary and larceny; that he was arrested on said charge, and detained in custody until the tenth day of said month, at which time the case was dismissed at the request of the prosecution, and plaintiff was discharged from custody. Plaintiff also called as a witness his father, Daniel A. Dorsey, who testified as to the amount of money expended in procuring a discharge of plaintiff in error, and that previous to the filing of the complaint plaintiff was employed in a store. Since such time he had been unable to again obtain employment. He also testified that, upon the night of the alleged burglary, plaintiff was at home, and that he had so informed defendant before defendant made the complaint. Plaintiff was also called as a witness, and testified to the arrest and detention. Plaintiff having rested his case, defendant was called as a witness in his own behalf. He testified substantially, that on the eighth day of October, 1884, he was the constable, and that on that morning he received information that a burglary had been committed, and he, in connection with Mr. Kavanaugh, began an investigation of the matter; that in the afternoon he arrested one Frank Dayton, charging him with the crime, basing his arrest upon a pair of pants supposed to be his, found in the store in which the burglary had occurred; that Dayton claimed the pants, (which was a pair of overalls,) and acknowledged his guilt, and stated that plaintiff and one Cornelius were with him, and were parties in the crime. Upon his cross-examination he admitted that he saw the father of plaintiff before he made the complaint. The question was then asked him: "Did he not ask you not to go any further until he could prove to you that his son had nothing to do with it?" This question was objected to as immaterial and improper, and the objection was sustained by the court, to which plaintiff excepted. We do not conceive the ruling of the court upon this question to have been a matter of very grave importance, as cases might arise in which an officer would not be justified in waiting to be advised that the person suspected was innocent, for fear of an escape. It is vaguely shown by the testimony that at that time he had plaintiff in custody. If this was true, the question was a very proper one as tending to show the *animus* of the officer's action. There was no danger of an escape, and if by making reasonable inquiry he could satisfy himself that there was no cause for the complaint, it would have been entirely proper for him to do so, and avoid the stain upon plaintiff's reputation, caused by the filing of the complaint and prosecution thereunder.

The following question was then propounded to defendant: "Did you not, while the Dayton boy was still insisting he was innocent, say to Kavanaugh, in the boy's presence, 'Take him to jail, and by the time he has laid there long enough, he will tell, I guess,' or something to that effect?" This question was objected to by defendant as immaterial, irrelevant, and incompetent, and the objection was sustained. In this we think the court erred. The question was material; it was relevant and competent. Defendant by his an-

swer alleged that the confession was made without any coercion on his part. Dayton was a mere boy, and if the alleged confession was extorted from him by a threat to take him to jail, and leave him there until he would confess, such threat would tend materially to disprove that such confession was voluntary, and would naturally require further investigation, where by the confession he implicated others.

It was further shown, by the transcript of the proceedings before the county judge, that Dayton was acquitted upon his preliminary hearing, the finding being that there was not probable cause to believe him guilty of the offense; he was therefore discharged. If Dayton was not guilty, his alleged confession, if made, was false. If false, it became material to ascertain in what manner it was obtained, not for the purpose of ascertaining whether his arrest was proper, but for the purpose of ascertaining the character of the information upon which defendant acted in making the charge against the plaintiff.

One Ren Julian was called as a witness, who testified that he had resided in Kearney for 12 years, and had known plaintiff since he was a very small boy. Certain questions were propounded to him, which, with their answers, we here copy: "You may tell the jury at what hour of the day or night previous to the eighth day of October, 1884, you have seen Edwin S. Dorsey on the street, and in what company? *Answer*. I have seen him at all hours of the day, and at all hours up to eleven o'clock at night. *Question*. What was he doing as late as eleven o'clock at night, and what company was he in? *A*. He was standing around the rink doors, in company with other boys. *Q*. Was he saying anything? *A*. He seemed to be the loudest-mouthed boy in the crowd—I have heard him swear louder and further than any boy in town." A Mr. McBirney testified to substantially the same thing. These questions and answers were all objected to by plaintiff, as immaterial, irrelevant, improper, and not about any issue in the pleadings, and attacking the witness for particular transactions, but not as to his general reputation. The objections were overruled, and the witness testified as above shown.

Without discussing the question as to whether defendant might have introduced evidence against the plaintiff's general character, it is clear that he was not entitled to give in evidence particular acts. It is well settled that character cannot be proven in this way. The general reputation of a party to an action may sometimes be investigated; and in this case, if proper at all, it would have been for the purpose of showing the good faith of defendant in making the complaint. General reputation, when thus placed in issue, may be supported by the party thus attacked by calling witnesses to prove the contrary of the statements of witnesses, by which his reputation is attacked. It would be quite difficult to see what proof could have been made to rebut the impression created upon the minds of the jury by this testimony. It was said that he was seen at the rink with other boys. This might be true, and yet afford no proof of his bad reputation in connection with the violation of law. It is said, also, that he was profane; swearing louder than other boys. This might also be true, and yet be no proof of a disposition to violate the law by burglarizing other people's property. It is insisted by defendant that the testimony of this witness "would not weigh very much with the jury in a trial in this action, for it was not of a very material nature," and "any prejudice it might have caused in the minds of the jury by its admission was very materially reduced, if not wholly obliterated, by the refusal of the court to give to the jury the eighth instruction asked by defendant, and must therefore be a very feeble ground for the reversal of a judgment of this character and importance." This instruction was to the effect that if plaintiff, by his own action by keeping late hours and bad company, brought himself into bad repute and public scandal and infamy and disgrace, that would be a very material fact which must reduce the amount of damages, if any were allowed.

to plaintiff. It may be first answered that the testimony was prejudicial, and, no doubt, it was an important factor, made use of by the jury in arriving at their verdict; and, second, that it was admitted at the bar of this court that the attention of the jury was not called to the instructions named, or to the refusal of the court to give it. It is quite clear, therefore, that the action of the court in refusing the instruction could have no effect whatever in repairing the injury done by the admission of the testimony.

For these errors the judgment of the district court must be reversed, and the cause remanded for further proceedings, which is done.

(The other judges concur.)

ROTHELL and others v. GRIMES.

(Supreme Court of Nebraska. November 30, 1887.)

1. CHATTEL MORTGAGES—VALIDITY—INSOLVENCY OF MORTGAGOR.
   The insolvency of a mortgagor, although a circumstance which may be taken, together with other material facts, to show a fraudulent design in disposing of property, is not of itself sufficient to establish it.
2. SAME—RIGHTS OF CREDITOR.
   A creditor may obtain from a failing debtor payment of his claim, provided he acts in good faith, and receives no more than sufficient to satisfy the debt.[1]
3. PARTNERSHIP—INSOLVENCY—RIGHTS OF FIRM AND PRIVATE CREDITORS.
   Where a firm is insolvent, the partnership property will be applied to the partnership debts, and a creditor of a member of the firm cannot be paid out of the partnership property, to the exclusion of creditors of the firm.
4. SAME—MORTGAGE OF FIRM GOODS TO SECURE LIABILITY OF PARTNER.
   A mortgage of partnership goods, given to secure the sureties on a bond of a member of the firm for the faithful performance of his duties as guardian, is not available as against creditors of an insolvent firm.

(*Syllabus by the Court.*)

Error from district court, Johnson county; BROADY, Judge.

S. P. Davidson, for plaintiffs. *D. F. Osgood* and *J. Reavis*, for defendant.

MAXWELL, C. J. In March, 1887, the plaintiffs commenced an action in replevin in the district court of Johnson county, to recover possession of certain goods and chattels of the value of $400. It is alleged in their petition that, under and by virtue of a chattel mortgage made and delivered to plaintiffs on the eleventh day of March, 1887, by E. M. McGee and William S. Kearney and McGee & Kearney, a partnership, to secure a note of $2,000, plaintiffs hold a special ownership in, and are entitled to the possession of, the goods in controversy, (particularly describing them;) that on and before March 16, 1887, they were in the lawful possession of said property under said chattel mortgage, and were proceeding to sell said property and apply the proceeds thereof in satisfaction of said debt secured thereby, in as expeditious, safe, and judicious manner as possible, in pursuance of said mortgage; that while plaintiffs were thus in possession thereof, on said sixteenth day of March, 1887, said goods and chattels were forcibly and wrongfully taken from the possession of the plaintiffs by defendant in the night-time; that by reason of the said wrongful taking of said property, and by reason of the negligent and careless handling of the same by defendant, the same have been damaged to the amount of $200; that when so taken by defendant said goods and chat-

[1] A creditor has the right to secure a preference of his claim against an insolvent debtor by purchasing the property of the latter, if the property conveyed does not exceed the debt, and the sole purpose of the vendee is to collect the amount due him; but if the property conveyed clearly exceeds in value the amount due, and the creditor knowing this fact pays a sum of money to the debtor to induce him to make the conveyance, and with the design to prevent the enforcement of the claims of other creditors, the transaction will be deemed fraudulent as to such other creditors. Oppenheimer v. Halff, (Tex.) 4 S. W. Rep. 562.

tels were worth $400, and they filled out and completed the assortment of the stock then being sold under said chattel mortgage by plaintiffs, and, by reason of these goods in controversy being so taken, said assortment was broken up and destroyed, and plaintiffs were damaged thereby in the further sum of $200; that at the time said McGee & Kearney made and delivered said chattel mortgage they were the owners of all said goods and chattels and said stock of goods, and had a right to sell or dispose of them by mortgage, and at the same time they delivered possession of said goods and chattels to plaintiffs; that all of said property so mortgaged and delivered to plaintiffs, including the goods in controversy, is not sufficient to pay the said debt secured by said mortgage; that defendant now still wrongfully detains said goods and chattels so taken, and has so wrongfully detained same for more than six hours, to the further damage of plaintiffs of $100, making the plaintiff's damages by reason of the premises aggregate the sum of $500.

The defendant in his answer denies, first, all the allegations of plaintiff's petition. He alleges that he is sheriff of said county, and as such, on March 16, 1887, he levied on the goods in controversy, under an order of attachment duly issued against E. M. McGee and W. S. Kearney as their property, and that he had no notice of any interest or lien by virtue of a chattel mortgage or otherwise, of plaintiffs upon said property; that at the time plaintiffs took possession of the goods in controversy, by virtue of a pretended chattel mortgage, E. M. McGee and W. S. Kearney, who gave said pretended chattel mortgage, were indebted in large amounts for goods purchased, and on which said mortgage was given, of which fact plaintiffs were knowing, and said mortgage was given and taken with the intent to defraud, hinder, and delay said creditors; that there is no description in said plaintiff's mortgage of the property sought to be recovered, and therefore plaintiffs are not entitled to recover in this action; that said pretended mortgage was given without consideration, and was void as to judgment creditors, and therefore void as to this defendant; that said mortgage was given to secure an amount largely in excess of any genuine *bona fide* indebtedness of E. M. McGee and W. S. Kearney, mortgagors, to plaintiffs, and was taken by plaintiffs and given by said mortgagors with the intent to hinder and delay judgment creditors of said mortgagors in the collection of their debts, and therefore void as to judgment creditors and this defendant.

The plaintiffs, in their reply to said answer, admit that defendant is sheriff of said county, and that their claim to said property is by virtue of a chattel mortgage executed by E. M. McGee and W. S. Kearney; but allege that said mortgage was given to secure a valid debt, and taken in good faith to secure said indebtedness, and without any intention to hinder and delay or defraud the creditors of said McGee & Kearney, and they deny each and every other allegation in said answer contained. On the trial the cause was submitted to the court, which found for the defendant that the value of his possession was $176.55 and that his damages were $1. The plaintiff then filed a motion for a new trial, upon the following grounds: (1) Court overruled plaintiff's objection to, and admitted improper testimony offered by defendant; (2) court erred in sustaining defendant's objection to, and refusing to admit proper testimony offered by plaintiffs; (3) said finding is contrary to the evidence; (4) said finding is contrary to law; (5) error of law occurring at the trial; (6) because said finding and judgment should have been for plaintiffs; (7) error of the court in the exercise of discretion in the cross-examination of plaintiff Charles L. Rothell, and in the cross-examination of the other plaintiffs, which prevented plaintiffs from having a fair trial; (8) error in assessing defendant's damages too high, and in assessing value of defendant's possession, as no amount is alleged in the answer as the value of defendant's claim. The motion was overruled, and the cause brought into this court by petition in error.

It is apparent from the testimony that there is a large number of other attachment suits against McGee & Kearney, and levied upon the property in question, which seem to be awaiting the decision in this case. The testimony shows that, on the eleventh day of March, 1887, McGee & Kearney executed a chattel mortgage upon their stock of goods in their store at Crab Orchard, Johnson county, to secure the sum of $20, payable March 21, 1887, with a provision in the mortgage that, if the mortgagees should at any time deem themselves unsafe, they could declare the mortgage due, and proceed to sell the goods, either at public or private sale. The mortgage was made on the night of the eleventh of March, 1887, and the next morning at 7 o'clock the mortgagees declared that they deemed themselves insecure, and thereupon took possession of the store and goods. On the sixteenth of that month the attachment under which the defendant claims the goods was levied on the same. There is a very large amount of testimony in the record which is exceedingly vague and indefinite, upon the following points: *First*, the value of the goods mortgaged at the time the mortgage was executed; *second*, the actual amount owing by the firm of McGee & Kearney to the mortgagees, or any of them; *third*, the amount of the individual debts of McGee or Kearney to some or all the mortgagees. The testimony shows beyond question that some of these mortgagees loaned money to the firm of McGee & Kearney, and the bank of J. D. Russell & Co. seem to have loaned certain sums to the mortgagors, which claims were assigned before the mortgage was executed to one of the mortgagees; but the exact amount of these claims is uncertain. That a creditor may secure the payment of his claim from a failing debtor, provided he acts in good faith and obtains no more property than will satisfy his claim, is well established in this court. *Leffel* v. *Schemerhorn*, 13 Neb. 342, 14 N. W. Rep. 418; *Shelly* v. *Heater*, 17 Neb. 505, 23 N. W. Rep. 521.

The testimony in the case, however, leaves it entirely uncertain upon the points named, and it was therefore impossible for the trial court to say that the sale was fraudulent.

2. Where a firm is insolvent, the partnership property is liable first for the partnership debts, and a creditor of a member of the firm cannot be paid out of its partnership property, to the exclusion of creditors of the firm. *Caldwell* v. *Manufacturing Co.*, 17 Neb. 489, 23 N. W. Rep. 336; *Bowen* v. *Billings*, 13 Neb. 439, 14 N. W. Rep. 152; *Roop* v. *Herron*, 15 Neb. 74, 17 N. W. Rep. 353. The creditors of the firm, therefore, will be preferred to the individual creditors.

3. The testimony shows that $200 of the amount of the mortgage was to secure a contingent claim of some of the mortgagees upon a guardian's bond of McGee. This cannot prevail against the creditors of the firm.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

(The other judges concur.)

BONNS *v.* CARTER.

(*Supreme Court of Nebraska.* November 25, 1887.)

Dissenting opinion. For opinion of the court, see 31 N. W. Rep. 381.

REESE, J., (*dissenting.*) This cause was decided at the July, 1886, term of this court, and is reported in 20 Neb. 566, 31 N. W. Rep. 381. On an application for a rehearing being granted, the cause was reargued and submitted, a majority of the court adhering to the decision first made. To this I cannot agree, and will here state my reasons therefor. The principal question involved, and which I shall notice, is the holding that the execution of the mortgage by B. C. Hamilton to Samuel H. Bonns was, in effect, an assignment for the benefit of creditors, and, not being made in accordance with the statute

governing assignments, was void. The discussion of this question involved the correctness of the charge given to the jury by the trial court, to the effect that the mortgage was an assignment for the benefit of creditors, and was void. This instruction being set out in the original opinion, need not be recopied here. I have carefully considered the authorities cited by counsel, as well as others not cited, and am led to the conclusion that the rule stated in the former decision cannot be sustained, either upon principle or authority, and should not be declared to be the law of this state.

My first consideration will be of the cases cited by Judge COBB in the opinion written by him above referred to.

The case of *Wallace* v. *Wainwright*, 87 Pa. St. 263, was a case in which the transfer of property was made to Wallace and Krebs, who were attorneys, and represented a number of creditors, in payment of the claims held by them. Some of the creditors named were not present, nor represented; some afterwards assented to the arrangement; some neither assented nor refused to assent. Wainwright obtained a judgment, and had an execution levied on the claims and judgments which had been assigned to Wallace and Krebs. The trial court held the transfer to them to be an assignment for creditors. This was affirmed by the supreme court, which held that the transfer created a trust; the legal title of the assigned property being in Wallace and Krebs, and the equities in the creditors. I have not at hand the statute upon which this decision was made, but by the references made to it in the opinion as applying to the assignment of property made by debtors "to trustees on account of inability at the time to pay their debts," I think it sufficiently appears that the decision is based wholly upon the language of the statute of Pennsylvania, and can have no bearing upon this case. It is pretty clear that the statute of that state refers to assignments of property made by debtors to trustees, and under that language the court could very properly hold that Wallace and Krebs took the property as trustees under the statute, and it was, therefore, an assignment.

The case of *Harkrader* v. *Leiby*, 4 Ohio St. 602, would be strongly in favor of the position of defendant in error, were it not that the decision is based wholly upon the statute of Ohio, which is as follows: "All assignments of property in trust which shall be made by debtors to trustees in contemplation of insolvency, with the design of preferring one or more creditors to the exclusion of others, shall be held to inure to the benefit of all the creditors, in proportion to their respective demands." This, in effect, defines a legal, general assignment for the benefit of creditors, and a case like the one at bar falls clearly within its provisions, and would be a general assignment; but, as we shall hereafter see, no such provision can be found in the statutes of this state governing assignments of property, and, therefore, we fail to see how the case above named can be quoted as authority.

The case of *Page* v. *Smith*, 24 Wis. 368, would seem to support the theory of the defendant in error, but whether based upon the statute of that state is not clear. It follows the decision in the case of *Norton* v. *Kearney*, 10 Wis. 386, which was decided in 1860. In 1885 a question similar to the question involved in the case at bar was before the same court in *Carter* v. *Rewey*, 62 Wis. 552, 22 N. W. Rep. 129; and, while the case of *Page* v. *Smith* is not in terms overruled, yet I am inclined to adopt the reasoning of Judge COLE in the opinion as being the last expression of that court upon the question involved, and which, to my mind, is the most logical. The instrument under consideration in that case was a chattel mortgage in the usual form, executed by Charles H. McLean, the debtor, upon a quantity of jewelry and other personal property named, upon the condition that if McLean should forthwith pay three debts specified, amounting to $385, also to secure such other claims against him as might come in the hands of the plaintiff for collection, and a claim of Aiken, Lambert & Co. for $127, then the sale should be void. The mortgagee took

possession of the property, and had such possession when it was seized under certain orders of attachment. I quote from the opinion the following: "There is no pretense that the debts which the chattel mortgage was given to secure were not the *bona fide* debts of the mortgagor, but it is said that McLean was justly indebted to other creditors when he gave this mortgage upon his entire stock of goods, and that the plaintiff knew the facts. But still it is competent for creditors where there is no statute forbidding such preferences, and the transaction is not tainted with an unlawful intent."

It was contended in that case that the instrument there under consideration was in effect an assignment for the benefit of creditors, and void by reason of the failure to comply with the requirements of the statute governing assignments.

The mortgage was sustained and held not to be an assignment. It contained the element of trust as in the mortgage in question, in the case at bar. In view of that decision, we do not think the supreme court of Wisconsin can be cited as sustaining the theory contended for by defendant in error.

Referring to the cases cited by the defendant in error, *Engelbert* v. *Blanjot*, 2 Whart. 239, is relied upon. The decision was made in 1836, and is founded upon an act of the legislature of 1818. The debtor assigned and conveyed a collection of personal property to his creditor to sell and satisfy his claims, and then pay other creditors named; the balance remaining to be returned to him. From the language of the opinion it is inferred that the act referred to makes an assignment or conveyance "for the use of his creditors," or "for the use of such persons to whom such assignment is made, and other creditors," an assignment for the benefit of all creditors, and requires assignments to be recorded. This was never recorded. The next day the debtor applied to court for the benefit of the insolvent laws, setting forth in his petition that he had conveyed all of his property in the assignment the day before, and annexed to the articles conveyed a list of his creditors. On the third of April, 20 days afterwards, he executed an assignment under the law. The assignees refused to act, and Engelhower was appointed by the court. Engelhower then brought suit for the property conveyed by the first transfer and succeeded in his action. The court held the first assignment void because not recorded. Under the very general terms of the act of 1818, we cannot see how any other holding could have been had, as the first transfer was "for the use of his creditors," and was, by the act, made an assignment of his property. This view is sustained by the holding of the same court in *Lockhart* v. *Stevenson*, 61 Pa. St. 64. This case was decided in 1869. Wooten, having failed, sold by bill of sale, and delivered his stock of goods to Lockhart in consideration of certain claims held against him by Lockhart, and part of his other creditors. He had previously made arrangement among those to divide the proceeds *pro rata*. The trial jury found the transaction was *bona fide*. It was claimed that the bill was an assignment for creditors which was required to be recorded. There being no trust for creditors, the question was, was it a sale or an assignment? It was held to be a sale, and not an assignment.

The case of *Burrows* v. *Lehndorff*, 8 Iowa, 96, was decided in 1859. The facts in that case were substantially as follows: On the sixteenth of January, 1857, the debtor made three chattel mortgages to secure that number of creditors, all made at about the same time, Burrows being the last of the three taking in his order. On the 17th, he made two more to other creditors, and a deed of trust to one Sylvester, to secure other creditors, the whole indebtedness being $4,922.04, the instrument covering the same goods, and the deed of trust contained in addition some real estate, the first taking precedence as to its payment, the others following in their order. It was filed January 17, 1857, at 5:50 o'clock, the others following in their proper order of succession every five minutes. The debtor's attorney notified the plaintiff the next day. On the 28th of the same month, he caused an attachment to issue.

The statute of that state, at that time, was that no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors of the assignor, shall be valid, unless made for the benefit of all creditors, in proportion to the amount of their claims. In the discussion of this statute, Judge WRIGHT, in rendering the opinion of the court, says: "*But for this provision* any debtor might make a general or partial assignment to a trustee for the benefit of his creditors with preferences, the said assignment being valid as against the process of said creditors, from the time of the execution of the deed, subject, of course, to any liens upon the property assigned." In support of this he cites a number of cases to which we need not refer. He then says the primary and controlling question is, was this an assignment? The question of fact was submitted to the jury. The instruction of the court was, in substance, that if the instruments were executed at the same time and constituted one transaction, were made by defendant on his own motion, and he was at the time insolvent, and by these instruments conveyed all his property not exempt from execution, then the conveyance would be an assignment, and void. The jury found against the defendant in the action, and the instruction and verdict were sustained. The case seems to have been, in the main, sustained upon the finding of the jury that the instruments were executed at the same time and constituted one transaction, and as being in violation of the statute of the state to which we have referred.

The case of *Van Patten* v. *Burr*, 52 Iowa, 518, 3 N. W. Rep. 524, was decided upon a demurrer to the petition. The petition alleged that the defendant executed a chattel mortgage for the benefit of a part of his creditors, and immediately, and on the same day, made a general assignment for the benefit of all, and that they were intended as a whole to constitute a deed and general assignment; that these instruments were prepared by the assignor's attorney at his request, both acknowledged before the same officer and filed by the attorney for his client at 2:54 and 3 o'clock P. M. before delivery, and that the assignment, as a whole, was void, because it gave a preference to one of the creditors. The demurrer to the petition was sustained by the district court, the judgment being reversed by the supreme court. Judge PECK, in delivering the opinion of the court, says: "The transaction contemplated in the provision of the statute which is substantially quoted in the case last above cited, and termed a general assignment, is a disposition of all the property of the insolvent for the benefit of all his creditors," and it did not matter how this was done, whether by one instrument or more; if all constituted one transaction as alleged, and conveyed all the property for all the creditors, it was an assignment. As it preferred those to whom the mortgage was given, it was void. The petition alleged that they, as a whole, were intended as one assignment. Now as a general assignment constituted a part of that transaction, it is very clear that the decision of the supreme court was right, being based alone upon the allegation of the petition that both instruments were intended by the insolvent as the one act of assignment.

The case of *Lampson* v. *Powers*, 19 Iowa, 479, may be considered as throwing some light upon the holding of the supreme court of that state, although not directly in point. In that case the debtor, simultaneously with an assignment, conveyed lands to one creditor in payment of a debt. Another he paid in money, and the third, part in money and part by the transfer of promissory notes. The court held that the insolvent had the right, in that way, to prefer creditors. The case is based upon the right of the insolvent to appropriate his property, while he exercises over it the *jus disponendi*, (the right of disposition.) The statute simply limits his right to prefer creditors where he makes a general assignment. It was held that the payments and the assignment did not constitute one transaction, so long as the insolvent retained the right of disposing of the property; that he might appropriate it to the payment of his debts and might prefer creditors. He might use all of his prop-

erty in this way, or he might so use part, and make a general assignment of the remainder. The distinction is drawn between the absolute appropriation of the property and conveyance by way of mortgage, if the debtor intends disposing of all his property for the benefit of his creditors, but if he mortgages a part and assigns that remainder, this constituted one transaction. The property passes to the mortgagee or assignee in trust to be disposed of as required by law, and the conditions of the instruments he executes. In that case the mortgage and the assignment, being coupled together and included in the one transaction, would become the one act of the debtor, and under the statute all the property would be included in the assignment. If then, while the right of disposing of the property exists, the debtor, as in this state, has the right to prefer creditors, there being no attempt to make a general assignment, it would seem that he might make such a disposition of his property to secure *bona fide* debts as he should desire.

The case of *Dickson* v. *Rawson*, 5 Ohio St. 218, is based upon the same statute as *Harkrader* v. *Leiby*, *supra*, and need not be noticed.

The case of *Winner* v. *Hoyt*, 28 N. W. Rep. 880, was decided by the supreme court of Wisconsin during the last year. The principal facts in that case were that six chattel mortgages were made, and accounts were assigned to secure several debts. The mortgages covered substantially the same property. All were made at the same time. The mortgagees knew the mortgagor to be insolvent. The property mortgaged was all the mortgagor had and did not cover more than 60 per cent. of the debts. It was intended that the mortgagee should take immediate possession, which he did, convert all into money, and divide it among the creditors *pro rata*. Upon a garnishee process against him, it was held that the several mortgages and assignments constituted one transaction, and that the garnishee acted as the trustee of the mortgagees and assignees, except as to his own claim, and that it was not in legal effect an assignment for the benefit of creditors, preferring those named, and void. This decision was founded upon the provision of the statute of that state which, so far as necessary, we quote: "All voluntary assignments or transfers whatever of any real estate, chattels real, goods or chattels, rights, credits, moneys, or effects, for the benefit of or in trust for creditors, shall be void as against the person making the same unless" executed as therein required, and "any and all assignments * * * made for the benefit of creditors, which shall contain or give preferences to one creditor over any other creditors except for the wages to laborers, * * * shall be void." It will be observed that this language is sweeping in its character, not only including all voluntary assignments, but all transfers whatever for the benefit of or in trust for creditors. It would seem that the existence of such a provision would tend to forestall any question as to the effect of such transfers, yet Judge TAYLOR dissents from the opinion of the majority of the court, and writes a lengthy and rather logical opinion, holding that—*First*, a debtor may prefer a creditor; *second*, he may prefer more than one; *third*, he may mortgage part of his property; *fourth*, he may mortgage it all. The decisions in this state may be said to settle these four propositions in the affirmative. A debtor may prefer his creditor; he may prefer more than one; he may mortgage a part of his property; he may mortgage all, if done *bona fide*. *Lininger* v. *Raymond*, 12 Neb. 167, 10 N. W. Rep. 716; *Grimes* v. *Farrington*, 19 Neb. 48, 26 N. W. Rep. 618; *Nelson* v. *Garey*, 15 Neb. 531, 19 N. W. Rep. 630; *Bierbower* v. *Polk*, 17 Neb. 268, 22 N. W. Rep. 698. We will briefly notice the authorities presented by plaintiff in error, and in addition thereto some to which neither party has referred.

The case of *Gage* v. *Chesebro*, (Wis.) 5 N. W. Rep. 881, is one in which a debtor assigned personal property to his creditor, authorizing him to go into possession, sell and dispose of the same, apply the proceeds to extinguishing indebtedness due creditors, and retain the balances to be applied upon certain

notes upon which the creditor was indorsed in case they were not paid by the assignor. This instrument was held a chattel mortgage, and not an assignment for the benefit of creditors, therefore not void because of a failure to comply with the law in regard to assignments. It is held that whenever it appears that an instrument is intended as security, the debtor has the right of redemption if seasonably exercised, and that the garnishee should not, by reason of the proceedings against him, be put in a worse position than if the different claims were enforced against him by the defendant himself. It is also held that the creditor might, though he knew his debtor was in failing circumstances, if his action was honest, and not for a fraudulent purpose, take an assignment of all his debtor's property to secure himself, and if the debt was *bona fide*, and the assignment made without fraudulent intent, it was valid. In writing the opinion of the court, Judge COLE says: "It is true there is no defeasance in the instrument, nor was it designed there should be, to give the grantor the right to reclaim the property upon the payment of the debts and liabilities therein mentioned; for whenever it appears that the instrument is intended merely as security, the debtor has the right of redemption, if seasonably exercised. But, without longer considering the question, to our minds it is plain that the instrument is nothing but a mortgage, and cannot be held void upon its face for any of the objections taken to it."

In *Peck* v. *Merrill*, 26 Vt. 686, Merrill became embarrassed, and Page, Lowell, and Taplin became his sureties, and to secure them from liability he turned over to them all his property at East Greenfield, subject to an attachment, and also his store at South Bradford. Peck & Co. garnished Page, Lowell, and Taplin under what was known in that state as trustee process. There was no assignment law in Vermont, but there was a law absolutely prohibiting assignments, making them void as against the creditors of the debtor. Without quoting at length from the opinion, it may be said that it was held that the act of 1843 prohibited general assignments, which should be so construed as to be confined to such transfers of property as were made in trust for creditors, and that the transfer by a debtor of all his property did not make of it what is termed a general assignment, unless it also be conveyed to trustees to be held in trust for their creditors, and if the debtor conveys his property directly to creditors, or sureties for their benefit, and no trust is created for others, the transfer must then be regarded as a mortgage or pledge of personal property, and in such a case the creditor or surety cannot be held as the trustee of the debtor unless there is a surplus left in his hands after discharging his claim against or liability for the debtor. It seems that, previous to the passage of the act referred to, general common-law assignments had been sustained by the courts. They were generally made to friends for preferred creditors, who kept all or covered up the property or returned it to the debtor. Sometimes assignees were wholly irresponsible. The act prohibited only assignments. It was held not to prohibit the transfer of property to preferred creditors or sureties.

The case of *McGregor* v. *Chase*, 37 Vt. 225, was decided in 1864, an assignment law having been enacted, but the decision does not give its provisions. It is decided that the deed, with conditions to be void if the debts were paid, which it was given to secure, was a mortgage to secure debts of the grantees, and for liabilities they had incurred. It was sustained as being a mortgage and not an assignment.

The case of *Low* v *Wyman*, 8 N. H. 536, was one in which Wyman, being in failing circumstances, and a considerable portion of his property being attached and taken by his creditors, transferred to an attorney, who held a claim against him, certain notes and accounts as collateral security. The attorney collected some $200, but not enough to pay his client. It was contended that the delivery of the notes and accounts was an assignment within the meaning of the assignment law and void, and, under trustee process, (garnish-

ment,) the attorney should be held liable to the plaintiff. The decision is that the debtor may pledge his property to secure the payment of a preferred debt, and that such transfer would not be a violation of the assignment law, which was that no general assignment should be valid except it provided for an equal distribution of all the property among the creditors in equal proportion. It is said that a debtor may pledge all his property in payment of a particular debt, and that the assignments intended by the statute are general assignments, purporting to convey all the debtor's property to trustees for the benefit of all his creditors. It appears that previous to the enactment of the assignment law, assignments were made that did not include all of the assignor's property, although so claimed, hence the act was passed requiring him, when he did make an assignment, to make oath that the deed included all the property he had, and that it should be equally distributed, otherwise the transfer was void. As we shall see further on, it seems to the writer that this principle must be the governing one in the case at bar. That the provisions of the assignment law of this state are intended to apply to general assignments made *as such*, and with the purpose and intent of the assignor to convey his property for the benefit of all his creditors, and that no mortgage or transfer of his property as security, when not *intended* as an assignment, will be held to be such.

The case of *Barker* v. *Hall*, 13 N. H. 298, was where a mortgage was executed by a debtor conveying all of his property to secure the payment of a portion of his debts, leaving others not provided for. This was held not to be an assignment, within the meaning of the statute of July 5, 1834, entitled "An act for the equal distribution of property assigned for the benefit of creditors."

The case of *Dana* v. *Stanford*, 10 Cal. 269, was a proceeding in garnishment against mortgagees. Deitz, the debtor and judgment defendant, mortgaged all his property to Stanford to secure debts actually due him and indemnify him against indorsements Stanford had made for him. From an examination of the case, it appears that it is similar in some respects to the Vermont case. Assignments had been made to friends and insolvent assignees before the enactment of the assignment law, and the law was enacted for the purpose of preventing that species of fraud, but not intended to prevent an insolvent debtor from transferring his property directly to creditors, either absolutely in payment of his debts, or as security by way of mortgage. The mortgage was held to be fair, *bona fide*, and without fraud, and not an assignment. In the very able opinion written by Judge FIELD, we find a reference to the statute of some of the states. The state of New Hampshire is somewhat like our own. In Connecticut, the words "in trust for creditors" occur in the act. In Ohio, the words "in trust" govern assignments for creditors. In New York, the statute contains the words "in trust for the use of the person making the same," and in all these states a mortgage to the creditors has been held good.

In *Morse* v. *Powers*, 17 N. H. 286, a mortgage was given to secure a debt to the mortgagee, and to indemnify another person against loss for having indorsed a note with the mortgagor as security. In this case it is said: "The objection that the mortgage is invalid because it is partly in trust for the benefit of Robert Morse, and thus itself in the nature of an assignment, cannot be sustained. It is not essential to the validity of the mortgage that it should be wholly for the benefit of the mortgagee, nor would the trust for the benefit of a third person, of itself, give it the character of an assignment within the act requiring assignments to comprehend all the property of the debtor and be without preferences."

In *Kohn* v. *Clement*, (Iowa,) 12 N. W. Rep. 550, Waynick & Co. were in business and became indebted. They made a mortgage to Kohn Bros. upon their stock in trade, which constituted their assets, to secure several.

other creditors, most of them, but omitting Clemments, Morton & Co., they seeking a judgment to take execution. This was held not to be an assignment as there was no intention it should be such. The case is similar to the one at bar, except that Kohn Bros., the mortgagees, were creditors, while Bonns was the agent of one of the creditors. Under the rule laid down in that case, if Bonns had been a creditor himself, instead of the agent for one of the creditors, his title to the property would have been good, so far as appears upon the face of the mortgage. We are not quite able to see why the fact that he was the agent of a creditor and not the creditor himself, should change the rule to be applied to the instrument executed.

In *Bank* v. *Crittenden*, (Iowa,) 23 N. W. Rep. 646, one Craiger was in business and heavily indebted. Among his creditors were Smith & Crittenden, whom he had promised to secure when desired. His house and store were burned. When informed of the disaster to the property, Smith & Crittenden took assignments of all debts in Council Bluffs, where they resided, and Crittenden went to Logan, the place where Craiger was in business, and procured assignments to him of Craiger's book-accounts, insurance policy, etc., to pay himself and other creditors in Council Bluffs. Craiger was at that time indebted to the Bank of Logan. This transfer to Crittenden was held not to be an assignment; that whether or not it was such, depended upon the intention of the parties, as might be shown by the circumstances of the transaction; that if the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it, if it is intended as an absolute conveyance of all his property, and is made for the purpose of securing a distribution of the proceeds among his creditors, or a portion of them, it is, in legal effect, an assignment. On the other hand, if the intention of the debtor is merely to secure his debts to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all of his property, and but a portion of his debts are secured by it. Some reference is made to the claim that the property was conveyed to Crittenden in trust for other creditors, but it was held that while Crittenden was a trustee, yet, as between him and Craiger, the debtor, he was not, and as between them the debt was due to him; that he was not a trustee of Craiger's appointment, but as to him the holder of all the claims.

In *Gage* v. *Parry*, (Iowa,) 29 N. W. Rep. 822, Morse & Humphreys, who were partners, gave Baker & Jones, who were their creditors, a mortgage on their stock of goods. They also gave a mortgage to Hurd, and assigned their accounts to Briscoe; then, within an hour, but not as a part of the first transaction, made a general assignment to Perry. This assignment was made before the mortgage to Hurd and the assignment to Briscoe were delivered. The mortgages to Baker & Jones were held good upon the ground that the creditors of Morse & Humphreys had no lien upon the property of the firm, and they, Morse & Humphreys, could do as they wished with it; they could pay or secure any or all of their creditors, with any or all of their proceeds, and such payment or security would not be affected by the assignment.

In *Waterman* v. *Silberberg*, (Tex.) 2 S. W. Rep. 578, Marks, the mortgagor, was indebted to a large number of persons; among his creditors was Silberberg, to whom he owed something over $2,000. The whole indebtedness was $15,000. Silberberg was his surety for all the debts named in the mortgage, 10 in number. These debts, with that due Silberberg, amounted to over $10,000. The mortgage was made to Silberberg to secure his debts and those for which he was surety. Silberberg took possession of the mortgaged property, which included all of the property of the debtor, and Waterman attached and levied on a part of the property, claiming that the transfer to Silberberg was void as being in contravention of the assignment law, by reason of its

preference of creditors. The mortgage was held valid as being a legal mortgage, and not an assignment.

The case of *Tootle* v. *Coldwell*, 30 Kan. 125, 1 Pac. Rep. 329, was one in which an attachment had been issued in a suit by the plaintiffs against the debtor, Coldwell. Prior to the attachment, Coldwell had executed chattel mortgages on the stock of goods in his business to his wife to secure the sum of $2,670, to Claflin, Allen & Co. to secure $2,000, to P. V. Coldwell to secure $354, and to a number of other creditors, all of which were stated to be *bona fide*, and it was contended that these mortgages were void as being against the provisions of the assignment law of that state; that they constituted altogether, a voluntary assignment for the benefit of creditors. In discussing this question, Judge VALENTINE, who wrote the opinion of the court, says: "The mortgages were not executed to a trustee as voluntary assignments under the assignment law of the state, but they were executed directly to the creditors themselves. They were not executed in the manner in which the statute requires voluntary assignments to be made." The assignment law does not prohibit the execution of such mortgages, and being intended as such, for the purpose of securing *bona fide* debts, they were valid.

The case of *Scott* v. *McDaniel*, 3 S. W. Rep. 291, was decided during the present year. Wheat & Thompson being indebted to various persons, conveyed to McDaniel property in trust to sell to pay certain enumerated debts described in the instrument; the debts described did not constitute all of the indebtedness of Wheat & Thompson, there being others which were not provided for. This conveyance was held not to be an assignment, and void because of the preferences which it contained; that the assignment law has reference only to assignments made under it, and that preference was given through instruments other than such assignments as the act contemplates are valid, unless in contravention of the act concerning fraudulent conveyances.

In *Gallagher's Appeal*, (Pa.) 7 Atl. Rep. 237, it was held that the law of Pennsylvania seemed to prohibit preferences in the assignment under the act, but it does not prevent a debtor from preferring his creditors, or any of them, so long as he retains dominion over his property, and there is no fraud in the transaction, and it was *bona fide*. This decision was made in 1886, and is, perhaps, a construction of an assignment law enacted after the decisions of that court hereinbefore referred to were made. In Jones, Mortg. § 355, it is said it is not essential to the validity of a mortgage that it be wholly for the benefit of the mortgagee. It is not objectionable that it secures a debt due him and a debt due another, so that the mortgagee holds the mortgaged property in trust for the benefit of a third person. Such a trust does not give it the character of an assignment within the act requiring assignments to comprehend all of the debtor's property, and to be without preferences, and that a mortgage is not objectionable as an assignment for the benefit of creditors, which is made to a creditor to secure a debt to him alone, or to secure a debt to him and also the debts of other creditors named. In Burrill, Assignm. § 6, p. 12, it is said, in substance, that a mortgage resembles an assignment more closely in its leading features of being a security or provision for a debt involving a resulting interest in the grantor on a certain contingency. An assignment is more than the security for a payment of debts; it is an absolute appropriation of the property to their payment. It does not create a lien in favor of creditors, but conveys the whole title, legal and equitable, to the assignee; there remains, therefore, no equity of redemption to the property, and the trust which results to an assignor in the unemployed balance does not indicate such an equity. A clear distinction is made in New York between assignments and mortgages, but as the words "in trust" are in the New York statute, the decisions do not aid us. By the New York law and decisions, a debtor may make a mortgage directly to one or more of his creditors, but not

to one for others, or himself and others, owing to the existence of those statutory words.

From this review of authorities cited, I conclude that the fact that the transfer was made to Bonns, as trustee for the creditors named, does not necessarily destroy the instrument as a mortgage, as the statute of this state contains no provision that the existence of such trusteeship shall render the instrument void, unless it complies with the law of assignments.

The proper discussion of this case must depend upon the construction of sections 1 and 29 of the assignment law of Nebraska. They are as follows:

"Section 1. That no voluntary assignment for the benefit of creditors hereafter made shall be valid unless the same shall be made in conformity to the terms of this act."

"Sec. 29. Every such assignment shall be void against the creditors of the assignor: *First.* If it give a preference of one debt or class of debts over another, except a preference to any person of not more than $100 for labor or wages. *Second.* If it require any creditor to release or compromise his demand. *Third.* If it reserve any interest in the assigned property or any part thereof to the assignor or assignors, or for his or their benefit, before his or their existing debts have been paid. *Fourth.* If it confer any power upon the assignee, other or different from those contained in this act. *Fifth.* If the assignor or assignors shall fail to make the inventory required to be made by him or them by this act, within the time required by this act, the assignment shall not be void, but that the county court may, by attachment or other proper remedy, compel the making and return thereof by the assignor. But an omission of any property, or of the name or claim of any creditor therefor, shall not avoid the assignment."

By the first section no voluntary assignment for the benefit of creditors can be valid unless made in conformity to the act. Considerable stress is placed upon the words "voluntary assignment." Burrill, Assignm. p. 3, § 2, defines voluntary assignments for the benefit of creditors to be "a transfer without compulsion of law by debtors, of some or all of their property to an assignee or assignees, in trust, to apply the same or proceeds thereof to the payment of some or all of their debts, and return the surplus, if any, to the debtor. Assignments in this restricted sense are distinctly with reference to their subject-matter, as being all or part of the debtor's property. The former are known as general assignments in contradistinction from partial assignments, by which terms the latter are defined. Such assignments are termed voluntary to distinguish them from such as are made by compulsion of law, as under the statutes of various states on insolvency,—the latter being sometimes termed statutory assignments,—or by order of some competent court. "Assignments in the sense in which they are here employed, are usually resorted to by debtors, who find themselves unable to pay their debtors in full, or the embarrassed state of whose affairs has compelled them to discontinue the transaction of business; and in some instances the provisions of the statutes, which have been passed by the state legislatures regulating and restricting the operation of such assignments, are confined exclusively to assignments made by insolvents, or by persons in contemplation of insolvency. But the insolvency of the debtor in his own estimation, or in fact, will not, apart from statutory provisions, unless connected with other evidences of fraud, invalidate the assignment." Assuming this definition of the term "voluntary assignment" to be the correct one, the provisions of the first section of the assignment law of this state referring to voluntary assignments must be for the purpose of distinguishing such assignment from an involuntary assignment, as under the laws of bankruptcy. There being no such law at this time, the word "voluntary" can have no essential or particular meaning with reference to the case at bar. The statute would then be that no assignment for the benefit of creditors shall be valid, unless it conform to the provisions of the act. Section 29

simply provides that such assignments shall be void, unless they comply with the provisions therein contained. As we have before stated, there is no intimation that anything short of an assignment under the law shall be held to be such. In other words, the act assumes to have nothing to do with any transfer not intended *as* an assignment. The words "in trust" or "in trust for the benefit of creditors," do not occur. It therefore seems quite clear that, to constitute a voluntary assignment, the conveyance must have been so intended by the grantor; that it must have been his purpose, at the time of the execution of the instrument, to make a voluntary assignment under the provisions of the assignment law, such intention to be drawn from the surrounding circumstances, and by the language of the conveyance. I am inclined to think that the statute refers only to assignments when intended as such, that is, when a debtor undertakes to make an assignment under the statute, he must make it in accordance with it, otherwise it is no assignment, and is void, and that the rules relating to the construction of mortgages and other instruments somewhat akin to assignments, but not intended as such, remain unchanged; and, therefore, this mortgage is not an assignment in the sense referred to in the first and twenty-ninth sections of the assignment law, and is not for that reason void.

A mortgage is a conditional transfer of property; a voluntary assignment is absolute. The debtor has a perfect right to prefer one, or any portion of his creditors, and in the absence of fraud, to secure them in part or in whole by the transfer or mortgage of any or all of his property, leaving the remainder of his creditors entirely unprovided for. He has the right, if *bona fide*, to execute a chattel mortgage to a creditor on any part or all of his property to secure just debts. He may also include in such mortgage any other creditors he may desire, and the mortgage will hold for all so included. Debts may be assigned to one creditor by a portion of the others, and he can take a mortgage to himself for all who so assign, and it is valid. It remains a mortgage. I can find no case or text where the question of the validity of a mortgage to a third party is discussed but that it has been held bad, but all of these cases are in states where conveyances "in trust" are expressly prohibited unless under certain conditions, such as the conveyance of all the property for the benefit of all the creditors. Our statute contains no such provisions. If the mortgage had been made to Rice, Friedman & Markell, or to any other one of the creditors direct, and for the benefit of the others, it would be good under the rule laid down in *Morse* v. *Powers; Kohn* v. *Clement; Carter* v. *Rewey; Scott* v. *McDaniel; Loan & Trust Co.* v. *McPherson*, 2 S. E. Rep. 267, and others which we do not now call to mind. Why would it not be as good if made to Bonns as if made to his principal? Does the fact that Bonns was the agent of Rice, Friedman & Markell require the application of a different rule than would have been applied if they themselves were substituted for him, or he had been a creditor? So far as appears, he had full authority to take security for the debt due them. He doubtless had the right to take the mortgage, either to himself or to his principals. I cannot believe that the mere fact that it was so written in the mortgage, should change the application of the rule. I therefore conclude that the instruction of the court to the trial jury that the instrument referred to "is an assignment for the benefit of creditors, and as such void under our statute, and conveyed no title to the plaintiff in this action against other creditors," was erroneous, and for that reason the judgment of the district court should be reversed.

MAXWELL, C. J., and COBB, J., adhere to the former judgment.

MAXWELL, C. J. The elaborate and carefully prepared opinion of Judge REESE is entitled to receive and has received great consideration. He shows conclusively that at common law a debtor may prefer one or more creditors;

and if this case rested upon that proposition alone, I would favor a reversal of the judgment. But even at common law, a debtor could not give to one or more of his creditors a greater amount of his property than would satisfy the debt or debts, and thus hinder, delay, or defraud other creditors. Thus, suppose A. is indebted to B. in the sum of $1,000, and is also indebted to other persons; he cannot pay B. $1,100, or any greater sum than is due to him in satisfaction of the claim. Such payment if made, would be in excess of the amount due B., and he would hold it like any other mere donee. Every person holds his property in two distinct capacities: *First*, as owner; and *second*, as *quasi* trustee for the benefit of his creditors. The law, therefore, requires him to apply his property to the purposes to which he impliedly pledged it in procuring credit, viz., the satisfaction of his debts. In other words, the law requires the debtor to execute the trust in good faith, and if he fails to do so, the law, as far as possible, will enforce the trust. A debtor, therefore, under the pretext of preferring certain creditors cannot overpay them, nor reserve a secret trust in the property in his own favor, and a creditor who greedily grasps and obtains more of a failing debtor's property than he is entitled to, to the exclusion of the claims of other creditors, does so at his peril. The statute against hindering, delaying, and defrauding creditors is plain and unambiguous, and there is no reason why it should not apply to a creditor who receives more than he is entitled to of a failing debtor's property. The rule of the common law allowing a failing debtor to prefer one or more of his creditors is entirely arbitrary, is contrary to justice and right, and has naught to commend it except a line of authorities. If a debtor is unable to pay his debts in full, it certainly is but justice that each creditor should be paid a fair proportion of the entire assets of such debtor. Any other rule carries upon its face the stamp of unfairness, and should, as far as possible, be discouraged. The general assignment law of this state prohibits preferences except in certain trifling matters, and, but for the first section of that act, no doubt would control in this case. A debtor who by any instrument transfers all his property to one or more creditors or other persons for their benefit, has *in fact assigned it*. So far as his right, control, and possession of the property are concerned, they have passed to others, and are not to be returned to the debtor until the purposes of the trust are accomplished; and then only the residue of the property is to be returned. No refinement of definition can make such a transfer essentially different from an assignment. In the instrument under which the plaintiff claims, is the following: "And I, the said B. C. Hamilton, hereby authorize the said S. H. Bonns to take immediate possession of the same and to sell the said property in the usual course of business at retail and private vendue, and apply the proceeds of the sales in *pro rata* proportion as the same may become due. The balance of the proceeds of the sales thereof and of the goods and chattels remaining after paying all reasonable expenses connected with the taking and selling of said property, if any there be, to be paid or returned to the said B. C. Hamilton, or his assigns, immediately upon the said notes being so paid." *Bonns* v. *Carter*, 20 Neb. 574, 31 N. W. Rep. 381. This is the language of a trust and the trustee was the assignee named in the instrument, and as under our statute such assignments are prohibited and declared invalid, it was of no effect. The judgment heretofore rendered is therefore, in my view, right, and should be adhered to. Judgment accordingly.

COWAN v. STATE.

(*Supreme Court of Nebraska.* November 30, 1887.)

1. CRIMINAL PRACTICE—PRELIMINARY EXAMINATION.
   Where it appears that the charge in the preliminary examination was substantially the same as that set forth in an information filed in the district court, the plea of want of preliminary examination will be unavailing.

2. SAME—PLEA IN ABATEMENT.
Where it is claimed there was no preliminary examination of a party accused of crime before filing an information against him in the district court, the question should be raised by a plea in abatement.

3. SAME—EVIDENCE—COMMISSION OF SIMILAR CRIME.
Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time the accused committed, or attempted to commit, a crime similar to that with which he stands charged.

4. SAME—INSTRUCTIONS—REASONABLE DOUBT.
The court, in defining a reasonable doubt, said: "It is a doubt for having which the jury can give a reason based upon the testimony." *Held* erroneous, and calculated to mislead.[1]

5. FALSE PRETENSES—INFORMATION.
Where, in an information against a party for obtaining money by false pretenses, it is alleged that "by reason of the false pretenses" the accused obtained the money, the words of the statute being "by false pretense," *held*, the allegation was sufficient.

6. SAME—EVIDENCE.
In a prosecution against a party for obtaining money under false pretenses from a bank, the note given by him for the money, and mortgage to secure the same, when introduced in evidence, are sufficient in that case to prove the *de facto* existence of the bank. *People* v. *Hughes*, 29 Cal. 260; *Bank* v. *Harding*, 1 Neb. 461.

(*Syllabus by the Court.*)

Error to district court, Valley county.

M. Randall and *E. W. Metcalfe*, for plaintiff. *The Attorney General*, for defendant.

MAXWELL, C. J. The plaintiff was convicted of the crime of obtaining money under false pretenses, in the district court of Valley county, and sentenced to imprisonment in the penitentiary. The charge in the information on which he was convicted is as follows: "That on or about the twelfth day of March, in the year of our Lord one thousand eight hundred and eighty-six, in the county of Valley, and state of Nebraska, one William Cowan unlawfully and feloniously did falsely pretend to the First National Bank of Ord, Valley county, Nebraska, a corporation organized under the laws of the United States, and doing business in Valley county, Nebraska, that he, the said William Cowan, was the owner of forty red cows branded with a heart on the right hip, fifteen red and white cows branded with a heart on right hip, two white cows branded with a heart on right hip, one red bull three years of age branded with a heart on right hip, one black stallion colt three years of age, and one bay mare colt three years of age, and after having conveyed to the First National Bank of Ord aforesaid the above-described property by chattel mortgage, obtained from the said First National Bank of Ord, by reason of the false pretense aforesaid, two hundred dollars in money, of the value of thirty-five dollars and upwards, to-wit, of the value of two hundred dollars, with the intent then and there and thereby unlawfully and feloniously to cheat and defraud said First National Bank of Ord of the two hundred dollars so as aforesaid falsely and fraudulently obtained, whereas in truth and in fact he, the said William Cowan, was not the owner of the forty red cows aforesaid, and was not the owner of the fifteen red and white cows aforesaid, and was not the owner of the one red bull aforesaid, and was not the owner of the one bay mare aforesaid, and was not the owner of the one

[1] A reasonable doubt is one for which a sensible man can give a good reason, based on the evidence or want of evidence. It is such a doubt as a sensible man would act upon, or decline to act upon, in his own concerns. U. S. v. Jones, 31 Fed. Rep. 718.
Respecting "reasonable doubt" in criminal cases, see Knarr's Appeal, (Pa.) 9 Atl. Rep. 878; People v. Lee Sare Bo, (Cal.) 14 Pac. Rep. 310; McCullough v. State, (Tex.) 5 S. W. Rep. 175; White v. State, (Tex.) 3 S. W. Rep. 710, and note; U. S. v. Jackson, 29 Fed. Rep. 503, and note; People v. Kernaghan, (Cal.) 14 Pac. Rep. 566.

black stallion aforesaid; he, the said William Cowan, then and there well knowing said false pretense to be false."

A motion was filed to quash this information, which motion was overruled, which is now assigned for error. The principal ground relied upon for quashing the information was that it did not appear that there had been any preliminary examination of the accused for the specific offense charged in the information before instituting this prosecution in the district court. It does appear, however, that a complaint was filed against the accused charging him with mortgaging property to which he had no claim or title, and thereby procured the money which it is alleged he fraudulently obtained. This, in our view, is sufficient, and it is apparent that the offense charged in the complaint is the same as that for which the accused now stands charged in the information. The proper mode of raising an objection of that kind is by a plea in abatement, and not by motion. This objection was, therefore, properly overruled.

2. It is claimed that the information is insufficient because of the words of the charge, "by reason of the false pretenses" he obtained the money, instead of the statutory words, "by false pretense or pretenses;" but in our view the words used in the information mean substantially the same as the statutory words. The objection to the information, therefore, is unavailing.

3. In the examination of the jurors on their *voir dire*, one W. D. Castor was sworn and examined as follows: "Did you say you had formed an opinion as to the guilt or innocence of the defendant as to the particular crime of which he is charged? Yes, sir. From what source did you derive that opinion? From what I heard from the different parties. Parties interested in the transaction? I think there is one of them. Relative of the defendant? No, sir. Parties who claimed to own the property? No, sir. From what you heard you formed an opinion as to his guilt or innocence? I did. Have you that opinion still? I have it yet; yes, sir. Is that a positive opinion, or conditional upon what you heard being true? Of course it is on what I heard being true. Notwithstanding that opinion are you able to sit here upon the jury and listen to the testimony produced and the instructions of the court and render a verdict entirely free from the opinion you now have? I think I could. Are you prepared to say positively you can? Yes, sir; I certainly could." The challenge for cause was thereupon overruled, to which defendant below excepted. Section 468 of the Criminal Code provides "that if a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay, and *not* upon conversations with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that such juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." The proper construction of this section was before the supreme court in *Curry* v. *State*, 4 Neb. 548, 549, and it is said: "Where the ground of challenge is the formation or expression of an opinion by the juror, before the court can exercise any discretion as to his retention upon the panel, it must be shown by an examination of the juror, on his oath, not only that his opinion was formed solely in the manner stated in this proviso, but, in addition to this, the juror must swear unequivocally 'that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence.' If he expresses the least doubt of his ability to do so he should not, in the face of a challenge for cause, be retained. And even where, by his formal answers, the juror brings himself within the letter of the statutory qualification, if the court should discover the least symptom of prejudice or

unfairness, or an evident desire to sit in the case, he should, in justice both to the state and the accused, be rejected." This juror was clearly incompetent. Evidently his opinion was formed from conversations with those who professed to know the facts, and no doubt were called, or could have been called, as witnesses in the case. Where an opinion is formed by conversation with such witnesses, the party is incompetent to sit as a juror, notwithstanding he may swear that he can render a fair and impartial verdict. But few persons called as jurors will admit that they cannot render a fair and impartial verdict notwithstanding their opinions, and in most cases, no doubt, they intend to do so; but there is danger of their bias affecting the verdict. The court, therefore, erred in retaining this juror. But as the error is not assigned in a motion for a new trial, it is unavailing.

4. Objection is made that there is no proof of the incorporation of the First National Bank of Ord, and that, therefore, there is no person to be defrauded. The state, however, introduced a promissory note for the sum of $200 signed by the accused, and also a chattel mortgage upon the stock described in the information, also signed by him and given to such bank; these instruments being those upon which the charge in this case was founded. This, so far as the accused is concerned, is proof of the *de facto* existence of the bank. *People* v. *Hughes*, 29 Cal. 260; *Bank* v. *Harding*, 1 Neb. 461. The objection, therefore, is untenable. On the trial of the cause the state was permitted to introduce testimony to show that the accused had, in two other cases, entirely distinct and separate from that under consideration, obtained goods under false pretenses. This was entirely unauthorized, and could not fail to be prejudicial to the accused. Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time the accused committed, or attempted to commit, a crime similar to that with which he stands charged, as it cannot be expected the accused will be prepared to disprove collateral attacks of this character. The law, therefore, excludes such evidence. *Smith* v. *State*, 17 Neb. 350, 22 N. W. Rep. 780.

5. The court in the third instruction said to the jury: "You are instructed that by a reasonable doubt is meant such a doubt as naturally arises in the mind of the jury, from a consideration of the evidence, as to cause them to pause and hesitate, and act as in the most important affairs of theirs. It is a doubt for having which the jury can give a reason based upon the testimony. To be convinced beyond a reasonable doubt is to have the judgment and the reason of the jury satisfied so they would go forward unhesitatingly and act under like circumstances of their own." The words "it is a doubt for having which the jury can give a reason based upon the testimony" were certainly calculated to mislead, and no doubt did mislead, the jury. The definition of a "reasonable doubt" given by Chief Justice SHAW in *Com.* v. *Webster*, 5 Cush. 295, is that the evidence must be such as to "establish the truth of the fact to a reasonable and moral certainty,—a certainty that convinces and directs the understanding, and satisfies the reason of those who are bound to act conscientiously upon it." This seems to be a correct definition of a "reasonable doubt."

6. There is testimony in the record from which the jury would have been warranted in finding that the accused, although not the owner of the property in question, nevertheless had authority to mortgage the same. This should have been submitted to the jury.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

(The other judges concur.)

Ex parte CARR.

(*Supreme Court of Nebraska.* November 30, 1887.)

1. CRIMINAL PRACTICE—VENUE—UNORGANIZED COUNTY.
Under chapter 19 of the Revised Statutes of 1866, all unorganized counties were attached to the nearest organized county directly east, for election, judicial, and revenue purposes; therefore, where a murder was alleged to have been committed in the county of Sioux, the party accused of committing the same could not be indicted and tried for the offense in Cheyenne county, it being directly south of Sioux county.

2. SAME—EVIDENCE—SECONDARY—CONTENTS OF LOST INDICTMENT.
Where the record of the indictment against a party accused of committing a crime has been omitted, or lost, or destroyed, the court will receive secondary evidence as to the essential facts stated in the indictment which conferred jurisdiction on the trial court.[1]

REESE, J., dissenting.

(*Syllabus by the Court.*)

Habeas Corpus.

Marquett, Deweese & Hall, for petitioner. *The Attorney General, contra.*

MAXWELL, C. J. The defendant was indicted in Cheyenne county in the year 1877, for the murder of one William Love, and convicted, and sentenced to the penitentiary for life. This is an application for a writ of *habeas corpus* to discharge him, on the ground that the offense was not committed in Cheyenne county, and that, therefore, the district court of that county had no jurisdiction. The records of Cheyenne county fail to show any copy of the indictment; hence we are compelled to rely upon secondary evidence as to the county in which the offense was charged to have been committed. One J. C. Lane, a witness on behalf of Carr, makes the following affidavit:

"*State of Nebraska, County of Lancaster—ss.*: J. C. Lane, being duly sworn, on his oath says that he is well acquainted with John Carr, the applicant for a writ of *habeas corpus* in this case, and has known said Carr since A. D. 1876; that affiant is well acquainted with the proceedings and prosecution of said Carr, by the state of Nebraska, for the alleged killing of William Love; that affiant knew the said Carr when the said Carr lived in Cheyenne county, and also while said Carr was confined in the county jail of said Cheyenne county; that this affiant was in Sidney at the time said Carr was indicted, and also at the time he was tried for the alleged killing of one William Love; that affiant well remembers the facts and the circumstances connected with the alleged killing of William Love by the said Carr; that at the time the said killing took place this affiant was in the employ of Major Mayberry, who owned a large amount of cattle in that country, and this affiant was working on the Platte river at Camp Clark for the said Maj. Mayberry at the time the killing took place; that in the summer following the killing of said Love, affiant was in the employ of said Maj. Mayberry and was engaged in gathering cattle over on Snake creek in the immediate vicinity where the killing took place, and where the body of said Love was buried; that affiant had several times seen the grave where William Love was said to be buried, and it was generally known, and understood, and spoken of as the grave of said William Love, who was killed by the said John Carr; that affiant has resided in the country above described, to-wit, in and about Camp Clark, and over on Snake creek, and has traveled through the country both as a freighter and a herder of cattle, from the time the said Love was killed until the year 1884, and that affiant is well acquainted with all the country in and about where

[1] As to the admissibility of secondary evidence to show the contents of public records, see Mobley v. Watts, (N. C.) 3 S. E. Rep. 677, and note.

the said Love was said to be killed; that affiant knows the line that divides Cheyenne county from the unorganized territory of Sioux, and knows that the grave said to be the grave of William Love is in what was then the unorganized territory of Sioux, and it is understood by everybody in that vicinity that the body was buried by some freighters where it was found; that affiant, having been acquainted with the said John Carr, when he learned that he was arrested and indicted for killing a man, interested himself in Carr's behalf to a certain extent, and went to the jail to see Carr, and also saw Carr in the court-room at the time he was tried; that affiant was shown the indictment by the said Carr, and affiant read the indictment and talked over the matter with the said Carr as to how he came to kill the said Love, and all the circumstances connected therewith, and where the killing took place, and how he killed him, etc.; and this affiant knows the contents of the said indictment, and well remembers that the said indictment charged the said Carr with the killing of one William Love in the unorganized territory of Sioux; that affiant and John McCarty, who was then sheriff of the county, were intimate friends, and affiant was acquainted with the said McCarty a long time, and was with the sheriff and in his office several times, and that affiant and the sheriff were having a conversation in regard to where the killing was done and the circumstances in connection with the killing, and in connection with the conversation the sheriff got the indictment, and he and this affiant read it over together and talked the matter over at the time, and the affiant is confident that the said indictment charged the said Carr with killing a man by the name of William Love in the unorganized territory of Sioux."

Laue is corroborated substantially by G. B. Moore, W. F. Payne, L. H. Bordwell, George H. Jewett, and France Reino. A letter of V. Beirbower, who was assigned as counsel to defend Carr, is also in the record, from which it appears that Carr was a "Norwegian and (at that time) could scarcely speak any English. He could explain nothing, and I remember we could find no interpreter in the town. I have always thought, and still think, that Carr never deserved that sentence. He was literally railroaded through his trial." Beirbower, therefore, being unable to get at any of the facts in the case from his client, and apparently finding a strong public sentiment against him, advised his client to plead guilty to murder in the second degree, although his client claims the act was committed in self-defense. The offense, however, is clearly shown to have been charged to have been committed, and to have actually been committed in Sioux county, and not in Cheyenne county.

Chapter 10 of the Revised Statutes of 1866, which were in force when the trial took place, provides that "all unorganized counties shall be attached to the nearest organized county directly east of them, for election, judicial, and revenue purposes." The court will take judicial notice that Sioux county, as it existed at the time of this trial, was directly north of Cheyenne county. The grand jury of Cheyenne county, therefore, and also the district court of that county, had no jurisdiction in the premises. This is not a case where there had been a change of venue, or the court had directed the finding of an indictment in Cheyenne county if, indeed, it would have had any authority so to do. The prosecution was instituted in Cheyenne county as a matter of right, and was clearly without authority of law. The court thus being without jurisdiction, its judgment is a nullity, and is held for naught. As no prosecution seems to have been instituted against the petitioner in Sioux county, the clerk is directed to notify the proper authorities of that and Box Butte counties of the action of the court herein, and within 20 days from the time of receiving such notice, such authorities can, if they so desire, institute proceedings to prosecute such charge, and in case of failure to do so, the petitioner will be discharged from imprisonment. Judgment accordingly.

COBB, J., concurs.

REESE, J., (*dissenting.*) I cannot agree to the conclusion reached in this case by the majority of the court, and will briefly give some of my reasons therefor, without elaboration or citation of authorities. While I entertain no degree of disrespect for Hon. V. Bierbower, who defended petitioner upon his trial, yet I do not believe an unsworn statement from him, or any other person, in the form of a letter to the present counsel for petitioner, should have any legal weight attached to it, nor should it be considered as evidence in any form. The law provides a method of taking testimony; that method should be followed. I find among the files in this application a letter from Hon. WILLIAM GASLIN, who was the presiding judge at the time of the conviction of petitioner, in which he says he does not remember much about the case, and therefore has no recollection as to the allegations of the indictment. If letters are to be considered, I am persuaded that if that judge had consigned a person to imprisonment *for life* upon an indictment alleging the offense to have been committed in a part of the state over which his court had no jurisdiction, he would have remembered it. It would take very strong proof indeed to convince me that he would have done so, or that Hon. C. J. Dilworth, who was at that time district attorney and present in court, prepared the indictment and conducted the prosecution, and who was shortly afterwards elected to the office of attorney general of the state, would have been a party to any such proceeding.

It is true that affidavits are presented by which it is sought to be established that such was the fact, but those affidavits, if competent evidence at all, were made nearly 10 years after the conviction, by men of whose intelligence or probity we know nothing, and some, if not all of whom, are personally friendly to the petitioner. If the solemn adjudications of our courts can be overturned in this way, then it seems to me there is not much "faith and credit" to be given them. Lost indictments may become common and the courts be besieged with applications for writs of *habeas corpus*. Suppose the authorities of Sioux county should institute a criminal prosecution against petitioner for murder, and pending the proceeding the indictment upon which he was convicted should be found, and it should contain the allegation that the murder was committed in Cheyenne county, with his plea of guilty therein as shown by the records before us. This would afford a complete bar to any other prosecution, and he would be entitled to his immediate discharge; for if it was so alleged and thus admitted, it would be wholly immaterial whether the crime was in fact committed on the north or south side of the county line. Again, the record before us shows that the defense of petitioner was conducted by Messrs. Bierbower & Heist, the latter of whom still resides in Sidney. Neither of those men furnish an affidavit as to the contents of the indictment, nor does Mr. Bierbower in his letter state that it was alleged that the crime was committed in the unorganized territory. Now can it be believed that if petitioner was "railroaded through his trial" on the void indictment, those attorneys, who are of respectable ability to say the least, would have tamely submitted to any such proceeding, without coming to the supreme court and procuring his discharge? I think not.

FORBES v. THOMAS.

(*Supreme Court of Nebraska.* November 30, 1887.)

1. APPEAL—CONFLICTING EVIDENCE.
   Where the testimony is conflicting, and pretty evenly balanced, the finding of a trial jury thereon will not be disturbed, even if the testimony seems to preponderate in favor of the losing party.

2. SAME.
   Evidence examined, and *held* to support the finding of fact necessary to support the verdict.

3. SAME—HARMLESS ERROR.
Error without prejudice will not require the reversal of a judgment.

4. FRAUD—CONCEALMENT—LIABILITY—EFFECT OF DISCHARGE IN BANKRUPTCY.
Where A., being indebted to B. in the sum of $10,000, procures C. to execute to B. a note and mortgage for $2,650, with the statement that B. would furnish the $2,650 to C., as a loan, the proceeds of such loan to be applied to the payment of a mortgage on the real estate included in the mortgage to B., amounting to over $1,200, and $900 thereof to be applied to the payment of a note for that amount held by A. against C., and another, the remainder to be paid in cash to C., but A. concealed from C. all knowledge of indebtedness to B., and, instead of procuring $2,650, procured only $1,000, and applied the $1,650 to the payment of his own indebtedness to B. without the knowledge or consent of C., and at the time of making the contract A. was not the owner of the $900 note, and could not deliver it to C., having transferred it to another long prior thereto, as collateral, to secure an unpaid debt, it was *held* that the concealment of the indebtedness from A. to B., and the appropriation of the money thereon, and the concealment of the fact that the $900 note had been transferred and could not be delivered, were a fraud upon C., and created a liability which a discharge in bankruptcy, under the provisions of the bankrupt law of the United States then in force, could not affect.

5. SAME—MEASURE OF DAMAGES.
In such case the measure of C.'s damages in an action against A. would be the $1,650, and legal interest thereon, notwithstanding the fact that by the increased mortgage liens on C.'s land he was unable to borrow sufficient to discharge them, and by subsequent foreclosure proceedings the land was sold, and C.'s title destroyed.

6. SAME—GOOD FAITH—EVIDENCE.
In such case the refusal of the trial court to permit A. to testify that in the transaction he acted in good faith, and intended to surrender the note, and believed he could do so, if error at all, would be without prejudice, the notes having never been surrendered or tendered.

7. LIMITATION OF ACTIONS—NON-RESIDENCE.
The cause of action occurred in 1875. In 1877 plaintiff in error, who was in business in O., in this state, changed his place of business to D., in Dakota territory. From that time until 1880, his family resided in O., when his wife joined him in Dakota, and remained there about four months. In 1881 his family all joined him in Dakota. The principal part of the time from 1877 until 1881, his family resided in the place occupied by him previous to his departure. He occasionally visited O., but did not make that his usual place of abode. *Held*, that these facts, together with other circumstances and testimony submitted to the jury, were sufficient to sustain the finding that "his usual place of residence" was not in O., and that the statute of limitations did not run in his favor.[1]

(*Syllabus by the Court.*)

Error to district court, Douglas county; NEVILLE, Judge.

George W. Doane and *H. D. Estabrooke*, for plaintiff. *J. L. Webster*, for defendant.

REESE, J. This action was instituted in the district court of Douglas county, by defendant in error against plaintiff in error, by which he sought to recover the sum of $10,000 damages resulting from fraudulent representations and conduct of plaintiff in error. The cause of action stated in his petition is that, on the twenty-third day of April, in the year 1875, he was the owner in fee-simple of the W. ½ of sec. 15, township 16, range 12, in Douglas county, Nebraska, and that at said date there was a mortgage on the premises to one Barker, in the sum of $1,200, and interest from April 8, in the year 1872; all of which was then due and payable. That defendant in error, being desirous of paying off said mortgage to Barker, applied to plaintiff in error for a loan of $2,650, to be secured by a mortgage on the real es-

[1] Respecting the suspension of the running of the statute of limitations by absence from the state, see Wood v. Bissell, (Ind.) 9 N. E. Rep. 425, and note; Stewart v. Spaulding, (Cal.) 13 Pac. Rep. 661; Brady v. Potts, (N. J.) 11 Atl. Rep. 345; Watkins v. Reed, 30 Fed. Rep. 908. See, also, Engel v. Fischer, (N. Y.) 7 N. E. Rep. 300; Lower v. Miller, (Iowa,) 23 N. W. Rep. 897.

tate; that plaintiff in error was then indebted to one William Vorse in a large sum of money, which he concealed from defendant in error, and which was unknown to him; and, to enable the plaintiff in error to cancel a part of his own indebtedness to Vorse, procured defendant in error to execute a note to Vorse in the said sum of $2,650, bearing date August 23, 1875, payable five years after date, and to secure the same to execute a mortgage on the real estate above described to Vorse, fraudulently representing to defendant in error that Vorse was advancing on said note and mortgage the full amount thereof; that plaintiff in error fraudulently represented to defendant in error that he would procure the $2,650, and out of that money pay, and cause to be canceled, the mortgage to Barker, and would surrender certain evidences of indebtedness that plaintiff in error held against defendant in error and one John Thomas, and would pay defendant in error the sum of $1,000 in cash; but that after obtaining the mortgage and note, he fraudulently did deliver the same to Vorse in payment of $2,650 of the indebtedness of plaintiff in error to Vorse, and did not pay to defendant in error the $1,000 in cash, nor cancel the mortgage to Barker, nor surrender the evidences of indebtedness held against the defendant in error; but paid Barker the sum of $785, and paid taxes on the land amounting to $215, which was all that defendant in error received from plaintiff in error for the note and mortgage of $2,650. It is alleged that defendant in error was, at the time, poor financially, and was himself unable to pay his incumbrance on the land, and, by reason of the mortgage to Vorse so fraudulently obtained by plaintiff in error, he was prevented from borrowing money on the land, and that the same was lost to him by the foreclosure of the Barker and Vorse mortgages. That, in addition to the loss of the real estate, a judgment had been rendered against him for the sum of $2,500, as a deficiency remaining after the sale of the mortgaged property. That the value of the real estate was $8,000. It is also alleged that plaintiff in error has been absent from the state for more than five years, and that he has not been within the state four years since the date of obtaining the mortgage.

Plaintiff in error, by his answer, admits the execution of the mortgage to Vorse, and the existence of the mortgage to Barker as alleged in the petition, but denies that defendant in error applied to him for the purpose of paying off the Barker mortgage; but alleges that defendant in error and one John Thomas, his brother, were at the time of the execution of the Vorse mortgage indebted to him in the sum of $1,650; that defendant in error well knew the plaintiff in error was indebted to Vorse, and that plaintiff in error applied to defendant in error and John Thomas, either to pay him the amount of their indebtedness, or secure the same in such manner as to enable him to use it in paying a part of his indebtedness to Vorse; and it was mutually agreed between them that defendant in error should execute the mortgage on the real estate as he did do; that $1,000 in money should be paid to him for the purpose of reducing the liens thereon, and that they should be afterwards paid by defendant in error; that by the execution of the $2,650 mortgage defendant in error and John Thomas paid to plaintiff in error the said sum of $1,650 due him from them, and received the benefit of $1,000 paid upon his indebtedness to Barker, and the taxes due upon the land. All allegations of fraud or concealment are specifically denied. It is admitted that he did not surrender the evidences of indebtedness held by him against the defendant in error and John Thomas, but it is alleged that they have never paid any part of such indebtedness, and have suffered no damage by reason of his failure to surrender them. It is admitted that the Barker and Vorse mortgages were foreclosed, and the land sold as alleged in the petition of defendant in error; but it is alleged that he suffered no damage thereby, as he had sold and transferred the land prior to the commencement of the foreclosure proceedings, and had no interest therein. The absence of plaintiff in error from the state is denied,

and it is alleged that from the time of the execution of the mortgage to Vorse until in April, 1881, plaintiff in error had continuously been a resident of the state of Nebraska, and of the city of Omaha, and that, while he was temporarily absent a part of the time, his home was in Omaha, where his family resided, and that, during all the said time, service of summons could have been made upon him as required by law in civil actions. It is alleged that, since the date of the execution of the Vorse mortgage, certain proceedings in bankruptcy had been instituted in the district court of the United States against plaintiff in error, which resulted in his discharge from all his indebtedness, and especially from the alleged indebtedness to defendant in error, on the twenty-fifth day of April, 1879.

Defendant in error, by his reply, denies the indebtedness of himself and John Thomas to plaintiff in error, in the sum of $2,650 or any other amount; but alleges that plaintiff in error had held certain evidences of indebtedness of John Thomas, the amount of which is not known by defendant in error, but that, at the time of said transaction, plaintiff in error was not the owner thereof, but had transferred them to a *bona fide* purchaser for value, and that the said evidences of indebtedness were not surrendered, either to defendant in error or John Thomas, by plaintiff in error, but were still outstanding and subsisting evidences of debt against them. That, at the time of the execution of the mortgage, plaintiff in error knew that he was not the owner and holder thereof, but had, long prior thereto, transferred the same. It is denied that the Vorse mortgage was executed for the purpose of securing any part of the said indebtedness. All knowledge of the indebtedness of plaintiff in error to Vorse at the time of the execution of the mortgage is denied; but it is alleged that the mortgage was executed to Vorse on the representation of plaintiff in error that Vorse would advance to plaintiff in error the full amount thereof. It is denied that the mortgage was given for the purpose of, or with the intention of, applying any part thereof on the indebtedness of the plaintiff in error to Vorse.

There was a jury trial which resulted in a verdict in favor of defendant in error for the sum of $3,229.80. A motion for a new trial was made and overruled, and judgment rendered on the verdict.

The first contention of plaintiff in error is that the verdict is not supported by the testimony. Upon this part of the case it must be sufficient to say that we have carefully read all the evidence submitted to the trial jury, and find the same conflicting in almost every material feature of the case. If the testimony of plaintiff and his witnesses was correct, a verdict might well have been rendered in his favor; but if the testimony of defendant in error and his witnesses is the correct version of the case, we cannot see that these facts would not support the verdict. Of this the trial jury was the sole judge, and so far as their finding of fact is concerned, upon the testimony thus conflicting, it must be taken as final. The question that then presents itself is, will the facts as testified to by the defendant in error and his witnesses, supported, as they are, by circumstances entitled to more or less weight, sustain the verdict? This testimony may be briefly said to be that, prior to the execution of the Vorse mortgage, defendant in error, being unable to pay the Barker mortgage, applied to plaintiff in error for a loan of $2,650, a part of which was to be applied to the payment of the Barker mortgage of $1,200 and interest, and part to the payment of the note held by plaintiff in error against defendant in error and John Thomas; the remainder to be paid to defendant in money. That at the time plaintiff in error was indebted to Vorse in the sum of $10,000 or upwards, but that he concealed the knowledge of this indebtedness from defendant in error, and without his knowledge or consent applied the $1,650 on its payment, promising to turn over the note of the Thomases for about $900; but at the time he made this promise the note was in the bank, pledged as collateral security for his indebtedness, and was not subject to his control;

that, soon after the mortgage was delivered to Vorse, he received from Vorse, for defendant in error, $1,000, which was applied upon the payment of the taxes and the Barker mortgage, promising defendant in error that the remainder would be soon received and paid over to him. Defendant in error made frequent demands for the remainder of the money, but never received it. Upon the maturing of the first interest on this $2,650 note, defendant in error received a letter from Vorse calling for its payment. He notified plaintiff in error of the fact, and proposed writing to Vorse, directing him to retain the interest out of the $1,650 not yet paid, and send him the balance. This plaintiff in error requested him not to do, but simply to write that he would send the interest in a short time, promising that he would furnish the $1,650 not yet received; but stating to defendant in error, in substance, that he did not desire Vorse to know that the money had not all been paid. About two years after the execution of the mortgage, when Thomas became satisfied he would never receive the $1,650, plaintiff in error offered to turn over to him the indebtedness of himself and his brother, John Thomas, in the shape of notes and accounts, which defendant in error finally agreed to take; but that these notes had also been transferred by plaintiff in error, and were not subject to his control, and were never delivered. Soon after the execution of the mortgage, plaintiff in error instructed defendant in error to go to the bank and call for the note upon himself and John Thomas, which it had originally been agreed he should have; but upon calling for it at the bank, delivery was refused. He afterwards executed an order to defendant in error, in writing, which, upon presentation, was refused, and the bank retained the note. Some of the notes were afterwards sued upon by the bank, and judgments were rendered against the Thomases, and, although not paid, these judgments are unsatisfied, and remain valid as against them.

It is true that upon the trial plaintiff in error stated upon the witness stand that he was ready to deliver over the note in accordance with his first agreement, which note was produced upon the trial for defendant in error, but it was subsequently shown that this note was still the property of the bank, held by it as collateral security, and that plaintiff in error had no control over it, and could not have delivered to defendant in error had he consented to receive it. If these facts were true, and of that the jury was the sole judge, it cannot be questioned that at the time that plaintiff in error promised to surrender the note for $900, he well knew his inability to do so, and that he had no control over it. He must have known, and did know, that Vorse was only to pay the $1,000, and apply the $1,650 upon the indebtedness of plaintiff in error. If he concealed from defendant in error the fact of this indebtedness and the intention of applying the $1,650 thereon, and the further fact that the note which he agreed to surrender was not his property, and that he could not surrender it, these facts would clearly establish fraud upon his part, and upon its discovery he would be liable to defendant in error for the damages sustained by reason of such fraud, which would be the $1,650 and its interest.

The question of the measure of damages was properly decided by the trial court in its fifth instruction given to the jury, which was as follows: "You are instructed that the plaintiff, having transferred to one Wiltsie all his right and title to the farm in question before the commencement of the foreclosure proceedings, cannot recover damages for loss of title and interest in said farm by reason of said foreclosure proceedings." And by the eighth instruction, which was as follows: "Should you be satisfied from the proofs there was a liability from defendant to plaintiff, created by the Vorse mortgage transaction, and that the same has not been satisfied, and that such liability was established by the fraud of defendant, and that the statute of limitation has not run, then you should allow plaintiff the amount of such claim against defendant, with interest at twelve per cent. to March 3, 1880, from

the date of the Vorse mortgage transaction, and seven per cent. from that date until the first day of this term."

By these instructions all questions of damages resulting from the loss of the farm are eliminated from the case, and need not be further noticed. The jury having found that the indebtedness was created by fraudulent acts of plaintiff in error, we see no reason why the verdict should, on that account, be molested.

It is next insisted that the court erred in the admission of testimony tending to prove that, after the execution of the Vorse mortgage, and prior to the foreclosure thereof, he made an effort to borrow money for the purpose of paying off the Vorse mortgage, but could not do so, owing to the extent of the liens against it, and that by the foreclosure he lost the land. If there was error in the admission of this testimony, it was clearly without prejudice, for the reason that this whole question was virtually withdrawn from the jury by the instruction number five, above quoted.

The next objection to the ruling of the court in the admission of testimony is that the court erred in sustaining the objection of plaintiff in error to the following question: "At the time you made this transaction with Mr. Thomas did you, in good faith, intend to surrender the notes to him?" And again: "State whether or not, at the time you made this transaction with the plaintiff, you believed that you could, and intended to, deliver the notes to which you have referred to Louis Thomas in good faith." It is said by plaintiff that "the *gravamen* of this action is the intent of Forbes to defraud Thomas, and that the right to recover rests upon the allegation in the petition that Forbes designed and contrived to defraud Thomas." While this is to some extent true, yet it could hardly be said that plaintiff in error intended otherwise than what would naturally result from his own acts. It would be a reproach upon his intelligence to say that, if he concealed his indebtedness to Vorse, and applied the mortgage, to the extent of $1,650, upon its payment, without the knowledge or consent of defendant in error, and also concealed the fact that the notes referred to in the testimony had been transferred by him, and could not be delivered, that he did not know, and in fact had not intended to comply with, his contract. His good or bad faith must be decided by what he did, and not by what he intended. It may be, and is, doubtless, true, that in some instances the question of intent, when propounded as the question in this case was, would be proper and competent; but there is nothing in this case which would call for the answering of this question. If the jury believed from the testimony, as they doubtless did, that plaintiff in error had knowingly and intentionally made the representations which defendant in error says he made, and that they were false, then the question of intent must be answered from his actions, and not from what he now says was his purpose.

The ruling of the court in the admission of certain mechanics' liens against the property of plaintiff in error is also assigned for error. It is quite difficult to see upon what theory these liens could be admitted. The witnesses for plaintiff in error testified that, upon a certain occasion, in a certain brick house of plaintiff in error, a conversation was had between the parties to the action by which it was agreed that the $1,000 was all the money to which defendant in error was entitled from the Vorse mortgage. The mechanics' liens were introduced for the purpose of showing the construction of the house after the date of the alleged conversation. We can readily see how it would have been entirely competent to prove the fact sought to be established by the introduction of the liens, but it is difficult to see how the papers thus become competent to prove that fact. However, it seems to us that the testimony sought to be counteracted by the introduction of the liens was not material to the merits of the case, for the reason that, if the conversation had occurred at the time and place as testified to by the witnesses of the plaintiff in error,

yet all that could be claimed for it would be that the Vorse note and mortgage was procured upon the promise of plaintiff in error to surrender notes against defendant in error, which he had no authority or power to do, the notes at that time being out of his hands. It could make no difference, therefore, whether the contract in that behalf was as claimed by plaintiff in error, or as claimed by defendant in error. No prejudice could result to plaintiff in error by the introduction of the mechanics' liens, and if the decision of the court was even erroneous it would not call for the reversal of the case.

The next question presented by plaintiff in error is the alleged errors of the court in the instructions given to the jury, and those asked by plaintiff in error and refused. Plaintiff in error requested the court to give, as his first instruction, the following: "The jury are instructed that the claim for damages in this action, based on the foreclosure proceedings referred to in the amended petition, and the sale of the land therein described, under the decree rendered in such foreclosure proceedings, cannot be sustained, and the jury will dismiss from their consideration the question of damages based on such claim." This instruction the court refused to give, and plaintiff in error excepted to the ruling of the court. All that can be claimed for this instruction was given in instruction number five, upon the court's own motion, which we have hereinbefore copied, and need not reproduce it. Although couched in defendant's own language, the sum of both instructions is that defendant in error could not recover damages for loss of his title to the farm by reason of the foreclosure proceedings. The verdict also shows that no such damages were given by the jury. It is objected that the fifth instruction given by the court was defective, because the reason assigned was the transfer by Thomas to Wiltsie of the title of the land. We cannot conceive that this would make any difference; the legal proposition given to the jury was that the plaintiff in the action could not recover on that branch of the case. The character of the instruction will not be held erroneous because an improper reason for it is given. *Marion* v. *State*, 20 Neb. 233, 29 N. W. Rep. 911.

It is next contended that the claim of plaintiff in error is barred by the statute of limitations. Section 12 of the Civil Code provides that actions for relief, on the ground of fraud, may be commenced within four years after the discovery of the fraud. The transaction of which complaint is made occurred in 1875, and the suit was instituted in 1883; more than four years intervening. But it is alleged in the petition that plaintiff in error has been absent from the state for more than five years, and that he has not been within the state four years since the date of obtaining the note and mortgage out of which the claim of defendant in error arises. This allegation is denied by the answer, and it is alleged on the part of plaintiff in error that, during all of the time from the date upon which the mortgage was made, until in the year 1881, plaintiff in error and his family had their residence and domicile in the city of Omaha, and that during all of said time service of summons could have been made upon him in the manner provided by law. Section 20 of the Civil Code provides that "if, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as a part of the period within which the action must be brought." Section 69 provides that "service shall be by delivering a copy of the summons to the defendant, personally, or by leaving one at his usual place of residence, at any time before the return-day." It appears from the evidence that, in 1877, plaintiff in error changed his place of business from Nebraska to Dakota Territory, his principal place of business being in Deadwood. From that time until in the year 1881, his family remained in Omaha, living a part of

the time on the residence property which was occupied by him and his family prior to his departure. In 1880 his wife went to Dakota, and remained with him four months. During the time of her absence the house was rented, and the tenant remained in it for some time after her return. During the time intervening between the departure of plaintiff in error, in 1877, and the removal of his family in 1881, he was not in Omaha, except for temporary purposes. He was frequently in Ogallala, in this state, for the purpose of purchasing and driving cattle to Dakota, where he sold them. His *business* location was in that territory, and he was doing no business in Omaha. In 1881, his family joined him in Dakota, where they all remained until a short time after the commencement of this suit, when they all removed back to Omaha. It thus appears that plaintiff in error was absent from the state a great portion of the time, and from his family in Omaha substantially all of the time, until the final removal of his family to Dakota, where he was. These facts would lead to the conclusion that his "usual place of residence" was not in Omaha. The words "usual place of residence" mean the place of abode. *Seymour* v. *Street*, 5 Neb. 85. We cannot see how it could be said, even upon the testimony of plaintiff in error, that his *usual* place of residence was in this state. The fact that his family remained in this state would not necessarily make it such, when it is not made to appear that, during any of the time of his absence, he had any intention to resume his residence in Omaha. See *Blodgett* v. *Utley*, 4 Neb. 24. But there was other testimony upon the question of residence which would sustain the verdict of the jury, even though the testimony of plaintiff in error and his witnesses had been different from what it was. James P. Haynes testified, in substance, that he was acquainted with plaintiff in error and his family, and that they moved to the Black Hills in 1878. George Thomas testified that he was acquainted with him, and that he knew him in Dakota, in 1878, where he was engaged in the commission business in Deadwood, and that he had been there ever since, and had not lived in Omaha since that time, to his knowledge. J. N. Phillips saw him in business in Deadwood, in 1877 and 1878, and did not know of his returning to Omaha, except occasionally. If the jury believed the testimony of these, this would sustain their verdict.

The last question presented is upon the refusal of the court to instruct the jury that the action was barred by the discharge of plaintiff in error under the proceedings in bankruptcy. Plaintiff in error requested the following instruction, which the court refused to give: "The jury are instructed that the certificate of discharge in bankruptcy of the defendant Forbes, which was offered in evidence, covers the claim sued upon in this action, and that the defendant is thereby discharged from all liability to the plaintiff thereunder, and your verdict will therefore be for the defendant." The provisions of the law of congress, commonly known as the "Bankrupt Law," in force at the time of alleged discharge, and by which it is claimed by defendant in error that this action was excepted from the provisions of the discharge, is as follows: "No debt, created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy. But the debt may be proved, and the dividend thereon shall be a payment on account of such debt." Section 5117, Rev. St. U. S. 1878. It will be perceived that, had the court given the instruction prayed for, he would virtually have withdrawn from the jury the whole question of fraud, which he had no authority to do. The court did instruct the jury as follows: "If the claim of plaintiff was not created by the fraud of Forbes, practiced upon plaintiff, then plaintiff can recover no sum whatever, as, in that case, Mr. Forbes would be discharged from any liability by virtue of his discharge in bankruptcy; but, on the contrary, if you shall be satisfied from the proofs that any claim which plaintiff may have against Forbes in the Vorse mortgage transaction was one based on the intentional

fraud of Forbes upon Thomas, then plaintiff should recover, notwithstanding defendant's discharge as a bankrupt." This instruction, we think, very properly submitted the question to the jury, to be determined on their finding of the fact, and as to the fraudulent transaction of plaintiff in error. If he was guilty of no fraud, the action was barred by the proceedings in bankruptcy. If the claim was created by fraud practiced upon defendant in error, it was not barred. Had the jury found there was no fraud, they would have been required by this instruction of the court to find for plaintiff in error. This submitted the whole question to them, and the instruction given was proper.

We find no error in the case which would call for a reversal of the judgment. It is therefore affirmed.

(The other judges concur.)

PEOPLE v. JONES.

(Supreme Court of Michigan. November 10, 1887.)

LIBEL AND SLANDER—CRIMINAL LIBEL—SUFFICIENCY OF COMPLAINT.

In an action for criminal libel, the complaint charged that the defendant published of and concerning the complainant a certain "false, scandalous, malicious, and defamatory libel, therein and thereby accusing and imputing to the said Adolphus A. Ellis, prosecuting attorney, infamous and degrading acts," namely, of refusing to prosecute a suspected crime of murder, because the law forbade his taking bribes. *Held*, that the complaint was sufficient.

Error from circuit court, Ionia county; VERNON H. SMITH, Judge.

This was an action for criminal libel. The complaint was as follows:

"The complaint and examination, on oath and in writing, of Adolphus A. Ellis, of said county, taken and made before me, FREDERICK S. HUTCHINSON, a justice of the peace in and for the city of Ionia in said county, upon the twenty-fifth day of April, A. D. 1887, who, being duly sworn, says that heretofore, to-wit, at the November election, A. D. 1884, he was duly elected prosecuting attorney of Ionia county, and that afterwards, to-wit, on the first day of January, A. D. 1885, he qualified, and entered upon the discharge of his duties of said office, and that he remained in, filled, and occupied said office during the whole of his said term of two years, as provided by the statute.

"Deponent further says that afterwards, to-wit, at the November election, A. D. 1886, he was duly elected prosecuting attorney in and for Ionia county, and that afterwards, to-wit, on January 1, A. D. 1887, he duly qualified and entered upon the discharge of the duties of the said office.

"Deponent further says that, by virtue of the said two several elections so had as aforesaid, he, during all of the time from the first day of January, 1885, up to and at the present time, has been and is prosecuting attorney of the county of Ionia, and at all times during his occupancy of such office of prosecuting attorney as aforesaid has endeavored to be and has been an honest, faithful prosecuting attorney of said county, and as such has always behaved and conducted himself as a true, good, and law-abiding officer of said county, and, until the committing of the several grievances by the said Cyrus G. Jones, Benjamin H. Bartow, and Franklin Roe, as hereinafter mentioned, was always respected and esteemed and accepted by and among his neighbors, and other good and worthy citizens of this state to whom he was in anywise known, to be a good, faithful, and efficient officer, and a person of good name, fame, and credit, to-wit, at the city of Ionia, in the county of Ionia, to-wit, at the village of Portland, in the county of Ionia, aforesaid.

"And deponent further says that he has never been guilty, or, until the time of the committing of the offenses and misconduct hereinafter mentioned, has never been suspected to have been guilty, of the offenses and mis-

conduct hereinafter mentioned to have been charged and imputed to him, the said complainant, or of any other such offenses or misconduct; by means of which said several premises he, the said complainant, before the committing of the said several grievances by the said Cyrus G. Jones, Benjamin H. Bartow, and Franklin Roe, as hereinafter mentioned, had deservedly gained and obtained the good opinion and credit of all his neighbors, and other good and worthy citizens of this state, to whom he was in anywise known, and the reputation of being a good, true, faithful, and efficient prosecuting attorney in and for the said county of Ionia.

"And the said complainant further says that, before the committing of the several grievances by the said Cyrus G. Jones, Benjamin H. Bartow, and Franklin Roe, as in the first and second counts of this complaint hereinafter mentioned, and on, to-wit, the twentieth day of November, A. D. 1886, one Emma Jane Collins, who was then and there the wife of Myron O. Collins, came to her death by a pistol wound, at the township of Danby, in the county aforesaid, and that afterwards, to-wit, on the twentieth and twenty-second days of November, A. D. 1886, there was held a coroner's inquest on the body of the said Emma Jane Collins, so found dead as aforesaid, and the coroner's jury then and there impaneled upon said inquest so rendered a verdict, in substance, that the said Emma Jane Collins came to her death by a pistol wound, fired from a pistol in her own hand. And afterwards, to-wit, in the early part or December, A. D. 1886, Myron O. Collins, husband of the said Emma J. Collins, was arrested before PIERCE G. COOK, Esq., a justice of the peace in and for Portland township, in said county; and said Myron O. Collins was then and there charged in the warrant and complaint before the said PIERCE G. COOK, with having killed and murdered the said Emma Jane Collins, on, to-wit, the twentieth day of November, A. D. 1886, and afterwards, to-wit, on the ninth day of December, A. D. 1886, the said cause came on for examination before the said PIERCE G. COOK, and said cause having been so called as aforesaid, the said complainant, Adolphus A. Ellis, such prosecuting attorney as aforesaid, then and there appeared for and on behalf of the people of the state of Michigan, before the said PIERCE G. COOK, justice of the peace, and told said PIERCE G. COOK, said justice, what investigations he had made concerning the death of the said Emma Jane Collins, and what he had been able to ascertain concerning the guilt of the said Myron O. Collins, and that he was unable to find any new evidence since the verdict of said jury so finding and determining that the said Emma Jane Collins came to her death by her own hand, as aforesaid. Such proceedings were thereupon had that afterwards, to-wit, on the ninth day of December, A. D. 1886, the said PIERCE G. COOK, justice of the peace as aforesaid, discharged the said Myron O. Collins from further examination on said complaint.

"Yet the said Cyrus G. Jones, Benjamin H. Bartow, and Franklin Roe, well knowing the premises, but then and there conspiring together to injure the good name and reputation of the said Adolphus A. Ellis, as prosecuting attorney aforesaid, contriving and wickedly and maliciously intending to injure him, the said Adolphus A. Ellis, prosecuting attorney as aforesaid, in his said office, good name, and credit, and to bring him into public scandal, infamy, disrepute and disgrace among all his neighbors and the people of the county of Ionia, and cause it to be suspected and believed by those neighbors and citizens that he, the said complainant, had been and was guilty of an infamous and degrading act, to-wit, of unlawfully and corruptly obstructing and preventing the prosecution of the said Myron O. Collins for the crime of murder aforesaid, and to subject him to pains and penalties by the laws of the state made and provided against and inflicted upon persons guilty thereof, and to vex, harass, and wholly ruin him, the said complainant, heretofore, to-wit, on the thirty-first day of January, A. D. 1887, at the village of Portland, in

the county aforesaid, the said Cyrus G. Jones, Benjamin H. Bartow, and Franklin Roe did then and there falsely, wickedly, and maliciously publish and procure to be published to Frank Doremus, of Portland, Michigan, and to divers other citizens of said county, of and concerning the said Adolphus A. Ellis, as prosecuting attorney in and for the county of Ionia, and of and concerning the said actions which had been so depending as aforesaid, and of and concerning the acts and doings of him, the said complainant, concerning the prosecution of the said Myron O. Collins for the crime of murder aforesaid, as such prosecuting attorney aforesaid, a certain false, scandalous, malicious, and defamatory libel, therein and thereby accusing and imputing to the said Adolphus A. Ellis, prosecuting attorney, infamous and degrading acts, said libel containing, among other things, by words in tenor following: 'Mr. Ellis, [the complainant, meaning,] let us say, instigated by the devil, obstructs our demands for justice, [intending thereby to charge that the said Adolphus A. Ellis, prosecuting attorney, for corrupt and wicked purposes, was obstructing the prosecution of the said Myron O. Collins for the crime of murder aforesaid, by the relatives of the said Emma Jane Collins.]' And in another part of which said libel there was and is contained the following false, scandalous, malicious, defamatory, and libelous matter of and concerning the said complainant, and of and concerning the prosecution of the said Myron O. Collins, and of and concerning the actions of the said Adolphus A. Ellis, as prosecuting attorney, relative thereto as aforesaid, imputing to the said Adolphus A. Ellis infamous and degrading conduct, in tenor, that is to say: 'But who is he, or what is the power that so instigates the devil in this matter? [thereby intending to ask what power or influence controlled the said Adolphus A. Ellis, prosecuting attorney, concerning the prosecution of the said Myron O. Collins for the crime of murder aforesaid.] That power is the law that forbids us [the relatives of the said Emma Jane Collins, meaning] to transfer to his pockets [the said Adolphus A. Ellis, prosecuting attorney, meaning] the contents of our [the relatives of the said Emma Jane Collins, meaning] own;' therein and thereby intending to charge that the said Adolphus A. Ellis was guilty of infamous and degrading acts, to-wit, of grossly, wickedly, and corruptly neglecting his duty as prosecuting attorney in and for Ionia, Ionia county, because the law forbade the relatives of the said Emma Jane Collins to pay to him, the said Adolphus A. Ellis, money for the prosecution of the said Myron O. Collins for the crime of murder as aforesaid, contrary and in violation of section number 1 of act number 192 of the public acts of 1879 of the state of Michigan, as amended.

"And the said complainant, on his oath, further says before the said justice of the peace that the said Cyrus G. Jones, Benjamin H. Bartow, and Franklin Roe, further contriving and intending, as aforesaid heretofore, to-wit, on the thirty-first day of January, A. D. 1887, at the village of Portland, in the county aforesaid, falsely, wickedly, and maliciously did then and there publish, and cause to be published, a certain other false, scandalous, malicious, and defamatory libel of and concerning the said Adolphus A. Ellis, prosecuting attorney, and of and concerning the said actions which had been so depending as aforesaid, and of and concerning the acts and doings of him, the said complainant, concerning the prosecution of the said Myron O. Collins for the crime of murder aforesaid, as such prosecuting attorney aforesaid, a certain false, scandalous, malicious circular of and concerning the said Adolphus A. Ellis, and of and concerning the said actions which had been so depending as aforesaid, and of and concerning the acts and doings of him, the said complainant, concerning the prosecution of the said Myron O. Collins for the crime of murder aforesaid, as such prosecuting attorney aforesaid; and therein and thereby accusing and imputing to the said Adolphus A. Ellis infamous and degrading conduct, which said false, scandalous, and libelous circular was of the tenor following:

"'THE COLLINS TRAGEDY!

"'*Circular No.* 5.

"'PORTLAND, January 31, 1887.

"'*To the Public:* Still bombarding the doors to the temple of justice, demanding only the opportunity to prove, in due form of law, that our charge of murder against Myron O. Collins is true, we once more solicit your attention. We [the Roe family meaning] have used our utmost endeavors to avoid the preferring of charges against Mr. Ellis; [thereby meaning that the Roe family, whose names are subscribed to said circular, had used endeavors to have the said Adolphus A. Ellis, said prosecuting attorney, prosecute the said Myron O. Collins for murder.] He, [the said Adolphus A. Ellis meaning,] like ourselves, [the said Roe family meaning,] is the victim of the injustice of the laws. It is said that Mother Eve was instigated by the devil; but, in God's name, then, who instigated the devil? So is it here, perhaps. Mr. Ellis, [the said prosecuting attorney meaning,] let us [the Roe family meaning] say, instigated by the devil, [wicked and unlawful intentions meaning,] obstructs our [the said Roe family meaning] demands for justice. But who is he, [what wicked influence meaning,] or what is the power, that so instigates the devil in this matter? That power is the law that forbids us [the Roe family meaning] to transfer to his pocket [the said Adolphus A. Ellis, prosecuting attorney, meaning] the contents of our [the said Roe family meaning] own; [therein and thereby intending to charge that the said Adolphus A. Ellis, on account of wicked and corrupt motives, and because the law forbade his taking bribes or pay from the said Roe family, then and there unlawfully and corruptly neglected and prevented the prosecution of the said Myron O. Collins for the crime of murder aforesaid.]

"'So be it! [thereby intending to charge that said prosecution of Myron O. Collins was neglected and prevented for the reasons aforesaid.] Upon advice of counsel we meekly submit to the opinion of the governor, supported by that of the attorney general, that we have not yet laid the proper foundation for demanding that the governor, by special message, direct the attention of the legislature to the fact that, in the mighty state of Michigan, there is made a charge of murder to secure an instant investigation of which the law is utterly impotent; [thereby intending to charge that the said Roe family had been advised by the governor and attorney general that there was no law in the state of Michigan to secure an investigation of the charges against the said Myron O. Collins, by reason of neglect and corrupt and wicked refusal of the said Adolphus A. Ellis, prosecuting attorney, to proceed and prosecute the same; and that, when proper foundation was laid, the governor would, by special message, direct the attention of the legislature to that fact.] But though there be delay, let no one suppose that the proceedings are at a stand-still. Charges and specifications against Mr. Ellis [said prosecuting attorney meaning] are being prepared as rapidly as possible, and are likely to be poured in upon the executive [the governor of the state of Michigan meaning] thick as autumnal leaves that strew the brooks in Valambrosia, [thereby intending to charge that, on account of the neglect and refusal of the said prosecuting attorney, Adolphus A. Ellis, to proceed in said cause and prosecute the said Myron O. Collins, because the statute forbade the Roe family paying said prosecuting attorney, it became and was necessary, and charges to that effect were being prepared in great quantities to be presented to the governor of the state,] the statutory prescriptions in that behalf being strictly observed; [thereby intending to say that such charges and specifications were of such nature and of such a character that an investigation of the doings of the said Adolphus A. Ellis, prosecuting attorney, concerning the prosecution of the said Myron O. Collins, would be had.]

"'Humbly trusting that it will soon be discerned that we [the Roe family meaning] are following the line of cleavage in this matter, [thereby intending to say that their doings and proceedings were legal and in the natural way under the law,] respectfully submitted, THE ROE FAMILY; [thereby meaning Gertrude Roe, Victoria Sleight, and Franklin Roe.]'

"Contrary to the form of the statute in such case made and provided, and in violation of section number one of act number one hundered and ninety-two of the Public Acts of the State of Michigan for A. D. 1879, as amended; which said libelous circular aforesaid was in printing, and was then and there published and sent to and read by Frank Doremus, George E. Nichols, and divers other good and lawful citizens of said county and state. Wherefore the said Adolphus A. Ellis prays that the said Cyrus G. Jones, Benjamin H. Bartow, and Franklin Roe may be arrested and held to answer this complaint, and further dealt with in relation to the same, as law and justice may require."

In the circuit court the respondent moved to quash the complaint and the proceedings thereunder, and to be discharged for defects and insufficiencies apparent upon the face of the complaint. The grounds of the motion were as follows: "*First.* That the complaint filed in said cause alleges no criminal offense. *Second.* In and by the complaint it cannot be determined whether libel or conspiracy is intended to be charged. *Third.* There are no individual acts of the respondents in publishing, writing, or circulating, by word, writing, sign, or otherwise, any libelous article amounting to a criminal offense, under the laws specified in said complaint. *Fourth.* There are not sufficient grounds laid in the complaint to constitute conspiracy. *Fifth.* Alleging the libel to be under act 192, Laws 1879, as amended, said complaint does not set up the offense of libel, or any criminal act. *Sixth.* There is no criminal act charged or alleged, collectively or individually, against either or all of the respondents mentioned in said complaint. *Seventh.* This complaint does not allege, in said (so-called) libelous publication, the imputation or attribution of such an act as infamous or degrading, as amounts to a misdemeanor, within the meaning of said act 192 of Laws of this state 1879, as amended. *Eighth.* Said complaint is ambiguous, uncertain, and does not inform the respondent for what offense he is to be tried. *Ninth.* The complaint does not allege whether the act complained of is a first, second, or subsequent violation of said act 192, as amended."

The motion was overruled by the court, and the respondent duly excepted. The respondent was then put upon trial in the circuit, was convicted, and he then brought his case to this court, upon exceptions before sentence. The exceptions go to the defects and insufficiencies of the complaint, and the errors of the court in overruling the respondent's motion to quash the complaint, and the proceedings thereunder had.

Jones & Bartow, (*Hammond & Lee*, of counsel,) for respondent.

SHERWOOD, J. The respondent was prosecuted criminally for libel before a justice of the peace in the city of Ionia, where he was duly convicted and sentenced to pay a fine of $100, and the costs of prosecution to the amount of $78.49, and, in default of such payment, to be imprisoned in the county jail for the period of 90 days. From this judgment the respondent took his appeal to the circuit court for the county of Ionia, where a trial before a jury was had, and the respondent was again convicted, and sentenced by the circuit judge to pay a like fine, and the same amount of costs, and, in default to be confined in the county jail in the city of Ionia for the period of 75 days, upon which judgment the respondent brings error.

The record presents but two exceptions for our consideration. They are stated in the record as follows: "Defendant excepts to the refusal of the court to quash said complaint and the proceedings thereunder, and to discharge the respondent. Defendant excepts to the ruling of the court overruling the first,

second, third, fourth, fifth, sixth, seventh, eighth, and ninth grounds alleged in the respondent's motion to quash said complaint and proceedings and to discharge the respondent." The defendant's motion to quash was made before the trial in the circuit court commenced. It is unnecessary herein to set out or discuss separately the nine different grounds, each of which is set out in the record. This motion was overruled by the court, and the respondent excepted. On an inspection of the reasons urged for the motion, we fail to discover any legal ground upon which the respondent's motion can be sustained. The second exception is to the refusal of the court to sustain the respondent's motion to quash the complaint, upon certain of the grounds before specified in the motion, and which are but a repetition of those already considered.

We have examined the whole record, and have found no error calling for correction or further discussion, and the judgment will therefore be affirmed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

PEDEN *v.* CHICAGO, R. I. & P. RY. CO.

(*Supreme Court of Iowa.* December 7, 1887.)

1. COVENANT—RUNNING WITH THE LAND—TO DRAIN SURFACE WATER.
   Plaintiff's grantor sold defendant's grantor a right of way for a railroad. The deed recited "the water on the south-east side of the road to be made to run on the same side of the road instead of through the cattle-guards." The defendant built a culvert carrying the water through the cattle-guards. *Held*, that this provision was a covenant running with the land, and not a condition attached to the estate.
2. SAME—RIGHT OF ACTION FOR FUTURE DAMAGES—EFFECT OF CONVEYANCE.
   Defendant purchased a right of way of plaintiff's grantor, and covenanted not to carry the water on the side of the track through the cattle-guard, but, before plaintiff's purchase, built a wooden culvert, carrying the water through the cattle-guards. After his purchase, a stone culvert was put in place of the former one. The jury were instructed that, if the first culvert was permanent, plaintiff's grantor had a right to sue, at his first injury, for all future damages, any time within five years; that if plaintiff purchased within the five years he could sue for any damages sustained afterwards, but if the first culvert was permanent he could not recover, as the five years had expired. *Held*, that these instructions were erroneous and conflicting; that if the first culvert was permanent the damages were original, and arose in favor of plaintiff's grantor at once, and the conveyance did not operate to assign the right of action.

Appeal from district court, Davis county.

On the fifteenth day of March, 1871, Joseph Peden executed a conveyance to the Chicago & Southwestern Railroad Company, whereby he conveyed a right of way across a tract of land then owned by him. The company soon afterwards constructed a railroad on the strip of land so conveyed to it. The consideration named in the conveyance is one dollar, and the instrument contains the following provision: "The water on the south-east side of the road to be *made* to run on same side of road, instead of through the cattle-guards." The railroad was constructed in such manner through the premises that the surface water which collected on the south-east side of the track was conducted along that side to a creek, except in times of great rain-fall, when a portion of it flowed across the track, and spread over the lands on the other side. In 1875 the defendant purchased the railroad, and since that time has operated it. In 1878 Joseph Peden sold the land to plaintiff, James M. Peden. After defendant purchased the railroad, it constructed a wooden culvert through the embankment. It also opened the cattle-guard, which was originally so constructed that no water flowed through it. These openings afforded a passage-way for the water which collected on the south-east side of the track, through which it flowed, and spread over the land on the opposite side. The openings

were constructed before plaintiff purchased the land, but after his purchase defendant replaced the wooden culvert with one of much larger dimensions, which was built of stone. This action was brought for the recovery of damages for the injury which plaintiff alleges was done to his land and the growing crops thereon by the waters which flowed through said openings, after his purchase of the land. Plaintiff recovered a verdict and judgment, and defendant appealed.

Thomas S. Wright and *S. S. Caruthers*, for appellant. *Payne & Eichelberger*, for appellee.

REED, J. 1. Appellant claimed that the provision in the deed is a condition subsequent, and, being a condition in deed and not in law, the right to take advantage of the breach rests alone with him who created it, and the estate to which it attaches. But the district court ruled that the provision is an independent covenant. This ruling is correct. As conditions subsequent tend to destroy estates, they are not favored in law. They are always strictly construed. And if it is reasonably doubtful whether a provision in the conveyance was intended as a condition subsequent or a covenant, the breach of which may be compensated in damages, it will be held to be the latter. But looking at the language of the present provision, and the objects which the parties had in view in the whole transaction, we think there is no doubt but it was intended as a covenant, rather than a condition attached to the estate. There is nothing in the language made use of which indicates that it was the intention that the estate conveyed should revert on the failure of the grantee to do the thing stipulated for; nor was there anything in the circumstances of the transaction indicating that such was their intention. The railroad company sought to acquire the land for use in connection with other lands, as a right of way for a line of railroad hundreds of miles in length, and the grantor conveyed it to them for that purpose.

The thing stipulated for was to be done after the road should be constructed. But when that was done the land conveyed by the grant became a part of the road, and its forfeiture would involve a material change in the line of the road, which could only be accomplished by a great expenditure of money. Surely the parties had no such result in view when they inserted the provision in the deed. The provision is very different in its terms from the one involved in *Close* v. *Railway Co.*, 64 Iowa, 149, 19 N. W. Rep. 886. In that case the conveyance was of a strip of ground to be used for depot purposes, and the deed recited that it was made in consideration of one dollar and the permanent location of a depot on the ground. We held that this was not a promissory undertaking by the grantee to maintain a depot on the ground for all time, but was a condition of the grant for the breach of which the remedy of the grantor was to declare a forfeiture. In that case, by the language made use of, the grant is upon the conditions named. The land was conveyed for depot purposes, and upon condition that it should be so used. But in this the stipulation is as to a matter independent of the grant, and of the use in which the land was to be devolved.

2. The district court also ruled that the covenant is attached to the land, and that defendant is responsible for such injuries as are the consequence of its own acts in violation of the agreement. The covenant is an agreement by the covenanter that it will, for all time, maintain its railroad and appurtences on the land in such condition that the surface waters accumulating on one side shall be prevented from passing over onto the land on the opposite side. It concerns, then, both the land conveyed by the deed and that retained by Peden, and it formed part of the consideration for which the lands were parted with. Mr. Washburn states the rule on the subject established by the authorities in the following language: "Such covenants, and such only, run with the land, as concern the land itself, in whosesoever hands it may be, and form

part of the consideration for which the land, or some interest in it, is parted with between the covenantor and covenantee." 2 Washb. Real Prop. 298.

3. The district court gave the following instruction: "If you find that the culvert was intended to be and become a permanent part of the road-bed, then you are instructed that a right of action accrued to Joseph Peden while he was the owner of the land, if his land was injured by reason of water flowing through said culvert at the time he suffered the first injury, and in such action he would be entitled to recover for all the damages he would sustain in the future, and he could maintain but the one action. But he would not be under any legal obligation to commence such action at once. The law would give him five years from the first injury in which to commence it, if he should own the property for that time. If you find that Joseph Peden conveyed the land to the plaintiff before the five years expired, then the plaintiff would have any balance of the five years remaining in which to commence an action for any damages he sustained after the land became his; but his right to commence an action would expire with the expiration of the five years. As it is admitted that this action was not commenced within five years from the time said culvert was put in, you are instructed that plaintiff is not now entitled to recover anything for any damages he may have sustained by reason of water flowing through said first constructed culvert, if you find that said culvert was a permanent part of said road-bed."

It appears to us that this instruction announces two propositions that are in conflict. By the last clause the jury were told that if the culvert originally constructed was a permanent part of the road-bed, plaintiff could not recover, for the reason that the action was not commenced within five years after it was put in. In the preceding part of the instruction they were told that if it was a permanent part of the road-bed, then a right of action accrued to his grantor when the first injury occurred for all the damages which he would sustain in the future, in consequence of its construction, and that he could commence his action at any time within five years if he continued to own the land; but that, if plaintiff purchased the land before the expiration of five years after its construction, he could maintain an action for the recovery of such damages as he sustained after his purchase, provided he brought the same before the expiration of the five years. Standing alone, this latter proposition is that plaintiff may recover for injuries to the land after his purchase, if he brought his action before the expiration of the five years, even though the culvert was a permanent part of the road-bed. But this is clearly in conflict with the last proposition in the instruction. It is also clearly erroneous. If the culvert was a permanent structure, the damages are original.

The right of recovery for all damages which may occur to the premises arose at once. *Powers* v. *Council Bluffs*, 45 Iowa, 652; *Stodghill* v. *Railway Co.*, 53 Iowa, 341, 5 N. W. Rep. 495. And the right accrued in favor of the one who owned the premises at the time, and the conveyance of the property to plaintiff did not operate as an assignment to him of the right of action.

It is insisted that the court erred in submitting to the jury the question whether the culvert as at first constructed was a permanent part of the road-bed. But that clearly is a question of fact. As we reverse the judgment on the ground pointed out, we will not now consider the question whether the verdict of the jury is sustained by the evidence. Reversed.

CLANCY v. KENWORTHY and others.

(*Supreme Court of Iowa.* December 7, 1887.)

CONSTABLE—MALICIOUS ARREST WITHOUT WARRANT—LIABILITY OF SURETIES ON OFFICIAL BOND.

Code Iowa, § 674, provides that a constable shall give a bond to faithfully perform the duties of his office. The petitioner in a suit against a constable and his sureties alleged the arrest without a warrant or probable cause, beating, and malicious prosecution of plaintiff by the constable, under cover and by virtue of his office. *Held*, that the allegations were sufficient to sustain an action on the bond for his damages.

Appeal from district court, Mahaska county; W. R. LEWIS, Judge.

Action by John Clancy upon the official bond of J. C. Kenworthy, as constable, to recover, against the principal and sureties, for a breach of its conditions. There was a judgment upon a verdict for plaintiff. Defendants appeal.

Nelson & Williams and *W. S. Kenworthy*, for appellants. *Phillips & Green*, for appellee.

BECK, J. 1. The bond sued on is in the form presented by statute, (Code, § 674,) and obligates the principal to render true account of his office as constable, to pay over all moneys coming to his hands in the discharge of his official duties, etc., and to "faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the other duties now or hereafter required of his office by law." The petition alleges a breach of the conditions of the bond in the following language: "That on or about the nineteenth day of September, 1885, the said J. C. Kenworthy, as said constable, under color and by virtue of his said office and his official position, did maliciously, unlawfully, and without reasonable or probable cause, and without warrant or any process of any court, arrest the plaintiff, and incarcerate him in the jail of said county, and keep him confined there for the space of about twelve hours, and during one night; that at the time of said arrest the said defendant, under pretense of necessity in order to accomplish said arrest, did, without any cause or provocation, and without reasonable or probable cause therefor, brutally, oppressively, maliciously, and unlawfully strike, beat, bruise, and wound with a club the said plaintiff on the head and severely injure and cut the head of the plaintiff, and cause him great bodily and mental pain and suffering; that, after he had so arrested and stricken and wounded the plaintiff, the said defendant placed and incarcerated the plaintiff in said jail as aforesaid, without having or procuring any care or attention or medical treatment to be given to the plaintiff, or the wounds thus made and inflicted upon him, although the plaintiff was badly cut about and upon the head, and bleeding and suffering severely, but left plaintiff in said jail until the following day before said wound was dressed; that afterwards, and while the said defendant still had the said plaintiff in custody, to-wit, September 14, 1885, the said Kenworthy claimed that he arrested the plaintiff because he found him in a state of intoxication, and filed an information against plaintiff, charging him with said offense before one E. D. MCNEILAN, a justice of the peace in and for said county, and prosecuted the plaintiff on said information for said crime; that the said prosecution is at an end, and the plaintiff has been duly acquitted of said charge; that the said charge and information so made and filed, and said prosecution by said defendant, was false, malicious, and without reasonable or probable cause, and was done by said defendant for the purpose of attempting to cover up and justify his offensive and malicious acts and conduct in arresting and beating the plaintiff, as aforesaid, and harassing, annoying, and oppressing the plaintiff."

The jury found a general verdict for plaintiff, and special findings to the effect that the constable did not believe, and had no probable cause to believe, that plaintiff was intoxicated at the time of the arrest; that he had no probable cause for filing the information; and that he used more force in making the arrest than he was authorized to believe was necessary. The defendant moved the court to arrest the judgment on the following grounds: "*First.* The petition does not state facts sufficient to constitute a cause of action, in that the petition shows that the defendant, J. C. Kenworthy, was a trespasser, and not engaged in the line of his official duty in any of the acts complained of in the petition, and hence the sureties on the bond sued on are not liable therefor, and this action on the bond cannot be maintained. *Second.* The petition and special verdicts show (1) that the defendant, J. C. Kenworthy, arrested and imprisoned the plaintiff without a warrant, and filed an information against him for being found in a state of intoxication, and that the defendant Kenworthy did all that without probable cause, and without believing that the accused was guilty thereof; (2) that in making said arrest the said J. C. Kenworthy acted maliciously, and used excessive force; (3) that in imprisoning the defendant and in instituting the criminal proceedings, and in making the arrest, the said J. C. Kenworthy was not actuated by the motives of vindicating or enforcing the law against being found in a state of intoxication, but by some private and malicious purpose, and the sureties on the bond are not liable for such a trespass on the person, nor for such a malicious prosecution, neither being in any manner connected with his duty as constable."

This motion was overruled. The only error assigned by defendants involves the correctness of this ruling.

2. We are of the opinion that the petition alleges a sufficient cause of action against the defendants. The official character of the principal defendant, and that the arrest was made in the discharge of the functions of the office of the constable, are alleged. He was authorized to make the arrest without a warrant. Code, §§ 1548, 4109, 4200. The petition avers that the arrest was made under color and by virtue of the office of constable held by the principal defendant, but shows that it was unlawfully and oppressively made, without probable cause. It is thus shown that he partially, fraudulently, and oppressively discharged the duties of the office in arresting plaintiff. It thus clearly appears, from the allegation of the petition, that the conditions of the bond were violated; and, as plaintiff is the injured party, he may maintain this action to recover on the bond the damages he has sustained.

3. But it is insisted that, as the constable is shown to have had no lawful authority to arrest plaintiff, his act was therefore not done in the line of his duty. In truth his act was in the line—direction—of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty, and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he of course is not liable. It follows that, if defendant's position be sound, no action can be maintained upon the bond in any case. In support of our conclusions, see *Tieman* v. *How*, 49 Iowa, 312.

The judgment of the district court is affirmed.

SHUCK v. CHICAGO, R. I. & P. R. CO.

(*Supreme Court of Iowa.* December 7, 1887.)

1. TENDER—INSUFFICIENT AMOUNT—STOCK KILLED BY CARS.
Plaintiff had a colt killed and a mare injured by collision with a train of cars on defendant's railroad. The agent of the railroad company tendered plaintiff $175 for the damage to both animals, but did not specify the amount tendered as payment for each, which tender was refused. The jury found that the colt was worth $125, and that the damage to the mare was $70. *Held*, that the tender was not good as to either animal.

2. RAILROAD COMPANIES—STOCK-KILLING CASES—PLEADING—OBJECTIONS, WHEN MADE.
Defendant, in an action for injuries to stock run over by its trains, urged on appeal that the petition did not in terms state that the mare and colt were running at large at the time of the injury, and insisted that this allegation was necessary under the statute. *Held*, that defendant was advised by the notice and affidavit of loss and injury which made a part of the petition, that plaintiff's cause of action was founded upon the statute, and, as he admitted all the averments of the petition, except those as to the alleged value of the colt and damage to the mare, and went to trial without a motion for a more specific statement, the petition should be regarded as sufficient after verdict. The record should show that at some stage of the proceedings the very defect complained of was presented to the court, either by motion for a more specific statement, or by motion in arrest of judgment.

Appeal from district court, Davis county; DELL STUART, Judge.

This is an action for the recovery of double damages for killing and injuring of certain live-stock, the property of the plaintiff, by a train of cars on the defendant's railroad. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.

T. S. Wright and *S. S. Caruthers*, for appellant. *Payne & Eichelberger*, for appellee.

ROTHROCK, J. 1. The action was brought under the provisions of section 1289 of the Code, which authorizes the recovery of double damages for injury to live-stock by the operation of a railroad, where such injury occurs by reason of the want of a fence at a place where the railroad company has the legal right to fence, but fails to do so. The injury complained of consisted of the killing of a colt, and an injury to a mare. The colt was killed on the ninth day of October, 1886, and the mare was injured on the twenty-second day of August, in the same year. The defendant admitted all of the allegations of the petition, except the amount of damages to the mare, and the value of the colt, as alleged in the petition. The further defense was made that, before the action was brought, the defendant tendered to the plaintiff the sum of $50 for the injury to the mare, and $125 for the damage suffered by defendant for killing the colt. The cause was tried on these issues, and the jury found that the colt was of the value of $125, and that the injury to the mare was $70. It was further found that no tender was made for the colt, and no tender was made for the injury to the mare.

The evidence warranted the finding that the damages amounted to the sum awarded by the jury. But the defendant insists that the evidence shows that a tender of $125 was made for the colt, and that no recovery can be had in excess of that amount for that item of damages. The evidence with reference to the tender is fully discussed by counsel in their respective arguments. It would serve no useful purpose to review the evidence here. It is sufficient to say that the jury were warranted in finding that the offer of $125 for the colt was not an unconditional tender, but that it was tendered in connection with the offer to pay $50 for the injury to the mare, and thus settle the whole loss. Indeed, we think the preponderance of the evidence is to the effect that the agent of the defendant did not offer nor intend to offer the plaintiff $125 for the colt, independent of the injury to the mare. It is scarcely neces-

sary to say that this was not a tender, and we think the court correctly instructed the jury on this branch of the case.

2. The petition did not in terms allege that the mare and colt were running at large at the time of the injury and killing. Counsel for the defendant insist that such an allegation was necessary in order to allow a recovery under the statute. But the defendant was advised by the notice and affidavit of the loss and injury, which were incorporated in and made a part of the petition, that the plaintiff's cause of action was founded upon the statute. Whether it was necessary to make the affirmative averment that the stock was running at large, we need not determine. We think, as the defendant admitted all of the averments of the petition excepting the alleged value of the colt and the alleged damage to the mare, and went to trial without a motion for a more specific statement, the petition ought to be regarded as sufficient after verdict. Indeed, it does not appear that the attention of the court was called to any alleged defect in the petition, even after verdict. The record should show affirmatively that at some stage of the proceedings the very defect complained of was presented to the court, either by motion for a more specific statement or by motion in arrest of judgment. It ought not to be masked under a mere general statement, as is done in this case.

We find no error in the record. Affirmed.

McArthur, Adm'r, v. Home Life Ass'n.

(*Supreme Court of Iowa.* December 8, 1887.)

1. Insurance—Agent—Estoppel of Company to Deny Authority.
   One claiming to be the agent of a life insurance company forwarded an application to it, signed by him as agent, and the company thereafter received from the insured dues and assessments on the policy issued on the application. *Held*, in a suit on the policy, that, having enjoyed the benefits of his acts, it could not deny that he was its agent.

2. Same—Alteration of Policy by Agent—Scope of Authority.
   An agent of a life insurance company falsely stated the age of the applicant, forged a medical certificate, and on the return of the policy materially changed it before delivering it to the insured, without the knowledge of either the company or the insured. *Held*, that in filling up the application, of which the medical certificate was a part, and in delivering the policy, the agent was acting within the scope of his authority; and that he perpetrated a fraud without the knowledge of defendant will not relieve it from liability on the policy.[1]

Appeal from circuit court, Des Moines county; Charles H. Phelps, Judge.

Action on a policy of insurance. Judgment for the plaintiff, and the defendant appeals.

Newman & Blake, for appellant. *Antrobus & McArthur*, for appellee.

Seevers, J. The trial was to the court, and the following are the facts found by the court: "That on the seventh day of June, 1882, one Geo. W. Hair, claiming to act as agent for the defendant, applied to decedent, A. Wooline, to take out a policy of insurance on his life in defendant company; that said Hair, through B. A. Bailey & Co., district agents of defendant's company, forwarded the application to the defendant, with his name indorsed as agent thereon; that on the twelfth day of June, 1882, defendant issued a policy to decedent on said application for the sum of $3,000, by the terms of which defendant undertook and agreed, upon proper proof of his death, to assess each member of class B, in which he was insured, according to the policy held by each in division B, then in force, and to pay over the amount so collected, less cost of collection, to the legal heirs of the assured, which policy was delivered to decedent by the duly-authorized agent of defendant;

[1] See note at end of case.

that decedent paid all his dues and assessments on said policy, according to its terms, up to February 16, 1885, on which day he died; that in April, 1885, proofs of his death were filed with the defendant in regular form, and thereupon the defendant made an assessment as stipulated in the policy, and realized therefrom the sum of $455.50, which was all they were able to collect on said assessment, which it now holds subject to the decision of this court; that the application upon which the policy was issued was filled up by said Hair; that said decedent, in reply to the question as to the date of his birth, stated that he was born on the twenty-fifth day of December, 1816; but that said Hair falsely stated it in said application as December 25, 1846, but in reading the answer to decedent read it as December 25, 1816; that decedent had no knowledge that the date of his birth was falsely stated in said application; that the policy issued to decedent stated that his age was thirty-six; that said policy was changed by said Hair after it was received by him, and before he delivered it to decedent, so as to represent his age as sixty-six, of which change decedent had no knowlege; that the pretended examination of the applicant by a physician, and indorsement on the application, was forged by said Hair without decedent's knowledge, and that in fact no physician's examination was ever made; the defendant had no knowledge of the false statement of the age of the applicant, or of the forging of the physician's certificate, or of the change of the age on the policy, until after the death of the assured; that the true age of the decedent appeared in the proof of death, which was received before the assessments were made; that under the rule of defendant company no policy was to be issued to any person over sixty years of age; that sometimes applications taken by said Hair were sent by him directly to the company, and that policies were sometimes sent by the company directly to him for delivery, but that this particular policy was sent to Hair through B. A. Bailey & Co., district agents of defendants, and to whom Hair was employed to take applications for policies. I further find that the assessments made under the policy were made upon the basis of the age of thirty-six, which was only one-half the assessment due upon policies issued to parties over fifty-six; the amount in the first case being one dollar, and upon the second, two dollars. I find that the policies contain the following provision, it being the only one relating to the authority of the agent, and there is no other evidence as to the authority of the agent Hair, except such as is found by the court in said clause of the policies. The said clause reads as follows: 'No. 7. The authority of the agent ends with sending in the application and delivering the policy, and he has no authority to collect assessments or annual dues, nor has the agent any authority to waive forfeiture, or change in any way whatever any of the conditions, provisions, or stipulations of this policy; and nothing shall be intended or deemed a waiver or a forfeiture or a change of the terms and conditions of this policy, on the part of the association, unless indorsed by the president or secretary hereon.'"

1. Was Hair the defendant's agent? The court found that he claimed to be acting in that capacity, and that he forwarded the application upon which the policy issued to the plaintiff through Bailey & Co., and that Hair's name was indorsed upon such application as agent. The defendant knew when it accepted the application and issued the policy that Hair, claiming to act as its agent, had procured the application, and the defendant thereafter received from the assured all of the dues and assessments due the company, according to the terms of the policy, for the period of nearly three years. Having received and enjoyed all the benefits of Hair's acts, the defendant cannot now be permitted to say he was not its agent. *Eadie* v. *Ashbaugh*, 44 Iowa, 519; *Mulligan* v. *Davis*, Id. 126.

2. Is the defendant bound by what its agent did when acting within the scope of the authority with which he was invested? We think this must be so. Hair, as must be presumed he was authorized to do, filled up the appli-

cation, and therein he falsely stated the age of the assured; and of this fact neither the assured nor the defendant had any knowledge. This clearly was a fraudulent act. But as Hair, at the time, was acting within the scope of the authority with which he was invested, the defendant is bound by the fraud of its agent. 1 Pars. Cont. 73, 74; *Davis* v. *Danforth*, 65 Iowa, 601, 22 N. W. Rep. 889; *Bank* v. *Telegraph Co.*, 52 Cal. 280; *Jewett* v. *Carter*, 132 Mass. 135. The same rule must prevail as to the medical certificate which was forged by Hair, and such is true as to the material alterations made on the face of the policy by Hair. It will be observed that the policy was intrusted to Hair for delivery to the assured, and that while it was in his possession, and before it was delivered, Hair fraudulently and materially changed it. It cannot be fairly said that Hair was a stranger to the parties or transaction, as counsel for the defendant contend. Counsel further claims that whoever deals with an agent is bound to inquire as to the extent of his authority. That such is the general rule, where a person contracts with an agent for a known principal, will be conceded; but whether it applies with full force, when the agent commits a fraud on both his principal and the party contracted with, may be doubted, for the reason that it cannot be presumed that a fraud will be committed. But, be this as it may, Hair, in transacting the business of the defendant, was authorized to fill up the application in accordance with the facts stated to him by the assured. He therefore was acting within the scope of the authority with which he was invested, and this is true as to the delivery of the policy. The medical certificate was an essential part of the application. In performing the business of the defendant, Hair perpetrated a fraud, and the fact that he did so without the defendant's knowledge is immaterial.

The judgment of the circuit court is right, and must be affirmed.

NOTE.

PRINCIPAL AND AGENT—APPLICATION FOR INSURANCE—FRAUD OR MISTAKE OF AGENT. The principal is bound by the fraud of his agent, Lynch v. Trust Co., 18 Fed. Rep. 486; where the fraud is committed by the agent while acting within the range of his employment, Brooke v. Railroad Co., (Pa.) 1 Atl. Rep. 206. And where an insurance agent, acting within the general scope of the business intrusted to him, deceives one applying for insurance, by deliberately writing false answers in the application, when full and correct answers have been given by the insured to the questions asked, the company receiving the premium will be estopped, in an action on the policy, from setting up the untruth of the representations, Sullivan v. Insurance Co., (Kan.) 8 Pac. Rep. 112; and it makes no difference that the insured has agreed that the statements made in the application are to be regarded as warranties, Stone v. Insurance Co., (Iowa,) 28 N. W. Rep. 47. So, although no fraud is charged, an incorrect statement inserted in the application by an insurance agent, without the knowledge or consent of the insured, will not defeat a recovery upon the policy. Insurance Co. v. Allen, (Ind.) 10 N. E. Rep. 85. And where the facts have all been correctly stated to the agent, and the latter makes out the application incorrectly, the liability of the insurance company is not affected, although the policy, subsequently issued, may contain a provision to the effect that the application, whether made by the agent or any other person, shall be deemed to be the act of the insured, and not of the insurer. Kansel v. Insurance Ass'n, (Minn.) 16 N. W. Rep. 430.

HUTCHINSON v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Minnesota. December 13, 1887.)

1. CONTRACT—EXECUTION—PARTY NOT BOUND BY.
   Evidence *held* insufficient to justify a finding that a contract signed by a party was signed under such circumstances that he was not bound by it.
2. CARRIERS—RESTRICTING LIABILITY BY CONTRACT.
   Doctrine that a common carrier may by contract restrict his liability applied.
3. SAME—INJURY TO PROPERTY SHIPPED—CONTRIBUTORY NEGLIGENCE.
   Held, that if the evidence in this case shows any negligence in the loss of property carried, a horse which jumped from the railroad car, and was killed, it shows negligence on the part of the owner who put the horse in the car, and opened and left open the window through which he jumped, as much as it showed negligence on the part of the carrier.

(Syllabus by the Court.)

Appeal from district court, Blue Earth county; SEVERANCE, Judge.

John D. Howe and *Lorin Cray*, for Chicago, St. P., M. & O. Ry. Co., appellant. *Collester & Foster*, for Hutchinson, respondent.

GILFILLAN, C. J. We see no objection to the admissibility in evidence of the contract. It expressed the terms on which the defendant received plaintiff's horse for transport to St. Paul. The omission of the rate to be charged is as to this point unimportant; for whether a rate was expressly agreed on, or the defendant was to receive whatever the service might be worth, or it was to do the carrying gratuitously, still it might by agreement restrict its liability, (except as to losses caused by its negligence,) and the delivery and acceptance of the animal for carriage was a sufficient mutual consideration to sustain the argument as to the extent of the defendant's liability.

There was no evidence from which a jury could reasonably find that plaintiff signed the contract under such circumstances that he was not bound by it. After putting his horse in the car, he asked defendant's agent for a receipt, and the latter laid before him the contract in duplicate, saying they were duplicates, and asked him to sign them, which he did without reading them, as he says, but he states no reason for not reading them, and none is apparent. To allow a man to avoid a written contract signed by him, upon such evidence as this, would establish a rule to effectually do away with a great many contracts.

The contract agreed that the defendant should not be liable for loss "by jumping from the cars." Of course, this exception would not cover a case where the jumping from the cars was due to defendant's negligence; and, of course, even in that case, the plaintiff could not recover if his negligence contributed to the loss. The evidence leaves no question as to how the loss of the horse occurred. The plaintiff put him in the car, tied him by a halter and rope near a sliding window or door, opened the window, and left it open. When the car was set in motion the horse, probably frightened by the motion, broke his fastenings, jumped through the widow, and was run over by the cars, and killed. There can be no question that it would not have happened but for the window being open. It may have been negligent to set the car in motion with the window open. But, if so, the same evidence that established defendant's negligence established as well that of plaintiff; for, if it was negligence to set the car in motion with the window open, it was equally negligence on the part of plaintiff just before, as he knew the car was to be moved, to open it and leave it open. The defendant had left it shut. The plaintiff left it open, without, so far as appears, apprising defendant's servants that he had done so. Surely, if there was negligence connected with it being open, plaintiff was as much responsible for it as defendant.

The order denying a new trial is reversed.

MERCHANTS' EXCH. BANK *v.* LUCKOW and others.

(*Supreme Court of Minnesota.* December 13, 1887.)

1. NEGOTIABLE INSTRUMENTS—CONDITIONAL DELIVERY—OTHER SIGNATURES.
Westman v. *Krumweide*, 30 Minn. 313, 15 N. W. Rep. 255, to the effect that it is competent to prove that a written instrument, not under seal, but delivered, was to become operative only on the happening of some contingent future event, as upon its being signed by some other person, followed, and applied to a negotiable promissory note.[1]

2. SAME—BONA FIDE HOLDER—BURDEN OF PROOF.
Cummings v. *Thompson*, 18 Minn. 246, (Gil. 228,) as to when the *onus* is on the plaintiff suing on negotiable paper to prove that he is a *bona fide* holder, followed.
(*Syllabus by the Court.*)

Appeal from district court, Winona county; START, Judge.

Tawney & Randall, for Merchants' Exch. Bank, appellant. *Lloyd Barber*, for Luckow and others, respondents.

GILFILLAN, C. J. The facts out of which this action arose, as found by the court below, (and the evidence fully justified the findings,) are that the defendant Luckow signed the note sued upon, payable to Jacob Willaner & Co.; and the other defendants, except Willaner & Co., agreed to guaranty its payment, provided one Matthew Leinekugel and Mrs. Herman Luckow should also join in the guaranty; and under that agreement such other defendants wrote their names on the back of the note, and it was then left with the agent of the payees, Willaner & Co., to procure the signatures of Leinekugel and Mrs. Luckow, with the understanding that when those signatures should be procured, and not before, the guaranty or indorsements of such other defendants should become operative and of force. The signatures of such other persons was never procured. The payees named in it indorsed it to plaintiff, but there was no evidence as to when it was indorsed, nor as to whether or not plaintiff was a purchaser in good faith, without notice, and for value; for which reason the court found that the plaintiff was not such a purchaser.

It was held in *Westman* v. *Krumweide*, 30 Minn. 313, 15 N. W. Rep. 255, and *Skaaras* v. *Finnegan*, 31 Minn. 48, 16 N. W. Rep. 456, that, in case of an instrument not under seal, it is competent to show by parol that, notwithstanding its delivery, it was intended by the parties that it should become operative as a contract only upon the happening of a future contingent event, such as that it should first be executed by some other person. It is claimed that the rule ought not to apply to negotiable paper, but we can see no reason why, as between the original parties, it should not apply to such instruments, as well as any other, nor why a transferee without notice, or without valuable consideration, or after maturity, should not take such negotiable paper subject to that defense, as well as to any other.

The effect of the facts found is that the alleged contract upon which the defendants, other than Luckow and Willaner & Co., are sued, never became operative, never was their contract, and the delivery of it to the payees by their agent, and the use made of it by the payees in transferring it as an operative contract, was in law a fraud upon the defendants. This being the rule laid down in *Cummings* v. *Thompson*, 18 Minn. 246, (Gil. 228,) that "where negotiable paper has been stolen or lost, or obtained by duress, or procured or put in circulation by fraud, proof of these circumstances may be given against

[1] The rule against the admission of parol testimony to vary the terms of a written contract, does not exclude evidence of an oral agreement, which constitutes a condition on which the performance of the written agreement is to depend. It is always admissible to show by parol that a document was conditioned on an event that never occurred. Michels v. Olmsted, 14 Fed. Rep. 219. As to the liability of a surety upon a contract delivered in violation of conditions imposed by him, see Taylor Co. v. King, (Iowa,) 34 N. W. Rep. 774, and note; Daniels v. Gower, (Iowa,) 3 N. W. Rep. 424.

the plaintiff; and, on such proof being given, it is incumbent on the plaintiff to show himself to be a holder *bona fide*, and for a valuable consideration; otherwise he is considered as standing in no better situation than the former holder, in whose hands the instrument received the taint,"— must apply. The *onus* was on the plaintiff to show that it was exempt from the defense. As it did not do so, it must fail. Order affirmed.

SECURITY BANK OF MINNESOTA *v.* BEEDE and others.

(*Supreme Court of Minnesota.* December 13, 1887.)

INSOLVENCY—ASSIGNMENT BY PARTNERSHIP—SEPARATE PROPERTY PASSES BY.

An assignment made by two partners under the insolvent law, construed, and *held* to pass the separate property of the partners, as well as their partnership property.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; REA, Judge.

Hale & Peck, for Security Bank of Minnesota, appellant. *Herring & Cochran* and *Shaw, Best & Cray*, for Bray and others, respondents.

GILFILLAN, C. J. The only question in the case is whether a certain assignment executed by the defendant, under the insolvent law of the state, is an assignment of only partnership property, or is operative to also transfer their separate property. The assignment differs from that in *May* v *Walker*, 35 Minn. 194, 28 N. W. Rep. 252, in that the operation of the latter was, by its express terms, restricted to partnership property. This assignment recites "that Richard D. Beede and George W. Bray, composing the firm of Beede & Bray," are indebted, etc., and are unable to discharge their just debts and liabilities, and that certain persons have commenced an action against them, "partners as Beede & Bray," and that upon an attachment therein the property of "Beede & Bray" was attached, and then proceeds: "Now, therefore, this indenture made this twenty-sixth day of February, A. D. 1887, between said Richard D. Beede and George W. Bray, partners as Beede & Bray, parties of the first part," "and Henry P. Herring," * * * "party of the second part, witnesseth, that the said parties of the first part, in consideration," etc., "have granted, bargained, sold, conveyed, assigned, transferred, and set over," etc., all the lands, tenements, hereditaments, and appurtenances, goods, chattels, choses in action, claims, demands, property, and effects of every description, belonging to the parties of the first part, wherever the same may be situated, and for a full and more definite description of which reference is hereby made to the inventory to be made and filed under this assignment, as provided by law. It being the full intention of this conveyance to assign to the said party of the second part all property owned by said grantors, Beede & Bray, whether situated in the state of Minnesota, or in any other state or territory, except such property as is by law exempt from levy and sale on execution." Then follows the statement of the purpose of the assignment, and of the disposition to be made of the property; being in accordance with the insolvent law. The assignment was signed by the defendants in their individual names, and sealed with their individual seals.

Whether this instrument transfers the separate as well as the partnership property of the defendants depends on whether the words, "composing the firm of Beede & Bray," and partners as "Beede & Bray," whenever occurring, were used only as *descriptio personarum*, or were intended to restrict the assignment to property owned by them as a partnership. Aside from these words, the description of the property is sufficient to cover all the property of the defendants, separate and partnership. The concluding clause of the description above quoted, "it being the full intention," etc., seems added to make more clear what property the parties intended. That clause as a whole,

includes the separate property, not only by its general terms, but by the exception. As a partnership can have no exempt property, (*Baker* v. *Sheehan*, 29 Minn. 235, 12 N. W. Rep. 704; *Prosser* v. *Hartley*, 35 Minn. 340, 29 N. W. Rep. 156,) the words of the exception would be meaningless, and of no effect, unless they were used to except from the conveyance separate property that would otherwise pass,—property that could be exempt. In view of the general terms describing the property, and of the exception, it cannot be said to be clear that the words describing the assignors as partners were intended also to define the property intended to pass; and, such being the case, the presumption is that the parties used the words in that sense that would make the instrument legal and effectual to carry out the general purpose had in view.

If the parties intended the assignment to pass only partnership property, then it was void. *May* v. *Walker, supra;* but, if it was intended to pass also their separate property, it was valid. It would require something more significant than inserting the words, "partners as Beede & Bray," after the names of the assignors, to limit the description of the property in such a way as to make the instrument void, and so defeat the evident purpose of the parties. The reference to the inventory to be filed did not control the assignment. Under no bankrupt law did the schedules filed by the bankrupt ever limit the operation on his property of the bankruptcy proceeding. Order affirmed.

VANDERBURGH, J., took no part in this decision.

JOHNSON and another v. COCKS.

(*Supreme Court of Minnesota.* December 13, 1887.)

1. MORTGAGES—FORECLOSURE—NOTICE—DESCRIPTION.
The description of the lands in a notice of foreclosure, under the power in a mortgage, was: "The undivided half of lots two (2) and three, (3,) in block two, (2.) Lot eight, in block four, (4,)" etc. *Held*, that the words, "the undivided half," apply only to lots 2 and 3.

2. SAME—PLACE OF SALE—TEMPORARY COURT-HOUSE.
In such notice, the place of sale was described as "at the front door of the court-house in the city of Minneapolis, corner 2d Ave. S. and 3d St." The county court-house had been partly destroyed by fire, and the county commissioners had rented a building on the corner of Second avenue south and Third street for the meetings of the courts, and for some of the county officers, and it was used for that purpose for some weeks before the date of the notice, and till after the sale. *Held*, a proper designation of the place of sale, and that the sale was properly made at the front door of the building at the corner of the two streets, though the door leading to the court-rooms (which were in the second story) was at the rear of the building on Third street, 80 feet distant from its front.

3. SAME—VALIDITY OF SALE—INADEQUACY OF PRICE.
When there is no fraud nor irregularity in the sale under the power, mere inadequacy in the price, especially if there be a right of redemption from the sale, is no ground for setting aside the sale.

4. SAME—OMISSION TO FILE AFFIDAVIT OF COSTS AND DISBURSEMENTS.
The omission to file the affidavit of costs and disbursements required by section 23, c. 81, Gen. St. 1878, does not affect the validity of the sale.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; REA, Judge.

Cross & Carleton, for Johnson and another, appellants. *John R. Vanderlip*, for Cocks, respondent.

GILFILLAN, C. J. Action to set aside a foreclosure of a mortgage, under the power of sale contained in it. Two matters are charged as irregularities in the sale: *First*, that the place of sale mentioned in the notice of sale was indefinite; *second*, that, while the mortgage was of the entire interest in the two lots owned by plaintiff, the notice of sale described the mortgage as upon

an undivided half of those lots. The description in the notice of sale was: "The undivided half of lots two (2) and three, (8,) in block two, (2.) Lot eight, (8,) in block four, (4.) Lot six, (6,) in block five, (5,) and lot five, (5,) in block nine, (9,)—all in," etc. Lots 8 and 5 are plaintiff's lots. The point made by plaintiff is that the words, "the undivided half," apply to all the lots mentioned. They do apply to the lots mentioned in the same sentence. But they are not carried over into the other sentences of the description so as to apply to the lots mentioned in those sentences. The notice is regular in that respect.

The place of sale is described as "at the front door of the court-house in the city of Minneapolis, corner 2nd Ave. S. and 3d Street, being in said county." The terms "Second Ave." and "3d St." are figures and abbreviations, the signification of which everybody is supposed to know. They are used to designate the location of the court-house. The facts, as found, are that the old court-house of the county, used as such for many years, had been partly destroyed by fire, so that the court-rooms and the rooms of several of the county officers could not be used, and the county commissioners had rented a building on the corner of Second avenue south and Third street, in Minneapolis, for three months, for temporary use for some of the county officers and for all the court-rooms, while the former court-house was undergoing repairs. The auditor, treasurer, register of deeds, and clerk of the court had removed into this building; the others remaining in the old court-house. The new building was used as a court-house from April 8th till the latter part of July; one term and part of another of the district court having been held in it. The notice of sale was dated May 15th and the sale was June 27th. This new building was a proper place at which to make the sale, and it was proper to designate it in the notice as the place. It does not appear that any one was misled by the notice. It is found as a fact that no injury accrued to plaintiff from the fact that the sale was made at that building. With the addition to the terms "court-house" of the words "corner 2nd Ave. and 3d St.," it is difficult to see how any one could be misled as to where the sale was to be. The front of the building was on Second avenue, a door entering at the corner of it. At this door the sale was made. The entrance of the court-rooms (which were in the second story) was on Third street, at the rear of the building, about 80 feet from the corner. The court below finds as a fact that no injury accrued to plaintiff from the sale being made at the door at the front of the building, rather than at any other door; and it is not apparent how there could any have accrued. The sale was really made at the door designated in the notice, which does not say front door of the court-room, but front door of the court-house, which it describes as at the "corner of 2nd Ave. S. and 3d St."

No fraud is alleged; and there being no irregularity in the notice of sale, or in the sale, inadequacy of the price at which the lots were sold was not material. Where there is no irregularity in the sale, nor fraud on the part of the mortgagee, and especially where there is a right of redemption from the sale, mere inadequacy of price is not of itself ground for setting aside a sale under the power. *Cameron* v. *Adams*, 31 Mich. 426; *Maxwell* v. *Newton*, 65 Wis. 261, 27 N. W. Rep. 31. And even though the other allegations of the complaint were such as to make those as to inadequacy of price material, and to make it error in the court to strike them out, still the result of the trial shows that there could be no prejudice from such error; for, upon the facts found as to the other allegations in the complaint, the retention in the complaint of the allegations as to inadequacy, and even proof of such allegations, would not have affected the result, nor benefited the plaintiff in the least. For this reason, we need not consider whether, upon the complaint alone, the allegations ought to have been struck out.

The neglect of a mortgagee to file the affidavit of costs and disbursements as required by section 23, c. 81, Gen. St. 1878, cannot affect the validity of

the sale. If it could, then it would be in the power of a mortgagee, by such neglect, to defeat the title of a *bona fide* purchaser at the sale. The affidavit is no part of the sale proceedings. The sale is complete (so far as any act is required to complete it) when the certificate is executed, acknowledged, and and recorded. There was no error in striking out the allegations in the complaint in respect to the omission to file such affidavit. Judgment affirmed.

JOHNSON *v.* CHICAGO, B. & N. R. CO.

(*Supreme Court of Minnesota.* December 13, 1887.)

1. TRIAL—REMARKS OF COUNSEL—WHEN NOT PREJUDICIAL.
Decision of the trial court, that improper remarks of counsel in summing up did not prejudice, sustained.

2. EMINENT DOMAIN—INJURY TO LAND BY OPERATION OF RAILROAD.
Where, from the evidence, it is apparent to the jury that maintaining and operating a railroad near buildings increases the risk, the jury may, though no witness has testified directly that it will, consider such risk, in estimating the damage to the land on which the buildings stand.

3. SAME—MEASURE OF DAMAGES—OPINIONS OF WITNESSES NOT CONCLUSIVE.
The opinions or estimates of witnesses, as to the amount of damage done to the land, not taken by taking part for railroad purposes, are not conclusive on the jury.
(*Syllabus by the Court.*)

Appeal from district court, Winona county; START, Judge.

Wilson & Bowers, for Johnson, respondent. *William Gale*, for Chicago, B. & N. R. Co., appellant.

GILFILLAN, C. J. This was a proceeding to ascertain the damages to respondent's lot, and the buildings thereon, in the city of Winona, by taking a part of the street in front of and belonging to the lot to lay appellant's track along it. The jury had a view of the premises. Evidence was given on both sides of the value of the lot, and of the buildings. Respondent offered evidence of the cost of the buildings, which was excluded. His counsel, in arguing the case to the jury, referred to the description of the buildings, and their view of them, and proceeded: "I ask you to say whether they could be put there for $7,000." The appellant's counsel excepted to this language, and it was repeated twice, each time being excepted to. This is claimed to have been misconduct on the part of respondent's counsel, and was one of the grounds of a motion for new trial, and the refusal of the court below to grant a new trial by reason of it is assigned as error.

The respondent's counsel may have gone beyond the legitimate line of argument of the case in referring to a matter as to which evidence had been excluded. In charging the jury, the court instructed them very emphatically that the cost of the buildings was not in issue, and they were to disregard any statement made in regard to it, except as the cost was involved in the market value. We cannot say that the remarks of counsel prejudiced the appellant before the jury, and the court below, with much better opportunity than we have, has decided, in refusing the new trial, that they did not prejudice. The record would have to show a decided probability of prejudice to justify us in reversing that decision. The case, as presented, does not call on us to do so.

One instruction to the jury was: "The increased risk of fire, if any, to the buildings on the premises, is an element of damages for you to consider and determine, so far as it affects the value of the property with the railroad in front of it." It is not denied that in such cases increased risk of fire to buildings is a proper element of damages. The objection was that the testimony, as to increased risk, was that of one witness, engaged in insurance, who, on being asked if laying the track and the use of it in front of the premises would increase the risk of fire, answered, "I don't know that it would;" and that,

therefore, there was no evidence of increase of risk; or, rather, that the evidence showed no increase of risk. But notwithstanding what the witness said, and that there was no other who testified on the point, the jury might find that there was increased risk. They saw the premises; the character and situation of the buildings, where the track was laid within 15 feet of them; and the evidence informed them to what extent the track was to be used.

Now, there are some things connected with the running of railroads that are matters of common knowledge and observation, and which everybody is supposed to know. Among these is that locomotives passing to and fro are liable to scatter sparks, and that such sparks, lighting on any combustible material, are apt to ignite it; and a jury have a right to apply this common knowledge in determining whether a witness, who testifies that a railroad, laid and used within 15 feet of a building, does not affect its value, or one who testifies that it will diminish the value, is most entitled to credit. There was no error in the instruction.

The court also instructed the jury: "The opinion of witnesses that have been introduced, concerning the amount of the damage to this property, is not at all conclusive upon you in estimating the damage. If on the evidence you believe that the damage is greater than any of the estimates put it, you may give a greater damage by your verdict." The verdict was considerably less than some of the estimates of witnesses put it. It is objected to the charge that it left the jury to fix the damages arbitrarily, as their passions or prejudices might incline them. It, however, requires them to find the damage from the evidence. That included, not merely the opinions of the witnesses as to the amount of damage, but the reasons, if any, which they gave for them; the testimony as to the character and situation of the property, its uses, and how such uses might be affected by the construction and operation of the railroad. Where testimony as to values is mere opinion, the jury are not bound by the amounts stated by the witnesses. The facts and reasons stated by a witness, as a basis for his estimate of value, may be such as to justify the conclusion that the estimate is too high or too low, and the jury surely could not be required to ignore such facts and reasons. The authorities are practically uniform that a witness' estimates of value are not conclusive on the jury. *Patterson* v. *Boston*, 20 Pick. 159; *Murdock* v. *Sumner*, 22 Pick. 156; *Head* v. *Hargrave*, 105 U. S. 45; *Anthony* v. *Stinson*, 4 Kan. 211; *Ward* v. *Lawrence*, 79 Ill. 295; *McReynolds* v. *Railway Co.*, 106 Ill. 152.

Opinions of values are from necessity received as evidence, and the jury must consider them with the other evidence, (as they were fully instructed to do in this case.) Where an article has a fixed market price, as is the case with grains, stocks, and many other articles, in the markets where such commodities are bought and sold, testimony as to such price is as to a fact, and not to an opinion, and is to be considered differently; so, also, is an expert's testimony as to a scientific fact.

The charge was correct. Order affirmed.

SLATER v. SLATER.

(*Supreme Court of Iowa.* December 7, 1887.)

DIVORCE—EVIDENCE—APPEAL.

The action of the trial court, in dismissing an action for divorce on the ground of adultery and cruel and inhuman treatment, will be sustained on appeal, where the evidence does not show that the plaintiff established her claim by a clear preponderance of evidence.

Appeal from circuit court, Cass county.

Action, by Nanina Slater, for a divorce. Judgment for the defendant, and plaintiff appeals.

A. S. Churchill and *Willard & Fletcher*, for appellant. *L. L. De Lano*, for appellee.

SEEVERS, J. The plaintiff and defendant were married in November, 1883. She was twenty-six or seven years old and he was fifty-three or four. They lived together until August, 1884, when the plaintiff left the defendant, and in November following this action was commenced. The grounds on which the relief is asked are adultery and inhuman treatment, endangering the life of plaintiff. The evidence is exceedingly voluminous, there being about 200 printed pages, which have been carefully read, together with the arguments of counsel It is obvious it would require much space and time to set out this evidence, and sufficiently comment thereon to make ourselves understood. We do not believe this is necessary or proper for several reasons; one of which is that much of the evidence is unfit for publication. We may say, generally, also, that much of the evidence is irreconcilable, nor can it be said that several of the witnesses were simply mistaken; but conviction is forced upon us that more than one witness has sworn falsely. Take the transaction said to have occurred in the barn between the plaintiff and defendant as an example. One of them is testified to by the defendant and two other witnesses. Now, these persons have sworn falsely, or the plaintiff has, and yet the general reputation of neither is impeached. This is true as to the other transaction. It is claimed for the plaintiff that she has been corroborated by certain witnesses introduced by her. We must not be understood as intimating these witnesses have sworn falsely, nor do we so desire to be understood as saying that the plaintiff or defendant or any other particular witness has so testified, but only that some one has. It would not be any benefit to the profession or parties to set out the evidence, and comment thereon. The only effect this would have would be to give greater publicity to this unfortunate controversy. Therefore, after careful consideration, we deem it best and sufficient to say that, in our opinion, the plaintiff has failed to establish, by a preponderance of the evidence, that she is entitled to a divorce. Therefore the judgment of the circuit court is affirmed.

SWAN *v.* WHALEY and others.

(Supreme Court of Iowa. December 8, 1887.)

1. TAXATION—NOTICE TO REDEEM—"LAWFUL HOLDER" OF CERTIFICATE—PARTNER.
   Code Iowa, § 894, provides that notice to redeem from tax sales shall be given by "the lawful holder of the certificate." A person purchased real estate at a tax sale, in partnership with another, and took the certificates in his own name. In dividing the certificates with his partner, he wrote his name on one, and delivered it to his partner, with the object of transferring it. *Held*, that such partner was the "lawful holder" and the proper person to give the notice, notwithstanding the informality of the assignment.

2. SAME—ASSIGNMENT OF CERTIFICATE—FAILURE TO RECORD.
   Code Iowa, § 888, provides that a certificate of purchase at tax sale shall be assignable by indorsement, and shall vest the title of the purchaser in the assignee, and that the assignment shall be recorded with the county treasurer. The purchaser of real estate at tax sale placed his name on the back of the certificate, and delivered it to another, who, by a full assignment, transferred it to defendant. The assignment was not placed on record. *Held*, that recording the assignment was not essential to the sale, but was for the purpose of affording evidence to the treasurer of who was entitled to the deed when the right to it accrued.

3. SAME—VALIDITY OF UNRECORDED ASSIGNMENT.
   Defendant purchased a certificate of tax sale, which was assigned to him; but the assignment was not recorded. Plaintiff, being the owner of the real estate sold, contracted for the purchase of the certificate with the original holder, who had forgotten that he had sold it. Plaintiff left by agreement the money to pay for the certificate with the county auditor, to be paid to the purchaser when he could find the certificate. After the time of redemption expired, the assignee procured a deed. *Held*, that the statute does not make the record of the assignment constructive no-

tice of the rights of the assignee, and the owner, if he does not redeem in accordance with the statute, must know at his peril that he is dealing with the owner of the certificate.

Appeal from circuit court, Butler county.

Action in equity by E. R. Swan to cancel a tax deed. The circuit court denied plaintiff relief, and he appealed.

Hemenway & Grundy, for appellant. *J. H. Scales* and *Gibson & Dawson*, for appellees.

REED, J. The facts of the case are as follows: The real estate in question was sold in 1880 for the delinquent taxes of 1879, and was bid in by J W. Phillips, to whom a certificate of purchase was issued. Clark Fairfield, however, was interested in the purchase of this and other tracts of real estate sold at the same sale, being in partnership with Phillips. Afterwards the partners made a division of the certificates acquired under the sale, and the one in question fell to Fairfield. For the purpose of transferring it to him, Phillips wrote his name upon the back of it, and delivered it to him. After the expiration of two years and nine months from the date of the sale, Fairfield caused the usual notice of the expiration of the period of redemption to be served on plaintiff, who was then in possession of the property, and the actual owner thereof, although the legal title was in another. After the service of the notice on plaintiff, Fairfield sold, and, by proper writing indorsed thereon, assigned, the certificate to defendant A. A. Whaley; but no evidence of that assignment, or the one from Phillips to Fairfield, was recorded in the treasurer's office. After the service of the notice to redeem on plaintiff, he applied to Alex Christie for the loan of an amount of money sufficient to make the redemption. Christie preferred to purchase the certificate, and hold it or take a deed under it, and hold the title as security for the loan, and the parties agreed to take that course, provided the owner was willing to sell the certificate. They applied to Fairfield, and he agreed to assign the certificate to Christie for $65, which was slightly in excess of the amount that would have been required to redeem. He directed them to deposit the amount with the county auditor, and promised that he would assign the certificate to Christie, and leave it with the auditor, and receive the money. As a matter of fact, however, he had already sold and assigned it to Whaley, but had forgotten the transaction. Christie left the money with the auditor, and explained to him the arrangement with Fairfield, but directed him, in case Fairfield did not assign the certificate and leave it with him before the expiration of the period for redemption, to apply the amount necessary to make the redemption on the last day of the period. Plaintiff was present at the time, and acquiesced in that direction. The parties learned afterwards, however, that Fairfield had not been able to find the certificate, and they determined that they would not make the redemption, but would wait until the certificate should be found, or a duplicate procured, and the assignment made, and they informed both the auditor and Fairfield of that determination; but the money was permitted to remain in the auditor's hands. After the expiration of the period for redemption, Whaley presented the certificate to the county treasurer, who executed to him a tax deed of the premises.

1. It is contended that the transaction between Phillips and Fairfield did not amount to a legal assignment of the certificate to the latter, and hence he was not the proper person to give the notice to redeem; and not being himself vested with the legal title to the certificate, his assignment to Whaley did not invest him with the title thereto, or entitle him to receive a deed thereunder. Section 888 of the Code is as follows: "The certificate of purchase shall be assignable by indorsement, and an assignment thereof shall vest in the assignee or his legal representative all the right and title of the original purchaser. * * * In case said certificate is assigned, then the assignment

of said certificate shall be placed on record in the office of the county treasurer in the register of tax sales." The contention is that this section requires a formal assignment, transferring to the assignee all the rights and interests of the purchaser, to be indorsed upon the certificate. So far as the objection that Fairfield was not the proper party to give the notice to redeem is concerned, we deem it unnecessary to inquire as to the soundness of that position. Section 894 provides that the notice shall be given by "the lawful holder of the certificate." By "the lawful holder" is meant the one who in law is the owner of the certificate, and entitled to the rights and benefits which may accrue under it. Now, while the evidence of Fairfield's title to the certificate in question may have been defective, there is no doubt that he was in law the owner of it. He had it in possession under the transaction with Phillips, the only other person who ever had any interest in it, and who delivered it to him with the object of transferring to him the property in it, and who, at the time of the transfer, did what the parties supposed was essential to pass the title to him. If redemption had been made, he would have been entitled to receive the money, and if he had retained the certificate until the right to a deed accrued, he would have been entitled to it. Beyond doubt, we think he was "the lawful holder of the certificate."

2. It is contended that Whaley was not entitled to receive a deed of the property from the treasurer, because of the insufficiency of the assignment from Phillips to Fairfield, and of the fact that neither of the assignments under which he held were recorded in the treasurer's office. When the right to redeem the property from the sale expired, some person was entitled to receive a deed. The right to redeem terminated at the expiration of 90 days from the date of the service of the notice to redeem, and the right to a deed accrued at that time. Code, § 895. And of necessity that right must have accrued to some person. To whom did it accrue if not to Whaley? Clearly it did not accrue to either Phillips or Fairfield, for neither of them retained any interest in the certificate, nor was either of them claiming any interest therein. The intention of the statute is that the deed shall be given to the lawful owner of the certificate, and clearly Whaley was such owner. The certificate of purchase is a mere chattel, and, like any other article of personal property, is the subject of bargain and sale. The provisions of section 888, with reference to the assignment and the recording thereof in the register of tax sales, relate merely to the creation and preservation of the evidence of the sale. They are not essential to the sale itself. A right in and to the certificate which would be enforceable in law can be created without either the execution or recording of any written assignment. The object of the provision is to afford the treasurer certain evidence of who is entitled to the deed when the right to one accrues. If, however, he should, without having any evidence of the assignment, execute a deed to the one who in fact and law was entitled to receive it, the question of its validity would not be affected by the fact that he acted without such evidence.

3. Finally, it is contended that as Whaley neglected to place his assignment of record, and plaintiff contracted with Fairfield with reference to its purchase and assignment to Christie, with the view of effecting a redemption, and without notice of Whaley's assignment, the latter is now estopped to assert title under his deed. But the statute does not make the record of the assignment constructive notice of the rights of the assignee. While a mode of making the redemption is pointed out by the statute, the owner of the property may effect redemption by contract with the holder of the certificate. But if he elects to take that course, he must know at his peril whether the one with whom he deals is the owner of the certificate. Affirmed.

WALKER v. RUSSELL and another.

(Supreme Court of Iowa. December 8, 1887.)

1. LIMITATION OF ACTIONS—LEX LOCI CONTRACTUS—PLEADING.
Plaintiff sued on a note more than 10 years overdue, alleging that it was made by defendants while living in Illinois, that they removed to Iowa less than 10 years before suit was brought, and that the action was not barred by the laws of Illinois. *Held*, that an averment in the answer that the note showed on its face it was barred by the statute of limitations was no answer to the allegations of the petition.[1]

2. PAYMENT—BURDEN OF PROOF—PRESUMPTION FROM LAPSE OF TIME.
Suit was brought in 1886 on a note made in 1872. A payment had been made upon it in 1879. Defendants had failed in business, and compromised with their creditors. *Held*, that the burden of proof was on defendants to prove payment, and, in view of all the circumstances, the lapse of time was not entitled to much consideration as a presumption of payment.

3. COSTS—NON-RESIDENT PLAINTIFF—REFUSAL TO REQUIRE SECURITY—HARMLESS ERROR.
Plaintiff, being a non-resident, sued defendants, and the court overruled a motion to compel him to give a bond for costs. *Held*, that as by the judgment of the court below defendants were to pay the costs, and it has been affirmed on appeal, defendants were not prejudiced by the ruling.

Appeal from district court, Guthrie county; O. B. AYRES, Judge.

Action by Charles L. Walker, administrator, upon a promissory note. The defendants pleaded payment of the note and the statute of limitations. There was a trial by the court without a jury, and a judgment for the plaintiff. Defendants appeal.

E. W. Weeks, for appellants. *J. D. Brown* and *J. H. Applegate*, for appellee.

ROTHROCK, J. 1. Counsel for appellants filed his abstract and argument, but omitted to file an assignment of errors. Appellee filed a motion to affirm, because no errors were assigned. Thereupon appellants filed an assignment of errors three days before the first day of the term to which the appeal was taken. Appellee moved to strike the assignment and dismiss the appeal, because of the failure to assign errors within the time required by law and the rules of this court. A showing was made in excuse of the failure to serve and file the assignment. We will not determine in this case whether an appellant may, upon a proper showing, file his alleged errors after the time required. The result we reach in the case renders a ruling unnecessary upon this point.

2. Complaint is made because the court struck out a part of defendants' answer, in which it was alleged that the note sued upon showed upon its face that it was barred by the statute of limitations. We do not think this was erroneous. The note was more than 10 years past due when the suit was commenced. But the plaintiff pleaded the residence of the defendants in the state of Illinois at the time the note was given, and their removal to this state less than 10 years before the suit was commenced, and set forth in his petition the statute of Illinois, by which it appeared that the action was not barred. It is very plain that an averment that the note showed on its face that the action was barred was no answer to the averments of the petition.

3. The main question in the case is whether the court was warranted in finding from the evidence that the note was unpaid. The burden of establishing the plea of payment was on the defendants. We have carefully examined all the evidence, and we do not think we would be warranted in reversing the judgment on this ground. It is true the note was payable on the first day of January, 1872, and suit was not brought thereon until September,

[1] Unless the facts which render the statute of limitations a bar to an action appear in the complaint, they must be stated in the answer to make the defense of the statute available. Paine v. Comstock, (Wis.) 14 N. W. Rep. 910.

1886. But payments were made thereon. The last payment indorsed was dated March 29, 1879. Appellant complains because the court stated in its conclusions of law that there was no presumption of the payment of the note by reason of the lapse of time since its maturity. The court did not find that the lapse of time was not a fact proper to be taken into consideration with the other facts in the case in determining the question of payment; and, in view of the fact that there was evidence tending to show that defendants failed in business in Illinois, and compromised with their creditors, the lapse of time was not entitled to much consideration in the case.

4. The defendants filed a motion in the court below to require the plaintiff to give security for costs, because he was a non-resident of the state. The motion was overruled, and complaint is made of this ruling. No prejudice has resulted to defendants by this ruling. All of the costs were awarded against them, and an affirmance in this court requires them to pay all legal costs.

Affirmed.

CONKLIN *v.* CITY OF KEOKUK.

(Supreme Court of Iowa. December 9, 1887.)

1. MUNICIPAL CORPORATIONS—CHANGE OF GRADE—NOTICE OF APPEAL.
When a notice of appeal from the commissioner's appraisement of damages in proceedings to change the grade of streets, under Code Iowa, § 469, providing that it shall be given to the mayor in writing, etc., is properly given to the mayor of the city, it is immaterial that his official character is not designated therein.

2. SAME—CHANGE OF GRADE—DAMAGES—INTERSECTING STREETS.
Where the grade of two parallel streets is to be changed, and the street connecting them must thereby, necessarily, be changed in grade, although not specified in the ordinance fixing the amount of change, the damage caused to property on the intersecting street is a proper consideration in fixing the amount which shall be paid as damages for the proposed change of grade of the parallel streets.

3. SAME—IMPROVEMENTS ACCORDING TO ESTABLISHED GRADE—QUESTION FOR JURY.
Under Code Iowa, § 469, providing that "when any city or town shall have established the grade of any street or alley, and any person shall have built or made any improvement on such street or alley, *according to the established grade* thereof, and such city or town shall alter such established grade in such a manner as to injure or depreciate the value of said property, said city or town shall pay the amount of the damages caused by the alteration," the question whether improvements have been made "*according to the established grade*" is one of fact for the jury. SEEVERS, J., dissents.

4. SAME—INSTRUCTIONS—INTENTION OF BUILDER.
Under this act an instruction that, if respondent's intestate "intentionally built his improvements above the grade line as established by the ordinances of the city, this would be building according to established grade, and with reference thereto, and to correspond with it, within the meaning of the statute, is erroneous, as it makes the question as to whether the improvements were made according to the grade depend entirely upon the intention of the builder, and a verdict thereupon in favor of the person damaged must be set aside.

5. ABATEMENT AND REVIVAL—DEATH—SUBSTITUTION OF REPRESENTATIVE—APPEAL FROM APPRAISEMENT OF DAMAGES TO LAND.
After the appraisement of damages suffered by an abutting property owner by reason of a change of grade had been reported to and accepted by the city council, the owner died. *Held*, that his administratrix, and not his heirs, was the proper party to be substituted in his place in the further proceedings by appeal, etc., as it was then an interest in personal property which was in litigation.

6. JURY—COMPETENCY—TAX-PAYER IN CITY.
The fact that one called as a juror in a litigation in which the city is a party is a tax-payer in the city, is no ground for challenge by the city.[1]

Appeal from circuit court, Lee county.

[1] In a suit in which a municipal corporation is a party, the fact that a proposed juror is a tax-payer of the corporation, is good ground for challenge by the party interested adversely to the city. Kendall v. City of Albia, (Iowa,) 34 N. W. Rep. 838; see note to Id.

O. S. Conklin in his life-time was the owner of lots 1, 2, 3, 4, 5, and 6, in block 16, and lots 7, 10, 11, and 12, in block 15, in the city of Keokuk. The blocks are bounded on the south and north by First and Second streets, and Bank street lies between them. In 1856 the city passed an ordinance establishing the grade of these streets; and while that ordinance was in force the lots were improved by the erection thereon of certain buildings. Afterwards another ordinance was passed, which establishes the grade, at the intersection of Bank and First streets, four and a half feet lower than the grade established by the ordinance of 1856. Commissioners were appointed as provided by statute to assess the damages which property owners would sustain in consequence of this change of grade. The commissioners made an appraisement of Conklin's damages, which the city council confirmed, and from the order of confirmation he appealed to the circuit court. While the proceeding was pending in the circuit court, Conklin died, and the present plaintiff, Sarah A. Conklin, who is the administratrix of his estate, was substituted by order of the court. The trial in the circuit court resulted in the award of damages materially greater than that made by the commissioners. The city appealed.

Anderson, Davis & Hagerman, for appellant. *Craig, Collier & Craig*, for appellee.

REED, J. 1. The notice of the appeal from the order confirming the appraisement of the damages by the commissioners was directed to "the Honorable George D. Rand, mayor of the city of Keokuk," and the following acceptance of service was indorsed on it: "I hereby accept service of the above notice this twenty-second day of June, 1883. GEORGE D. RAND, Mayor."

The city filed a motion in the circuit court to dismiss the appeal, because of the alleged insufficiency of the notice, but the motion was overruled. The point urged in support of the motion is that the notice runs to said Rand in his individual, rather than in his official, capacity. The provision under which an appeal in a proceeding of this character may be taken is found in section 469 of the Code, and is as follows: "Any person interested may appeal from the order of confirmation to the circuit court of the county in which such city or town is situated, by notice in writing to the mayor, at any time before the expiration of twenty days after the entering of the order of confirmation." Under that provision the notice of appeal must be given to the mayor. If a notice sufficient in form is given to the person who holds the office of mayor, it is immaterial, we think, how it is directed, or by what title he is designated. A notice directed to the mayor, the city, or to George D. Rand, if he as matter of fact was mayor, would have answered all the purposes of the law.

It is urged, however, that there is no evidence in the record that Rand was mayor at the time. The motion, however, makes no question of that kind. The ground upon which it asked the court to dismiss the proceeding was that the notice was directed to Rand in his individual capacity, and not that he was not in fact mayor of the city. Defendant is not now entitled to have that question considered.

2. The city objected to the substitution of the administratrix as plaintiff. It was proven on the trial that Conklin left surviving him a widow and four children, all of whom resided in Lee county, and were of full legal age; and it is insisted that upon the death of Conklin they, and not the administratrix, were the parties in interest, and should have been substituted. If it can be said that the injury which was to be compensated by the damages *accorded* in the proceeding had already occurred when Conklin died, it would be clear that the right to compensation was in the nature of a personal claim in his favor, which like any other personal property, would descend to the administratrix. But if, on the other hand, the damages will accrue only when the physical change in the grade is made, and the object of the proceeding is to

determine in advance the amount which will be a just compensation for the injury, when it occurs, it is equally clear that the owners of the realty are necessary parties to the proceeding. It was held by this court in *Hempstead* v. *Des Moines*, 63 Iowa, 36, 18 N. W. Rep. 676, that the right of action for the recovery of damages on account of a change of grade in a street arose, not when the ordinance making the change was passed, but when the physical change of the surface of the street was made. In that case, however, the city, after *making* the ordinance, proceeded at once to reduce the street to the established grade. No proceedings were had in advance of the work to ascertain the extent of the injury which the property would sustain in consequence of the change or to compensate the owner therefor. The rule laid down in the case is founded on that state of facts, and it is not necessarily applicable in a proceeding of this character. When the commissioners returned their appraisement to the city council, that body had the power, at its discretion, to either annul or confirm the award. Code, § 469. If they had elected to annul the appraisement, the whole proceeding would have been at an end. No rights would have accrued, and no liabilities would have been incurred by it. But when the council confirmed the appraisement the city acquired the right, upon the payment or tender of the damages, to reduce the street to the new grade. By that act it determined that it would make the physical change necessary to conform it to the grade. Having thus acquired the right to do the act which would occasion the injury to the property, and having fully determined that it would exercise that right, the damages accrued from that moment. From that time nothing remained to be done except to ascertain the amount. The right to be compensated constituted a claim in favor of the owner of the property.

3. The city challenged for cause a number of persons who were called as jurors in the case, the ground of the challenges being that the jurors were tax-payers in the city, but the challenges were overruled. It was held in *Cramer* v. *City of Burlington*, 42 Iowa, 315, that a challenge by the plaintiff for the same cause was properly sustained. The ground of the holding is that as the tax-payer would be compelled ultimately to contribute to the payment of any judgment which might be rendered against the city, he was directly interested in the result of the action, and his interest was of such a nature that the adverse party ought not, in justice, to be compelled to accept his judgment in the case. But that reason can have no application when the challenge is by the city. The tax-payer has no interest adverse to the city to be affected by the litigation. The right of challenge is allowed the parties as a means of protecting their interests. But it is not a ground of challenge by one party that the juror has an interest adverse to that of the other.

4. Each one of the lots fronts on Bank street. Those in block 16 are improved together, and constitute a single property, which extends from First to Second street, and is bounded on two sides by those streets. Lots 11 and 12, in block 15, also constitute a single property, which is bounded on one side by First street. Lots 7 and 10, in block 15, are separately improved, and constitute separate properties. Lot 7 fronts on both Bank and Second street. But lot 10 fronts only on Bank street. The jury found that lot 7 was damaged to the extent of $30, and lot 10, $250, by the change of grade. It was urged that neither of those properties are upon the street the grade of which was changed, and hence those amounts should be excluded from the award. That claim is based upon the fact that the ordinance of 1883, while it establishes the grade at the intersection of First and Bank streets, does not, in express terms, change the grade of the latter; and it is contended that it is not changed. But there can be no doubt but it was the intention of the city, by the ordinance, to change the grade of that street, and we think it has the effect necessarily to change it. First and Second streets are parallel with each other, and Bank street intersects them at right angles. The ordinance,

while it lowers the grade of First street four and a half feet, does not change Second street. Now, the lowering of First street necessarily has the effect to change the grade of the connecting streets between it and Second.

5. The natural surface of the lots in block 16 is some 16 feet above the grade of Bank street, as established by the ordinance of 1856. It is also above the grade of First and Second streets. The buildings erected on that property were placed upon the natural surface of the ground, and the lots were not cut down or sloped to the lines of the streets. The natural surface of the lots in block 15 was also above the grade of the streets as established by that ordinance. When they were improved they were cut down considerably, but not to the level of the streets, and the foundations of the buildings are several feet above the grade lines. The Bank street front of lots 10, 11, and 12 was protected by a stone wall, and there were stairways from the street up to the buildings. The statute affording the property owner a remedy for the injury occasioned by a change of grade, (Code, § 469,) providing that "when any city or town shall have established the grade of any street or alley, and any person shall have built or made any improvement on such street or alley *according to the established grade* thereof, and such city or town shall alter such established grade in such a manner as to injure or depreciate the value of said property, said city or town shall pay to the owner or owners of said property so injured the amount of such damages."

It was left to the jury to determine whether the improvements in question were made according to the grade established by the ordinance of 1856. Counsel for appellant contended that it should be determined as matter of law that those on block 16 were not so made. They have not claimed that it is essential that the whole property should have been lowered to the level of the street, or even that the foundations of the buildings should have been placed as low as the grade line. But their position is that the improvements cannot be regarded as having been made "according to the established grade," unless some part of the property was brought to the level of the street, or something else was done to conform it to the grade; such as the erection of a wall upon the front, the sloping of the ground to the grade line, terracing it, or the like. The question depends upon the force and effect of the words, "according to the established grade," in the statute. The statute should be liberally construed, with the view of giving effect to the legislative intent. It was enacted with the view of affording relief in a class of cases in which very great injuries are sometimes inflicted upon property owners, and for which, in the absence of statute, they were without remedy. We agree with counsel that, to entitle a party to relief under the statute, it is not essential that his buildings should have been erected on the level of the street, for it would often be impracticable to build upon that level. Much desirable property can be found in almost any town or city in the state which is so situated that it can be comfortably and conveniently used for residence or other purposes without reducing it to the grade of the streets upon which it abuts; and to hold that the owners of such property are without remedy for the injury which changes in the grade of the street would cause to it, because they had not placed their improvements upon the level of the street, would be to place a very narrow construction upon the statute. We think property is improved according to the established grade of the street, within the meaning of the statute, whenever it is so improved that it can be comfortably and conveniently used for the purpose to which it is devoted, while the street upon which it abuts is maintained at that grade. The only object which the owner could have had in view in constructing any of the improvements, which counsel contend were necessary in this case to conform the property to the grade, would have been to facilitate the use of the property in connection with the street. But if the circumstances were such that it could be comfortably and conveniently used without such additional improvements, there was no necessity for making

them. The property in that case was adapted to the grade without them. The question, then, is one of fact, and was properly submitted to the jury.

6. The circuit court gave the following instructions: "If Conklin intentionally built his improvements above the grade line as established by the ordinances of the city, this would be building according to established grade, and with reference thereto, and to correspond with it, within the meaning of the law." By this instruction the question whether the improvements were made according to the grade depends entirely upon whether they were intentionally built above the line. Under it, the question whether the buildings could have been comfortably or conveniently used, while the street was maintained at that grade, is entirely immaterial. The instruction is erroneous, and could hardly fail to be prejudicial. As we must reverse the case on this ground, we do not consider other questions argued by counsel. They are not deemed of general importance, and may not arise on another trial. Reversed.

SEEVERS, J., dissents as to the fifth point of the opinion.

STATE v. LAUGHLIN.

(*Supreme Court of Iowa.* December 9, 1887.)

1. BASTARDY—PROCEEDINGS TO COMPEL FATHER TO SUPPORT BASTARD—TWO YEARS' LIMITATION.
   The Iowa statute limiting actions for statutory penalties to two years has no application to proceedings to compel the father of a bastard to provide maintenance for such child.
2. JURY—JUROR EXCUSED AFTER CASE OPENED—IMPANELING NEW JURY—TALESMAN.
   After the impaneling of a jury, and the statement of counsel, a juror was excused for cause. Thereupon the parties refused to call another juror to take his place, and the court discharged the jury, giving the parties full power to challenge the jury to be called, and thereupon the eleven remaining jurors were recalled, and one by-stander. As nothing appeared from the record to disprove that the court first exhausted the regular panel, and then had a talesman summoned, it will be presumed the proceeding was regular and no error was committed.
3. TRIAL—INSTRUCTIONS—REFERENCE TO PARTICULAR PORTIONS OF EVIDENCE.
   If a court instructs a jury to take into consideration *all* of the facts brought out in the evidence, it is not error for it to refuse to indicate particular points in the evidence, suggested by defendant's requests for instructions.

Appeal from district court, Madison county; O. B. AYRES, Judge.

This is a proceeding under the statute, the object of which is to charge the the defendant, Thomas Laughlin, with the support and maintenance of an illegitimate child of which it is alleged he is the father. The defendant, by a plea of not guilty, denied the parentage of the child. There was a trial by jury, and a verdict of guilty, and the defendant was, by order of the court, required to pay certain sums at stated periods for the support of the child. Defendant appeals.

V. Wainwright, for appellant. *Ruby & Wilkins*, for appellee.

ROTHROCK, J. 1. The first question presented in argument arises upon an allegal error in the selection of the jury. The following are the facts upon which the defendant bases his complaint. We quote from the bill of exceptions: "A jury composed of the same members as the present jury, with the exception of Thomas Kirkland, Jr., were duly impaneled and sworn, statement of counsel made to jury, when the court excused said Kirkland on account of dangerous sickness of juror's mother. The parties declining to call one more juror, the court discharged the panel, and reimpaneled a jury, allowing each party the full number of challenges. The new jury were composed of the same jurors as before, with the exception of John Gowin, who was not a member of the regular panel, the member of the regular panel pres-

ent being excused. To the action of the court in discharging said jury and reimpaneling, the defendant at the time duly excepted." The defendant claims that a by-stander was "*injected*" into the jury by the action of the court. No question is made in argument as to the power of the court to discharge the juror Kirkland. The parties then declined to call another juror. The court thereupon discharged the remaining jurors, and impaneled a new jury. It will be presumed that the jury was impaneled in the regular and lawful manner; that is, by first exhausting the regular panel, and then calling talesmen. There is nothing in this record showing the contrary.

2. The evidence shows that the child, the paternity of which is in question, was born on the eighth day of December, 1883. The complaining witness claimed that it was begotten on the twenty-eighth day of February, 1883. The prosecution was commenced on the twenty-eighth day of May, 1885. Defendant claims that the proceeding is barred by the statute of limitations, because it was not commenced within two years after the defendant became pregnant. The statute authorizing the proceeding is as follows: "Sec. 4715. When any woman residing in any county of the state is delivered of a bastard child, or is pregnant with a child, which, if born alive, will be a bastard, complaint may be made in writing by any person to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceeding shall be entitled in the name of the state against the accused as defendant." It will be observed that the complaint was filed within two years after the birth of the child. Defendant claims this is too late, because it might have been commenced at any time after the complainant became pregnant. We do not think the statute limiting actions for statutory penalties and other actions to two years has any application to this proceeding. Section 4721 of the Code is as follows: "If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums, and in such manner, as the court shall direct, and with the costs of the suit; and the clerk may issue execution for any sum ordered to be paid immediately, and afterwards from time to time, as it shall be required, to compel compliance with the order of the court." The judgment and order of the court is for the maintenance of the child, and the law contemplates that the sum required to be paid shall be paid in installments from time to time. And section 4722 provides that "the court may, at any time, enlarge, diminish, or vacate any order or judgment rendered in the proceeding herein contemplated, on such notice to the defendant as the court or judge may prescribe." It is apparent from these sections that the obligation to maintain the child is a continuing one, and a new and enlarged order may be made at any time to meet the necessary outlay for the maintenance of the child.

3. The evidence in the case was conflicting. The complainant testified that the defendant was the father of the child, and that it was begotten on the night of February 28, 1883. The defendant was a witness in his own behalf, and did not deny that he was in company with the complainant and others on the night in question; but he stated, in substance, that he was in such state of intoxication as to be unconscious, and that he did not think he was the father of the child. There was a witness in behalf of the defendant who testified that he met the complainant by appointment at night in a barn about nine months before the child was born. The defendant prepared and presented to the court certain instructions to the jury in which these and other points of his defense were specially mentioned, and in which the jury were directed to take said evidence into consideration in determining the paternity of the child. The court, refused to give these instructions to the jury and the refusal is complained of by the defendant. We do not think the complaint is well founded. The court on its own motion, instructed the jury to the effect that they should take into consideration all of the evidence in the case, and

give to the several points of the evidence such weight as they thought they were entitled to. This was sufficient. The law does not require the court, in the instructions to the jury, to call special attention to the facts testified to by the several witnesses.

4. It is claimed that the evidence was insufficient to warrant the verdict. We have examined it with care, and do not concur in the claim made. Affirmed.

INDEPENDENT SCHOOL-DIST. OF FAIRFIELD *v.* FARMER and others.

(*Supreme Court of Iowa.* December 9, 1887.)

APPEAL—BILL OF EXCEPTIONS—CERTIFICATE OF COURT REPORTER INSUFFICIENT.

A bill of exceptions in Iowa must be signed by the trial judge, or in particular cases by the by-standers; and where the transcript from the lower court purports to contain all of the evidence and the exceptions taken at the trial, but is made and certified to by the court reporter alone, it is not such a record of the proceedings as will justify a review thereof by the appellate court, and the decision below will be affirmed.

Appeal from district court, Jefferson county.

Action at law. Trial to the court, judgment for the plaintiff, and the defendant James F. Crawford appeals.

Leggett & McKenney and *M. A. McCord*, for appellant. *D. P. Stubbs*, for appellee.

SEEVERS, J. The errors assigned are that the court erred in admitting evidence to which the appellant objected. The abstract sets out the objections made, the rulings of the court, and states that the appellant excepted thereto; and it further states that it contains "all the evidence that was offered or introduced on the trial of the cause. The evidence was taken down by the official short-hand reporter of the court, and was extended by him, and preserved by a bill of exceptions as provided by statute, and made a part of the record." An additional abstract has been filed by the appellee, which denies that the abstract "contains all the evidence offered or introduced on the trial of the cause; denies that any exceptions were taken to the rulings of the court, or that the court made any rulings thereon." The statements in the abstract filed by the appellee are denied in an amended abstract filed by appellant. It will be observed that the abstract filed by the appellee, in substance, states that no bill of exceptions was signed by the court, or rather that the rulings made by the court were not preserved by a bill of exceptions. As no bill of exceptions is set out by the appellant in the amended abstract, it is doubtful whether we are required to look into the transcript; but we have done so, and find that the claimed bill of exceptions was noted by the reporter, and that he has extended or made a transcript of his notes, and has certified thereto as above stated.

The appellee has filed a motion to strike out the evidence, and affirm the judgment and rulings of the court in admitting evidence, on the ground that the evidence and such rulings have not been preserved by a bill of exceptions. This leads to the inquiry as to whether it is essential, in the absence of a statute providing otherwise, that a bill of exceptions must be signed by the judge. A bill of exceptions is defined to be an "objection made by a party in a cause to the decision of the court, on a point of law, which, in the confirmation of its accuracy, is signed and sealed by the judge or court who made the decision." Bouv. Law Dict. 175. See, also, *Mays* v. *Deaven*, 1 Iowa, 216. It may be conceded the statute provides that, as to some matters, it is not essential the exceptions shall be signed by the judge; but such is not the case as to the matter in hand. As to it the statute implies, if it does not in terms so provide, that the exceptions shall be so signed, or by the by-standers, which in a proper case is deemed equivalent to a signing by the judge. Code §§

2831–2835, inclusive. The latter section provides, if the judge refuses to sign a true bill of exceptions, that it may be signed by the by-standers, but no provision is made that it may be signed by the reporter. The presumption obtains that all questions of law are correctly decided by the court, and he who asserts the contrary must exhibit to this court a bill of exceptions signed by the judge or by-standers, showing the exact question presented to the court, and how it was decided, before we are authorized to review it, unless there is a statute which provides otherwise. While it is true no particular form is required, such signature or signatures is an essential prerequisite.

We have no occasion to determine what the rule is in equity causes in relation to identifying the evidence. For the reason that the rulings of the court to which errors are assigned have not been preserved and identified by a bill of exceptions, the judgment of the district court is affirmed.

STATE v. FRAHN.

(*Supreme Court of Iowa.* December 9, 1887.)

1. BURGLARY—IN FIRST DEGREE—SUFFICIENCY OF EVIDENCE.
   The evidence against a defendant, indicted for burglary, showed that the goods stolen were of a bulky character, were taken from a house in a somewhat isolated locality, and were found soon after the loss in defendant's possession. *Held*, that the difficulty of removing such goods unobserved, in the absence of other testimony, was entirely insufficient to sustain a conclusion that they were taken in the night-time; and as the time of taking is the chief distinction, under Code Iowa, between burglary in the first and second degrees, a verdict of guilty in the first degree should be set aside.

2. SAME—POSSESSION OF PROPERTY STOLEN BY BURGLAR.
   Where it is shown that a larceny and burglary were committed by the same person at the same time, and the goods taken at the time of the burglary are found in the possession of a person soon after the occurrence, this is *prima facie* evidence that he is guilty of both offenses.[1]

Appeal from district court, Jasper county

Defendant, John Frahn, was convicted upon an indictment for burglary in the night-time. He now appeals to this court.

Alanson Clark and *E. J. Salmon*, for appellant. *A. J. Baker*, Atty. Gen., for the State.

BECK, J. 1. Under the statute of this state, burglary of a dwelling-house is of two degrees,—the first, the breaking and entering in the night-time, with the intent to commit a felony; the second, the breaking and entering in the day-time. The punishment for the first degree is imprisonment in the penitentiary, not to exceed 20 years, in the absence of aggravation by reason of the offender being armed, or committing an assault upon any person in the dwelling, or being aided by confederates present at the commission of the crime; and for the second is imprisonment in the penitentiary for not more than 10 years, or fine of not to exceed $100, and imprisonment in the county jail for not more than one year. It will be observed that, in the estimation of these statutes, there is a wide difference in the heinousness of the degrees of this offense.

2. We are of the opinion that the evidence utterly fails to show that the offense was committed in the night-time. The only evidence to establish defendant's guilt was testimony tending to show that the dwelling-house was broken open, and that certain goods left therein were found in defendant's possession. It cannot be denied that the evidence which is claimed to identify the goods found as those left in the house is, to say least of it, extremely unsatisfactory. It can hardly be said that it utterly fails on this point; but

[1] See note at end of case.

it does wholly fail to show that the crime was committed in the night-time. It is said that, on account of the bulky character of the goods stolen, the probability arises that they were taken in the night-time. In view of the facts that the house was somewhat secluded and was unoccupied by any person for several days, it is quite as probable that the goods were taken in the day-time as at night.

3. The district court gave the following instruction, which is complained of by defendant's counsel: "If you find from the evidence beyond a reasonable doubt, that some person stole from the said dwelling-house the beds or bedding, or some portion thereof, introduced in evidence in this case, by breaking and entering the said dwelling-house in the night-time, with intent to steal the same, and you further so find that recently thereafter such property thus stolen, if any, was found in the possession of the defendant, then and in such case you would be warranted in concluding that the defendant stole the property, if any, thus found in his possession, by breaking and entering said dwelling-house in the night-time, with intent to steal such property, unless the facts and circumstances shown by the evidence raise in your mind a reasonable doubt as to whether he did not come honestly into such possession. But if such facts and circumstances do raise such reasonable doubt, then you would not be warranted in drawing such conclusion from such recent possession, if established." This instruction is in accord with our ruling in *State* v. *Rivers*, 68 Iowa, 611, 27 N. W. Rep. 781, wherein we hold that, where it is shown that the larceny and the burglary were committed by the same person at the same time, recent possession of the goods stolen is *prima facie* evidence that the possessor is guilty of both offenses.

4. We think the district court should have sustained the motion for a new trial, on the ground that the evidence wholly failed to show that the offense was committed in the night-time. The prejudice resulting to defendant from the conviction, in the absence of evidence showing such fact, is apparent.

For the error in overruling the motion for a new trial, the judgment of the district court is reversed.

NOTE.

BURGLARY—POSSESSION OF STOLEN PROPERTY—PRESUMPTION. Possession of property, taken at the time of the commission of a burglary, without other facts indicative of guilt, is not sufficient to support a conviction of burglary. Stewart v. People, (Mich.) 3 N. W. Rep. 863; State v. Tilton, (Iowa,) 18 N. W Rep. 716. Though the unexplained possession of property recently stolen is *prima facie* evidence that the one in possession is guilty of larceny, it is not alone sufficient to sustain a conviction of burglary. State v. Shaffer, (Iowa,) 13 N. W. Rep. 806. Otherwise, where it is shown that the larceny and the burglary were committed at the same time, Smith v. People, (Ill.) 3 N. E. Rep. 733; and by the same person. State v. Rivers, (Iowa,) 27 N. W. Rep. 781. See State v. Kirkpatrick, (Iowa,) 34 N. W. Rep. 301, and note, as to the presumption of guilt arising from the possession of stolen property.

WORK *v.* WAPELLO CO.

(*Supreme Court of Iowa.* December 10, 1887.)

INTOXICATING LIQUORS—PROSECUTION—ATTORNEY'S FEE—PAYABLE BY COUNTY.

An attorney selected by a peace officer to prosecute a person charged with keeping liquors for unlawful sale, under Code Iowa, *c.* 6, tit. 11, is entitled to the fee provided by statute for such services to be paid by the county, under Code Iowa, § 3829.

Appeal from district court, Wapello county; CHARLES D. LEGGETT, Judge.

This is an agreed case, brought by W. A. Work, an attorney, to recover compensation for the prosecution before a magistrate of an information filed by a peace officer charging the person prosecuted with keeping intoxicating liquors for unlawful sale. The plaintiff was selected by the peace officer filing the information to prosecute the case. There was a judgment for plaintiff. Defendant appeals.

A. C. Slick, for appellant. *D. H. Emery*, for appellee.

BECK, J. 1. The amount in controversy being less than $100, the cause was appealed in order to determine the following questions of law certified by the judge of the district court: "*First.* Has a peace officer who has made an information for a violation of chapter 6, tit. 11, Code, before a magistrate, the right since January 1, 1887, to select an attorney other than the county attorney, and without notice to such county attorney, to appear for the state upon the trial, at the expense of the county? *Second.* Is an attorney so selected and under such circumstances entitled to receive from the county treasury the fees provided by section 3829, Code, for appearing and prosecuting before the justice of the peace?"

2. Under Code, § 1551, a peace officer filing an information against one violating the statute in relation to intoxicating liquors (Code, c. 6, tit. 11) is authorized to select an attorney to prosecute the case. Code, § 3829, provides a prescribed fee, five dollars, which shall be paid by the county in such case to the attorney prosecuting it. Before the enactment of chapter 78, Acts 21st Gen. Assem., an officer called the district attorney was elected and paid by the county, who was charged with the duty of conducting prosecutions for the state. Code, § 3775. It was especially made his duty to appear for the state in prosecutions for violation of the statute relating to intoxicating liquors, unless the person filing the information selected another attorney. Chapter 73, Acts 21st Gen. Assem., provides for the election of county attorneys to perform the same duties discharged by the district attorney. There are no express provisions found in this chapter repealing the statutory provisions above cited pertaining to the prosecutions of informations for the violation of the statute relating to intoxicating liquors; and the provisions of those statutes and the chapter just mentioned are not inconsistent or conflicting. The later statute, therefore, does not, under familiar rules of the law, repeal the prior enactments by implication. Indeed, the statutes are wholly in harmony, and it was doubtless the legislative intention that the prior statute referred to should remain in force.

In our opinion the decision of the district court is correct. Affirmed.

FRANK and another *v.* ARNOLD and others.

(*Supreme Court of Iowa.* December 12, 1887.)

1. TAXATION—ACTION TO SET ASIDE TAX DEEDS—PROOF OF TITLE IN PLAINTIFF.
   Plaintiffs, in an action to set aside four tax deeds, claimed title to the premises under a quitclaim deed, executed to one of their number in trust for them, and under a sheriff's deed in foreclosure proceedings against their grantor. *Held*, that plaintiffs had shown such title in themselves and their grantor as entitled them to maintain the action, and that the word "owner," in an agreed statement of facts, used with reference to the property, implies "title."

2. SAME—PURCHASE AT TAX SALE BY JUNIOR MORTGAGEE—PURCHASE IN NAME OF THIRD PARTY—FRAUD.
   S., a junior mortgagee, foreclosed his mortgage, purchased at the sale, and took possession. While in possession, the premises were sold for taxes, and deeds executed to A. In an action by plaintiffs, claiming under the senior mortgage and a conveyance from the mortgagor, to set aside such tax deeds, the evidence showed that S. was the owner of a bank, and A. his cashier. The bank loaned money on mortgage security, to protect which S., at delinquent tax sales, purchased the certificates in A.'s name, under an agreement with the latter that S. would furnish the money and have authority to sign A.'s name, A. to share in the profits and pay interest on the sums invested. A. never paid any interest, nor was there ever any accounting between the parties. While S. was in possession of the tracts in controversy, he accepted service of notice of expiration of redemption from the tax sale as "the person in possession, and also as the person in whose possession the above land is taxed." *Held*, that the tax deeds were void as against plaintiffs, the evidence showing that S. was the principal in the transaction, A.'s name being used only for convenience.

3. SAME—COMBINATION TO PREVENT BIDDING.

In an action to cancel certain tax deeds, several witnesses testified that W. bid off the land for A., one of his co-defendants, under an agreement between them to take turns in bidding; W., though testifying at the trial, failed to controvert this evidence. *Held*, that there was a fair preponderance of evidence to establish an unlawful combination between W. and A. to keep down competition at the sale, and the tax deed should be set aside.

Appeal from district court, Adams county; JOHN W. HARVEY, Judge.

Action in equity by G. W. Frank and another against T. S. Arnold and others, to set aside certain tax deeds, and to redeem. Judgment for defendants, and plaintiffs appeal.

T. M. Stuart, for appellants. *Maxwell & Dale*, for appellees.

SEEVERS, J. The pleadings are lengthy, and it is not essential, we think, to set them out, deeming it sufficient to state the claims of the parties, and the facts, as we find them, which are material.

1. It is conceded by counsel for appellants that no person can question a tax title, unless he shows that he or the person under whom he claims had title to the real estate at the time it was sold; and counsel for the appellees claim that the plaintiffs have failed to establish a title in themselves or the persons under whom they claim. The land in controversy was sold for delinquent taxes in November, 1881. There is an agreed statement of facts, and we find the fact to be that in July, 1875, L. L. Parsons owned the land, and at that time executed a mortgage thereon to one Antes, which was foreclosed, the land sold in November, 1884, to the plaintiffs, and the same conveyed to them by the sheriff in December, 1885. It is also true that in April, 1882, the said Parsons conveyed the land by quitclaim deed to the plaintiffs. Whatever title Parsons had the plaintiffs now own, unless the tax title is valid. The agreed statement of facts states that Mrs. Parsons owned the land in 1875, and there is nothing tending to show that she conveyed the premises to any one, or that she had been in any manner divested of her title. If we understand the contention of counsel, which is doubtful, their claim is that there is a distinction between ownership and title. That is to say, that a person may own real estate and yet have no title. It occurs to us that there is no merit in this claim. We are unable to see the distinction claimed. When the word "owner" is used with reference to property, it means one who has title; and that is what the parties undoubtedly meant and understood when the agreed statement of facts was executed.

2. Mr. D. S. Sigler was made a defendant in the action brought to foreclose the mortgage under which the plaintiffs claim, because he was the holder of a junior mortgage on the lands. This mortgage was foreclosed, the premises sold to Sigler, and the same conveyed to him by the sheriff in 1882, and under such purchase and conveyance he took immediate possession of the premises, and he remained in possession thereof until after the tax deeds were executed. It is properly conceded by counsel for the defendants that, under the circumstances above stated, Mr. Sigler could not legally have acquired a tax title in his own name, or in the name of another person for his use, benefit, or advantage. The treasurer in fact conveyed a portion of the land to Arnold, and another portion to Widner, so that the tax deeds on their face show that the tax title was vested in the persons just named. The claim of the plaintiffs is that in truth and in fact such title belonged to Mr. Sigler; that the persons above named held it for his use and benefit, or, at least, he was beneficially interested therein. The determination of this question requires a full statement of the facts and circumstances as shown by the evidence. Mr. Sigler, or the Bank of Corning, of which he was the owner, loaned money to different parties, which was secured by mortgages on real estate, and when lands were sold for delinquent taxes a clerk in the employ of Sigler or the bank attended such sales for the purpose of purchasing lands s$_0$

mortgaged, for the protection of the mortgagee. The purchases were made in the name of Arnold, under an agreement between him and Sigler, which will be hereafter referred to. Widner, a clerk in the employ of Sigler, attended the tax sale in 1881, and purchased one tract of land in the name of Arnold, and the certificate was issued to the latter. Two of the other tracts in controversy were purchased by Gibson, and the other by Brown, and certificates were issued to them. These certificates were afterwards procured by Sigler, as he testifies, as agent of Arnold, and assigned to the latter. In 1884, the land was taxed to Sigler, and in December of that year Sigler acknowledged service of the expiration notice, in pursuance of which deeds were executed, in the following words: "I hereby accept full and complete legal service of the foregoing notice as the person in possession of, and also as the person in whose name the above land is taxed, waiving true copy and all illegalities."

The certificates were at all times in the possession of Sigler, and were never seen by Arnold. Previous to the expiration of the tax certificate, Sigler wrote Arnold, "in substance, that some tax certificates would soon expire, and recommended that they be placed in the hands of certain attorneys for attention." Arnold so directed, and the expiration notices were prepared by such attorneys. The agreement between these persons in relation to the purchase of the land at tax sale, as testified to by Mr. Sigler, was as follows: Arnold purchased lands through Sigler for several years, the purchases being made by some one employed by the latter, who furnished all the money to make the purchases, and received all the money paid in redemption of the land so purchased. There never has been a settlement between them, and Arnold has never paid Sigler interest on the money advanced. The reason for transacting the business in the name of Arnold was that Sigler "did not care to be known as a tax-title purchaser, and yet wanted to protect the interests of parties for whom he had made mortgage loans, and Arnold was willing to profit by the business in the way it was arranged." The arrangement commenced in 1880. The general scope of Sigler's authority was to sign Arnold's name in transacting the business. Arnold testifies that he is unable to state the amount of money furnished. "I paid Mr. Sigler interest on all he invested for me. The agreement was verbal with Mr. Sigler. He was to attend to the business, and furnish all the money required to carry on the business, and I pay him interest on the same. * * * Sigler did not tell me what lands he wanted to purchase in my name. He was to buy good lands for me. I left the entire matter with Sigler up to about September, 1885, or mostly so. Sigler did not write me first, and suggest that I write Maxwell & Dale. I never received such a letter. I have no letters received from Sigler in 1884 and 1885. I have none now, and never had any."

Arnold is cashier of a bank. Both he and Sigler testify that the latter was the agent of the former in relation to the investment in lands sold for taxes, and that the lands in question belong to Arnold, and so they do; that is, the legal title is vested in Arnold, that is, if the tax title is valid; but we do not understand either of them to testify in terms that there is not some understanding between them, if Arnold's title is valid, that Sigler would receive a share of the profits from the transaction. We are impressed that there is such an understanding between these persons, whereby Arnold at the proper time will convey the land purchased by Gibson and Brown at the tax sale to whoever Sigler may direct, or that they are jointly interested therein. The business has been carried on for about five years, and there has been no accounting between them,—no payment of interest; or, if there has been, as Arnold testifies, the amount so paid is not stated. The amount invested is unknown by Arnold, and yet he has agreed to pay interest thereon. He does not know the amount of lands purchased; never has made any inquiries; never received any letters in relation to the business during 1884 and 1885,

and yet he is the cashier of a bank, and presumably a business man. It cannot be true; and Mr. Sigler, it seems to us, when the evidence is viewed from a business standpoint, must not only be interested in these lands, but the principal in the transaction, and Arnold's name used for convenience only.

A witness testifies that Sigler told him, in a conversation about these lands, that any lands "not redeemed that went to deed, Arnold paid him a certain per cent. on the money, and they divided up on the land." When all the facts and circumstances are considered, the evidence of this witness is greatly strengthened, and we think it creates a preponderance in favor of the proposition that there was such a conversation, although Sigler, while admitting the conversation, says he stated to the witness that he had "no interest in the land that went to the tax deed." This view is greatly strengthened when it is remembered that Sigler was in possession of the land under a foreclosure of a mortgage, and the premises had been conveyed to him by the sheriff, and that an action was pending in which he sought to compel the assignment of the mortgage under which the plaintiffs claim. See *Grant* v. *Parsons*, 67 Iowa, 31, 24 N. W. Rep. 578. Under these circumstances, Sigler accepted service of the expiration notice, and not only made no effort to prevent, but seemingly, judging from the manner of accepting service, aided and abetted in the vesting of the superior title in Arnold, and yet he testifies he would not have any claims on the land if he had succeeded in acquiring the title as he was endeavoring to do. Mr. Sigler further testifies that he does not know what Arnold would have done about it. Mr. Sigler undoubtedly means that he would not have any legal claims on the land; and, of course, he did not know what Arnold would have done until he acted.

3. As to the land conveyed to Widner, we do not think he was a good-faith purchaser, for two reasons: He bid off the land at the tax sale, in the name of Arnold, and after the service of the expiration notice, and after an attempt had been made by the plaintiff to redeem, by paying the required amount of money to the auditor, he claims to have purchased the certificate for $100, and it was assigned to him by Arnold in consideration of that amount of money. But the understanding was that, if the attempted redemption proved effectual, the amount so paid was to be refunded to him. This does not have the appearance of a *bona fide* transaction. There was 40 acres of land Widner claims to have purchased in this one-sided transaction. We cannot think Arnold is thus, substantially, giving away 40 acres of land. But, if wrong in this, the second reason is that there was an unlawful combination among the bidders at the time Widner purchased the land in the name of Arnold at the tax sale. There is a fairly decided preponderance of the evidence in favor of the proposition. The arrangement or tacit understanding which was carried out in substance by the bidders, was that they should take turns in making bids, and while this was in force Widner bid off this tract of land. In the opinion of the other bidders he claimed the right to bid when it was not his turn. This, using the language of a witness, made a "fuss," and, when the other Parsons lands were offered, there was competition; but when they were disposed of, the understanding was resumed. More than one witness so testified, and their evidence, it seems to us, is entitled to full faith and credit when the significant fact is considered that, although Widner testified in this case, he fails to controvert the evidence above mentioned, and is silent as to whether or not there was such understanding.

A judgment must be entered setting aside the tax deeds, and it may be entered here, or in the court below, as the plaintiff may elect, and the judgment of the district court is reversed.

STATE v. HALSTEAD.

(Supreme Court of Iowa. December 12, 1887.)

1. EMBEZZLEMENT—EVIDENCE—DEPOSIT SLIPS—IN HANDWRITING OF DEFENDANT.
Upon the trial of a defendant indicted for embezzlement, he offered in evidence certain deposit slips used in making bank deposits, in the name of the company from which he was charged with embezzling, to show that the funds were properly accounted for. These slips were in his own handwriting, and were the *memoranda* from which the bank made its entries in its books. *Held*, that their exclusion on the ground that the bank-books were the primary evidence of the fact to be shown, and because they were in defendant's own writing, was error.

2. SAME—EVIDENCE—LETTER-PRESS COPIES.
Letter-press copies of letters sent by defendant to his employers, and containing statements of his accounts with them, are not competent evidence to prove an embezzlement by defendant, when it is not shown that the original letters cannot be procured.[1]

3. SAME—DEFENDANT'S ATTORNEY AT PRELIMINARY EXAMINATION DISQUALIFIED TO PROSECUTE.
To allow an attorney, who has acted in behalf of a defendant charged with embezzlement, at the preliminary examination, at which examination defendant was discharged, to afterwards act and appear of record in behalf of the state upon the trial of the same defendant, indicted for the same crime, is error.

Appeal from district court, Union county; JOHN W. HARVEY, Judge.

Defendant, E. O. Halstead, was convicted upon an indictment for embezzlement, and now appeals to this court.

Maxwell & Leonard, for appellant. *A. J. Baker*, Atty. Gen., for the State.

BECK, J. 1. The defendant was employed by the National Lumber Company, and had charge of its business at Creston. His duties required him to make sales of lumber, receive payments made to the company in the course of its business at Creston, make payments and remittances as required in the proper management of the business, and make daily written reports to the company by letter addressed to its place of business in Chicago. The evidence tends to show that all the money received by the defendant was not accounted for by him; the *shortage* being a considerable sum. Certain persons who had purchased lumber of defendant, as agent of the company, made payments therefor to defendant, which, it is claimed, were not entered upon the company's books at Creston, nor reported by defendant.

2. The defendant offered in evidence certain "deposit tickets" which were *memoranda* of deposits made by him to the credit of the company in a bank, wherein it kept an account. The tickets were in defendant's handwriting, and showed the amounts deposited, and the funds deposited as currency, coin, and checks. They were given by him to the bank at the times the deposits were made, and were retained by the bank. They were used as *memoranda* from which the bank's books as to deposits were written up. The defendant insisted that the tickets tended to show that certain sums paid by him by checks, which the evidence of the state tended to show were not accounted for, were in fact deposited in the bank to the company's credit. The evidence was objected to on two grounds: (1) The tickets are secondary evidence, the books of the bank being primary. (2) They are in defendant's own handwriting. It seems that the tickets, as they are the *memoranda* from which the books were written, were in fact the primary evidence, the very first paper showing the correct transaction recorded in the books. They were surely competent, as tending to show the amounts deposited, the date thereof, the funds deposited as checks or cash, all of which, doubtless, would tend to show whether defendant had deposited the funds he had received from the parties

[1] A letter-press copy of a written instrument is but secondary evidence, and is not admissible, without first showing the loss of the originals or giving notice to produce them. Ward v. Beals, (Neb.) 15 N. W. Rep. 858.

making payments to him. We are not to inquire as to the weight of the evidence, but simply to determine its competency. The fact that they were written by defendant does not affect their character as evidence. The bank, by accepting them and entering their contents in its books, adopted them as correct statements of transactions noted therein. We think the district court erred in excluding them.

3. The state introduced letter-press copies of letters, containing the reports of the defendant to the Chicago office of the company. The state made no effort to show that the original letter could not be produced. The letter-press copies are *but copies*, and cannot be introduced if the originals be unaccounted for, and it is not shown that they could not have been produced at the trial. *Lumber Co.* v. *Coal & Min. Co.*, 66 Iowa, 292, 23 N. W Rep. 674; *Hill* v. *Aultman*, 68 Iowa, 630, 27 N. W. Rep. 788; *Delaney* v. *Errickson*, 6 N. W. Rep. 600; *Ward* v. *Beal*, 15 N. W Rep. 353; *Foot* v. *Bentley*, 44 N. Y. 166; Whart. Crim. Ev. (8th Ed.) § 160.

4. The bill of exceptions found in the record recites proceedings had upon the trial in the following language: "On the eighteenth day of May, 1886, when this cause was called for trial, and when the jurors were drawn by the clerk, and taken their seats in the jury-box, J. P. Flick, district attorney for the Third judicial district, arose and, addressing the court, stated that he desired to have the name of James G. Buel, an attorney and member of the bar of Union county, then present, entered upon the record as appearing for the state in connection with the district attorney in the prosecution of said cause. Thereupon the defendant, E. O. Halstead, arose and, addressing the court, objected and protested against the appearance of said attorney Buel as a prosecutor in the case, and stated in substance that Mr. Buel had been his attorney in the preliminary examination held before a justice of the peace at a previous time when he had been arrested under the same charge, and that he had continuously counseled and consulted with said Buel as his attorney in relation to his defense up to within a few weeks of the present term of this court. Thereupon said Buel, attorney, arose and stated to the court that he had at one time been the attorney of Mr. Halstead in a case, but that it was another and different case from the one now about to be tried. The court thereupon, in substance, said that Mr. Buel having been his attorney in another case than this would make no difference, and noted his name on the docket as appearing for the state, and ordered the impaneling of the jury to proceed, and said Buel continuously from that time to the close of the trial actively participated in the trial in behalf of the state, and the said Buel alone, as the attorney for the state, had charge of the state's resistance and objections to defendant's motion for a new trial; that during the whole of said trial, said Buel, as attorney, examined and cross-examined the larger portion of the witnesses for the state, and took generally a leading part in the prosecution of said case."

5. In the motion for a new trial, which was overruled, the defendant bases an objection to the judgment on the grounds of the misconduct of Mr. Buel in appearing against defendant in the prosecution of the case, and in misleading the court, when the objection was made against his appearance, by the statement that he had been defendant's attorney in another and different case. We think the district court erred in not sustaining the motion on these grounds. Mr. Buel, in his statement taken upon the hearing of the motion for a new trial, states that he appeared for defendant upon a preliminary examination, upon the charge of embezzlements, for which defendant was indicted in this case. The defendant was discharged upon the preliminary examination. He states, in effect, that the discharge was upon technical grounds, and for the further reason that, as the lumber company had charged to defendant upon its books the amount of his defalcation, it had recognized him simply as a debtor, who was liable only in an action to recover the debt. He declares

that he obtained no knowledge of any secrets of defendant's connected with the case, and that he withdrew from it for the reason that defendant failed to pay him fully for his services, and that he informed defendant in their last interview that he would not further act as his counsel. The defendant, in an affidavit in support of the motion, makes statements in conflict with those made by Mr. Buel in his testimony.

The courts will give approval in no degree to the conduct of Mr. Buel, as stated and explained by himself. Attorneys at law are not mere mercenaries, who may desert the cause of those for whom they are enlisted, and take service on the other side, for no other reason than that their fees are not wholly paid. They are not bound to serve those who will not pay them, and may withdraw from the service of such; but they cannot take employment on the other side. The reason of this rule is found in the relation of attorney and client, which is one of confidence and trust in the highest degree. The attorney becomes familiar with all facts connected with his client's cause; he learns from his client the weak points of the case, as well as the strong ones. Such knowledge carried by the recalcitrant attorney to the other side would be the sure means of defeat and injustice to the client. If attorneys are authorized, after employment, to take retainers from the other side, the exercise of this authority would be the means of oppression through which clients could be coerced into payment of extortionate fees; and the profession of the law would be brought into disgrace by permitting those who pursue it to take advantage of the secrets of litigants, obtained while the confidential relation of attorney and client existed. The members of the profession must have the fullest confidence of their clients. If it may be abused, the profession will suffer by the loss of confidence of the people. The good of the profession, as well as the safety of clients, demand the recognition and enforcement of the rules we have stated. *Henry* v. *Raiman*, 25 Pa. St. 354; *Gaulden* v. *State*, 11 Ga. 47; *Wilson* v. *State*, 16 Ind. 392; *Price* v. *Railroad Co.*, 18 Ind. 137; *Herrick* v. *Catley*, 1 Daly, 512; *In re Cowdery*, 10 Pac. Rep. 47; Weeks, Attys. at Law, § 120; Whart. Crim. Ev. § 498.

6. No other conclusion can be reached upon the consideration of the bill of exceptions and Mr. Buel's evidence as above stated than that he misled the court below by the statement that he had not been employed in the case before the court. While the statement may possibly be technically true, it doubtless led the court to the belief he had not been so employed by defendant; that he did acquire or could have acquired, through the relation of attorney and client, knowledge of the defense which could be unprofessionally and dangerously employed against defendant in the prosecution of this case. Yet, in fact, while the proceedings upon the indictment and those upon the information constituted different cases, the facts and the charge in each were the same, and the same line of defense was or could be pursued in both. The relation of attorney and client existed with its concomitants of confidence and trust equally in both cases, and in each demanded that defendant should disclose to Mr. Buel all facts connected with the charge against him. It is plain that the ethics of the profession forbid that the knowledge of facts obtained from defendant in one case by Mr. Buel should be used against defendant in the other; but in withholding a full statement of facts when the objection was first made, the court below was doubtless misled into permitting him to appear in the case as an attorney for the prosecution. On this ground the district court should have granted a new trial.

Other questions urged by counsel need not be considered, for the reason that they will not necessarily arise upon another trial.

BAKER v. CHICAGO, B. & Q. R. CO.

(*Supreme Court of Iowa.* December 13, 1887.)

1. RAILROAD COMPANIES—STOCK-KILLING — NEGLIGENCE IN RUNNING TRAIN — SPECIAL FINDINGS.
   In an action against a railroad company for killing cattle, the special findings of the jury showed that defendants were not running their engine which did the damage in a careful manner, but were running negligently and carelessly. *Held*, that the verdict for the full value of the cattle killed could be sustained on this ground, regardless of the controverted question as to whether the fence of the company was properly kept up.
2. SAME—EVIDENCE OF NEGLIGENCE.
   The evidence showed that a train which killed plaintiff's cattle struck them in the night; that it was a moonlight night; that there had been a storm the preceding day, which in many places knocked down the railroad fences, of which the train-men were aware; that, from the position in which the cattle were found, the train must have been running at a high rate of speed. *Held*, that the evidence justified findings that the train was carelessly and negligently managed.
3. NEGLIGENCE—INSTRUCTIONS.
   An instruction that negligence may be established "by showing facts and circumstances *bearing more or less directly upon the fact of negligence*" is not error, when other instructions given in connection therewith make the meaning clear, and state the rule of law properly.
4. TRIAL—RULINGS ON EVIDENCE—HARMLESS ERROR.
   An admission of an answer to an objectionable question, which is entirely favorable to the objecting party, is not prejudicial error.

Appeal from district court, Decatur county; JOHN W. HARVEY, Judge.

This is an action at law brought by G. W. Baker to recover damages for killing and injuring certain cattle, the property of the plaintiff, by being struck and run over by an engine on the defendant's railroad. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

T. M. Stuart, for appellant. *Bullock & Hoffman* and *Young & Parrish*, for appellee.

ROTHROCK, J. 1. The plaintiff alleged in his petition that an engine of the defendant ran upon and killed eight of his steers, and injured another, and that he was thereby damaged in the sum of $495. It is also averred that plaintiff served on the defendant a notice and affidavit as required by law, and that more than 30 days had elapsed after said service, and no payment or settlement had been made for the damages sustained. Judgment was demanded for $495, and no more. This appears to have been the plaintiff's estimate of the actual damages. His estimate given as a witness on the trial amounts to that sum, and there was no evidence in the case showing the actual damages to be less than $385. It will thus be seen that the plaintiff neither claimed nor recovered double the actual damages sustained. The verdict was for $495, and this verdict can be sustained as being for actual damages only. It is true, the cattle were killed and injured by passing upon the railroad track through an open gate at a place where the defendant had the right to fence its road; but there was a second count in the petition in which the plaintiff claimed a right of recovery because the employes of the defendant who were in charge of the engine ran the same in such a reckless and careless manner, and no attempt was made to check the engine, and that the injury could have been avoided by the exercise of the most ordinary care.

Now, while it is true, much of the time during the trial was taken up with a controversy as to whether the defendant was liable because of the gate being left open, and whether the gate was so decayed and rotten and broken that it would have been no barrier against live-stock if an attempt had been made to close it, yet the plaintiff was entitled to recover by proving the alleged negligence in the operation of the engine, no matter how securely the

road might have been fenced. In other words, if the employes in charge of the engine did not properly manage the same, and, by running it with ordinary care, could have avoided injury to the cattle after they were or could have been seen from the engine, the defendant is liable for the actual damages, without regard to the condition of fences or gates, and the jury evidently founded their verdict upon this ground, as shown by the following special interrogatories submitted to them, and the answers thereto: "(6) Does not the preponderance of the evidence introduced in this case show that at the time said cattle were struck and injured by the engine, that said engine was being run in a careful and prudent manner, and at a moderate rate of speed? *Answer.* No. (7) Does not the preponderance of the evidence in this case show that defendant's employes in charge of such engine were using reasonable care and diligence in the operation or running of said engine at the time it struck and injured plaintiff's cattle? *A.* No. (8) Does not the preponderance of the evidence show that defendant's employes, in charge of said engine when it struck plaintiff's cattle, did everything that reasonably could be done to avoid such injury? *A.* No." If the plaintiff had claimed double damages in his petition, or if the verdict had actually been for double damages, there might be room for controversy as to whether the jury may not also have found that the defendant was liable because the gate was open. But as the jury in answering the above special interrogatories found, in effect, that the defendant was liable for negligently operating the engine, these special findings are decisive of the rights of the parties, and it was the duty of the jury to return a general verdict for the plaintiff, without regard to the other questions in the case.

The important question is whether the answers to the special interrogatories are supported by the evidence. Counsel for the defendant insists that they are absolutely without any evidence to sustain them. In determining this question, it is not practicable to set out the evidence of the witnesses. There are always so many facts and circumstances adduced, and which properly enter into the question as to whether an act is the result or offspring of negligence, that it is impracticable to set them out in an opinion. The cattle were killed in the night at from 10 to 11 o'clock. An important question in the case is how far they could have been seen by the persons on the engine whose duty it was to be on the lookout for obstructions on the track. The persons on the engine testified that the night was so cloudy and foggy that an object on the track could not have been seen except at a very short distance. On the other hand, other witnesses testified that it was a bright, clear, moonlight night. It may be said that, as the men in charge of the engine knew that the road was fenced, there was less necessity that they should be on the lookout for obstructions. But there had been a heavy rain and wind storm during the day preceding, which was of such severity as to injure the fences in places, and blow open gates on the line. There was therefore a necessity for more than ordinary precaution in running the engine. The plaintiff and one other witness testified that, from the sound and roar of the engine, they thought it was run at very great speed. The men on the engine testified that it was running at the rate of from 12 to 15 miles an hour. Eight of the cattle were killed at once, or so injured that they were worthless, and another was injured to a considerable extent. They were left lying along the road for a considerable distance. There is quite a conflict in the evidence as to the position of the injured cattle as they were left upon the track. Owing to the heavy rain, the ground was soft, and the tracks of the cattle were visible. We cannot set out the evidence fully as to what was observed by the witnesses who examined the track and marks upon the ground after the injury. This evidence, no doubt, had an important bearing upon the findings of the jury, and as one rises from a careful perusal of it he cannot but say that a man in the exercise of fair judgment and without passion or prejudice might well find from the evidence that the men in charge of the engine should

have, in the exercise of ordinary care, avoided the injury. It is true, the court instructed the jury at the instance of the defendant that proof that a train or engine was run at any rate of speed does not constitute in itself negligence. But this was not a direction to the jury that an unusual and reckless rate of speed was not a proper fact for their consideration in connection with the other facts in determining the question of negligence.

As we have said, the jury were fully warranted in finding that the night was bright and clear, with the moon shining, and, taking into consideration the manner in which the cattle were left upon the road, and the distances apart, and the places where they must have been struck, the finding that the train must have been running at an immoderate speed is supported by sufficient evidence; and we say this in view of the fact that the injury occurred on Sunday night after a severe storm, of which the train-men had full knowledge, and in view of the proven fact that the track was not patroled on Sundays unless in case of apparent necessity therefor.

2. It remains to be determined whether the court erred in any of its rulings upon the branch of the case upon which the verdict was founded. The injury occurred near Leon, Decatur county. The telegraph operator at that point was called as a witness for the defendant, and stated that, when the engine reached that station, the engineer told him that he had better call up the section foreman; "that he had knocked off three or four cattle up there." Thereupon the plaintiff, upon cross-examination, asked the witness for all the conversation with the engineer, and whether the engineer did not say that "he just threw open the throttle-valve and let the engine run into them." This was objected to by the defendant. It is possible that the plaintiff had the right to prove the whole conversation; but whether this is so or not, the witness answered that the engineer did not so state. The defendant was therefore not prejudiced by the cross-examination.

3. The defendant complains because the court refused to give to the jury certain instructions upon the doctrine of contributory negligence. We do not think that the facts of the case required the court to submit that question to the jury.

4. Objection is made to the ninth instruction given by the court to the jury. It is as follows: "(9) And on this branch of the case you are further instructed that the burden of showing negligence on the part of defendant's employes in charge of said engine is on the plaintiff. Yet negligence, like any other fact, may be established by showing facts and circumstances *bearing, more or less directly, upon the fact of negligence.*" The words in italics are said to authorize the jury to find negligence by a less degree of proof than is required by law. Perhaps the instruction is not so clear as it might have been made; but it is one of several instructions upon that question, and when considered with the others of which it appears to be a part, we discover no error in it. Taken alone, it merely advises the jury that the facts and circumstances which go to establish negligence may be such as bear more or less directly upon the issue of negligence. It defines the character of the evidence, rather than its weight or effect. Affirmed.

HASTED *v.* DODGE and another.

(*Supreme Court of Iowa.* December 13, 1887.)

1. SETTLEMENT—ACCEPTANCE OF CHATTELS IN PAYMENT OF DEBT—VALUE.
   A debtor and creditor had an accounting, and the latter agreed to accept certain property of the former in full satisfaction of his debt; but the property was valued by them at eight dollars less than the amount of the debt, which difference was disregarded, and the agreement above entered into. *Held*, that the rule that acceptance of part payment of a debt is no consideration for the release of the whole debt, has no application to such a case, where property is accepted in payment.
2. JUDGMENT—ENTRY PENDING MOTION FOR NEW TRIAL.
   When it appeared that judgment was entered up while a motion for new trial was on file, which motion was overruled, and all the proceedings occurred at the

same term of court, *held*, that the fact that judgment was entered before the determination of the motion, was no ground for reversing the decision on the motion.

3. REPLEVIN—ELECTION TO TAKE MONEY JUDGMENT—DAMAGES FOR RETENTION. In an action for the possession of certain personal property, or its value, if the same cannot be found, the plaintiff elected to take a money judgment, and the jury estimated the value of the property at $150, and the damage for the retention thereof at $100. *Held* that, having elected to take a money judgment, plaintiff was not entitled to damages for retention, and the judgment should be reversed, unless he would remit $100.

Appeal from superior court of Creston; GEORGE P. WILSON, Judge.

This is an action by Enoch Hasted against August Dodge and John Wood for the possession of certain personal property, or for the value thereof, if the same cannot be found. The plaintiff claims to be the owner of the property. The defendant Dodge claims that he held a chattel mortgage on the property, and that he put the mortgage in the hands of his co-defendant Wood, who, as agent, foreclosed the mortgage by seizing and selling the property. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendants appeal.

Maxwell & Leonard, for appellants. *D. W. Higbee*, for appellee.

ROTHROCK, J. 1. The plaintiff claimed that the mortgage had been paid and settled in full, and should have been canceled of record, but that, instead of doing so, the defendant Dodge wrongfully caused the property to be seized and sold. The question as to the payment and satisfaction of the mortgage was the principal one in the controversy upon the trial. Appellants' insist that there was no evidence upon which to found a verdict that the same was ever paid. We do not think this position can be sustained. The theory of the plaintiff is that he had an accounting with Dodge, and they estimated that the plaintiff's property was sufficient to pay the mortgage, excepting eight dollars; that Dodge thereupon agreed to take the property at the face of the mortgage, and call it a settlement in full; and that this was agreed to, and he afterwards bought the property back from Dodge, but that Dodge failed to cancel the mortgage; and it cannot be said that there is no evidence to support the claim made. Counsel for the appellants claim that the release of the eight dollars was without consideration, and that the foreclosure of the mortgage was therefore rightful. The rule that the acceptance of part payment is no consideration for the release of part of a debt not paid can have no application to a case, where, as in this, payment is made in property of a considerable amount, and the debt exceeds in a very small sum the estimated value of the property, and it is agreed to take the property for the debt.

2. It is claimed that the judgment should be reversed, because the same was entered up while a motion for a new trial was on file, and the motion for a new trial was afterwards overruled. This was all done at the same term, and was not prejudicial to the defendants. If the court should have been of the opinion that the defendants were entitled to a new trial, the fact that a judgment had been entered a day or two before the ruling on the motion would not deprive the court of the power to grant the new trial.

3. The plaintiff did not attempt to repossess himself of the property by a writ of replevin. The jury found the property to be of the value of $150, and they found the plaintiff to be entitled to $100 for the unlawful detention of the property. It appears by an additional abstract that the plaintiff elected to take a money judgment. The court thereupon rendered judgment for $250. This was erroneous. The plaintiff having made his election to take the value of the property, is not entitled to any damages for being deprived of its use. The recovery of the full value of the property is a full and complete recompense for all the wrongs of which he complains. Unless the plaintiff, within 20 days, remits in writing $100 of the judgment, the same will be reversed. If within that time the *remittitur* is filed, the judgment to the amount of $150 will be allowed to stand. Modified and affirmed.

MILLER v. MILLER.

(*Supreme Court of Iowa.* December 13, 1887.)

CONTRACT—CONSIDERATION—AGREEMENT BETWEEN HUSBAND AND WIFE.

In an action brought by a wife against her husband upon a contract made between them by which the husband agreed, in substance, to drop all matters of dispute, live as a husband ought to live, and pay to the wife $200 per year, if the wife would remain at his home, drop all matters of dispute, keep his house, and live with him, the petition stated that previous to the making of the contract the husband had been wasting his money on other women, and the contract was made to settle differences arising thereby. *Held*, that the contract was without consideration, and a demurrer to the petition should be sustained. ADAMS, C. J., and SEEVERS, J., dissent.

Appeal from district court, Polk county.

This action was brought by Nancy A. Miller upon a written contract executed to her by the defendant, her husband, Robert S. Miller. The defendant demurred to the petition, and the demurrer was sustained. The plaintiff elected to stand upon her petition, and judgment was rendered against her for costs. She appeals.

Cole, McVey & Clark, for appellant. *C. P. Holmes*, for appellee.

ADAMS, C. J. The contract sued upon is in these words: "This agreement, made this fifth day of August, 1885, between the undersigned, husband and wife, in the interests of peace and for the best interests of each other and of their family, is signed in good faith by each party, with the promise each to the other and to their children that they will each honestly promise to help each other to observe and keep the same, which is as follows, to-wit: All past causes and subjects of dispute, disagreement, and complaint of whatever character or kind shall be absolutely ignored and buried, and no allusion thereto by word or talk to each other or any one else shall ever be made. Each party agrees to refrain from scolding, fault-finding, and anger in so far as relates to the future, and to use every means within their power to promote peace and harmony, and that each shall behave respectfully and fairly treat each other; that Mrs. Miller shall keep her home and family in a comfortable and reasonably good condition, and Mr. Miller shall provide for the necessary expenses of the family, and shall, in addition thereto, pay Mrs. Miller for her individual use $200 per year, payable $16⅔ per month in advance, so long as Mrs. Miller shall faithfully observe the terms and conditions of their contract. They agree to live together as husband and wife and observe faithfully the marriage relation, and each to live virtuously with the other."

The petition demurred to is quite long. We cannot set it out. The defendant demurred upon the ground that it showed the contract to be without consideration and against public policy. His position is that the plaintiff merely agreed to do what by law she was bound to do. The majority think that the defendant's position must be sustained. The writer of this opinion is not able to concur in that view. The petition sets out several reasons and inducements for making the contract. Among other things, it avers, in substance, that the defendant, while improperly spending money upon other women, refused to furnish the plaintiff with necessary clothing, and she had been compelled to furnish it herself by her personal earnings. This the demurrer admits. It appears to the writer, then, that the plaintiff had the right to separate from the defendant, and go where she could best provide for her wants. This right she waived in consideration of the defendant's contract sued upon. The waiver of the right, it seems to the writer, constituted a consideration for the contract; but, as the majority think otherwise, the judgment must be affirmed.

SEEVERS, J., dissents from the majority, and concurs with the writer of the opinion.

RICE v. KAHN and others.

(Supreme Court of Wisconsin. December 13, 1887.)

1. CHATTEL MORTGAGES—DEBT BECOMES PAYABLE WHEN MORTGAGEE TAKES POSSESSION.
If a mortgagee, availing himself of a stipulation in a chattel mortgage, takes possession of the property, or is about to do so, before the debt secured by the mortgage falls due, he thereby confers upon the mortgagor the right to pay the debt and keep his property.

2. SAME—AFFIDAVIT OF RENEWAL—TIME OF FILING.
A chattel mortgage was filed with the town clerk, February 23, 1882. On January 18, 1884, an affidavit was filed in attempted renewal thereof. *Held*, not a compliance with Rev. St. Wis. 655, § 2315, which requires such affidavit to be filed within thirty days next preceding two years from the filing of the mortgage, and that the mortgage was void as to *bona fide* purchasers.

3. SAME—AFFIDAVIT OF RENEWAL—DESIGNATION OF AMOUNT DUE—ESTOPPEL.
An affidavit of renewal of a chattel mortgage stated that the amount of the mortgagee's interest in the property was $130, when, in fact, it was more than that. *Held* that, as against a purchaser who relied on the statement contained in the affidavit, the mortgagee was estopped to claim that more than $130 was due.

4. TENDER — OF MORTGAGE DEBT — EQUIVALENT TO PAYMENT — CONVERSION BY MORTGAGEE.
When the owner of mortgaged chattels, which are about to be taken under the mortgage, tenders the mortgagee the amount sufficient to pay the mortgage debt, and such tender is kept good until the trial, the tender divests the title of the mortgagee as effectually as would a payment of the debt; and the mortgagee, by taking away and selling the property, is guilty of conversion, and the owner may maintain an action of trover against him.

5. SAME—TENDER, WHEN KEPT GOOD.
At the time the mortgagees of certain chattels were about to seize the property under their respective mortgages, the agent of the owner of the chattels exhibited the money due on both mortgages to one of the mortgagees, and to the sheriff who was acting as agent for the mortgagees in making the seizure, offering the same to them, and stating the amount, and the purpose for which it was tendered. He kept the same money in his possession, subject to the order of the mortgagees, until the trial, when he paid the same into court for their use. *Held*, that the tender was kept good.

Appeal from circuit court, Outagamie county.

This case, and the facts which the testimony introduced on the trial tended to prove, are sufficiently stated in the brief of counsel for the plaintiff, as follows: "This is an action of trover, brought by the plaintiff against the defendants, to recover the value of certain property seized by the defendants under certain chattel mortgages. The facts in the case are briefly these: One Henry Flint executed three chattel mortgages, as follows: One dated February 18, 1882, to the defendant Henry Hammel, to secure the payment of $100, which mortgage was filed in the office of the town clerk of the town of Osborn, Outagamie county, Wisconsin, on the twenty-third day of February, 1882, (Henry Flint at that time residing in the town of Osborn;) the second, executed by Henry Flint, then residing in the town of Seymour, in said county and state, to the defendant A. Kahn, to secure the sum of $100, which mortgage, bearing date October 5, 1883, was filed in the office of the town clerk of the town of Seymour, in said county, on the sixth day of October, 1883; the third mortgage was executed by Henry Flint, then residing in the town of Osborn, to one M. D. Newald, bearing date the ninth day of April, 1883, and filed in the office of the town clerk of the town of Seymour, in said county, on the twentieth day of February, 1885. On the twenty-fifth day of February, 1885, Henry Flint sold and executed to John Rice a bill of sale of the same property covered by the three mortgages, which bill of sale was filed in the office of the town clerk of the town of Seymour, on the twenty-sixth day of February, 1885. The said Henry Flint resided in the town of Osborn, in the county of Outagamie, until some time in July, 1883, when he removed to the town of Seymour, and resided there until and after the twenty-fifth of

February, 1885. The plaintiff paid part down in cash upon the property, and was to pay the balance by turning the account that Henry Flint owed him upon the purchase price of the property. Before purchasing the property in question, the plaintiff examined the records of the town clerk of the town of Seymour, where Flint then lived. On the twenty-seventh day of February, 1885, the defendant A. Kahn, acting in his own behalf, and as the agent of Henry Hammel and M. D. Newald, went to the farm of the plaintiff, which was in possession of his tenant, Henry Flint, for the purpose of taking the property in question from the possession of Jerome Flint, residing there with his father, Henry, and in whose care the property had been left by Rice. While there for that purpose, but before he had succeeded in removing the property from the plaintiff's farm, and while in the act of doing so, the witness Mitchell, acting as the agent of the plaintiff, Rice, tendered to him the sum of $250, and thereupon demanded the possession of the property, which was refused. The defendants removed and disposed of the property. The plaintiff, by his agent, Mitchell, kept the identical money so tendered, separate and by itself, and brought the same into court on the trial, and deposited it with the clerk, where it now remains, subject to the order of the defendants." The verdict and judgment were for the plaintiff for the value of the property in controversy. The defendants appeal from the judgment.

Raymond & Haseltine, for respondent. *Leopold Hammel*, for appellants.

LYON, J. On the question whether the plaintiff can maintain this action of trover to recover the mortgaged property, in case he tendered sufficient to pay the mortgage debts which were valid as against him, or whether he is driven to his suit in equity to redeem, we have no difficulty or doubt. If the property in the hands of the plaintiff was only subject to the two mortgages recorded in Seymour; if the amount tendered by Mitchell, in behalf of the plaintiff, at the time the property was about to be taken under the mortgages, was sufficient to pay the debts secured thereby; and if such tender was kept good until the trial,—we hold that the tender divested the title of the mortgagees to the property just as effectually as a payment of the debts secured by the mortgages would have divested it; and if they took, carried away, and sold the same after such tender, against the remonstrance of the owner, they are guilty of a conversion thereof, and the plaintiff (the owner) may maintain this action of trover against them, and recover the value of the property. We do not regard the fact of any importance that the most of the mortgage debts were not due at the time the property was seized. If a mortgagee avails himself of a stipulation in the mortgage to that effect, and takes possession of the mortgaged property, or is about to do so, before the debt secured by the mortgage falls due, he thereby confers upon the mortgagor the right to pay the debt and keep his property. We believe the views above expressed are sustained by the authorities cited on behalf of the plaintiff, and they certainly accord too well with justice and sound sense to be overturned by mere technicality. Substantially the same views were held by this court in *Harder* v. *Hosp*, 34 N. W. Rep. 145. The controlling questions of fact in this case are, therefore, (1) was a sufficient sum tendered on behalf of the plaintiff to redeem the property in controversy? and, if so, (2) was the tender kept good?

1. One of the mortgages under which the defendants claim, was filed in the town clerk's office of the town of Osborn, February 23, 1882, and an affidavit in attempted renewal thereof was filed in the same office, January 18, 1884. This was not a compliance with the statute in that behalf. Rev. St. 655, § 2315. That statute requires such affidavit to be filed within thirty days next preceding the expiration of two years from the filing of the mortgage. This affidavit was not filed within that time, but was filed more than thirty days preceding the expiration of such two years. This failure renders the mortgage void as to purchasers in good faith of the mortgaged property. Hence,

if the plaintiff purchased the property in question without actual knowledge of the existence of such mortgage, he takes the property relieved from the lien thereof. Under the instructions of the court the jury necessarily found that he had no such actual knowledge, and the testimony sustains the verdict in that behalf. It was only necessary, therefore, for the plaintiff to redeem from the two mortgages filed in the clerk's office of Seymour, which were valid, subsisting liens upon the property in his hands.

The amount tendered was $250. The amount actually unpaid on those two mortgages, as between mortgagor and mortgagees, was a few dollars more than that sum. One of those mortgages, however, had been renewed by the filing of an affidavit under the statute, in which it was stated that the amount of the mortgagee's interest in the property by virtue of the mortgage was $130. Taking that sum as the amount unpaid on the mortgage at that date, the amount unpaid on both mortgages is a little less than $250. So the question is whether the mortgagee is bound by such statement in his affidavit of renewal; the plaintiff not knowing that more than $130 was then unpaid on the security. The principal object of the statute is to give notice to all persons interested, at intervals of two years, of the amount of the mortgage debt, and we think that the statements thus made may safely be relied upon by those who contemplate becoming interested in the mortgaged property. In the present case, the plaintiff examined the files in the clerk's office of Seymour, and did rely upon the statement contained in such affidavit of renewal. Under these circumstances, we hold that the mortgagee is now estopped to claim that more than $130 was due at the time he filed such affidavit. It follows that a sufficient sum was tendered to pay the mortgage debts.

2. Was the tender kept good? It was made by Mitchell, the agent of the plaintiff, when the defendants were about to seize the property under the mortgages. The proof tends to show that he exhibited the money to one of the defendants, and to the sheriff who was acting as agent for the defendants in seizing the property; that he offered the same to them, and stated the amount thereof at $250, and the purpose for which it was tendered; that he kept the same money in his possession, subject to the order of the mortgagees, until the trial, and during the trial paid the same money into court for their use. Beyond all question, the tender was kept good.

Some exceptions presenting other questions were taken to the rulings of the court on the trial, but, in the view we have taken of the case, they are not very material. We have examined these rulings to some extent, however, and fail to detect any error.

The judgment of the circuit court is affirmed.

STENNETT v. BRADLEY and another.

(Supreme Court of Wisconsin. December 13, 1887.)

1. HUSBAND AND WIFE—MANAGEMENT OF WIFE'S FARM BY HUSBAND—OWNERSHIP OF CROPS AND STOCK.
   In an action for damages for conversion of certain crops and stock, the evidence showed that plaintiff and her husband had occupied her farm about four years, and that she let the farm to her husband, who carried it on and sold and appropriated the products thereof, and that he used and disposed of the crops and stock raised and kept thereon, during that time, as his own, without interference from plaintiff; also that plaintiff admitted and stated that her husband owned the property. *Held*, that the evidence was sufficient to warrant a finding by the jury that the products of the farm were the property of the husband, and that the wife could not recover.

2. TRIAL—INSTRUCTIONS—REFUSAL TO GIVE CORRECT BUT PREJUDICIAL INSTRUCTIONS.
   When instructions to the jury, refused by the court, would in fact have prejudiced the case of the party proposing them, the refusal is not a ground of complaint, even though the instructions proposed contain correct propositions of law.

8. Same—Stipulations—Instructions.

In an action for the conversion of certain crops and stock, the issue being as to the title to the property, the evidence was not the same as to both. On the trial, however, counsel for both parties stipulated that, "if the jury find for the plaintiff, they shall value the crops taken by the defendant as uncut and standing in the field, and the stock taken shall be valued as at the time when it was taken." *Held*, that the stipulation placed the stock and crops on the same footing, and that a charge to the jury that "the verdict will either be for the whole amount of the property,—its value as standing in the field,—in favor of [plaintiff,] or it will be no cause of action," could not be complained of, in the absence of any request for an instruction preserving a distinction between the two classes of property.

Appeal from circuit court, Columbia county.

This is an action to recover damages for the alleged conversion by the defendants, William Bradley and Thomas McBurnie, of certain sheep, cattle, and grain claimed by the plaintiff, Maria Stennett, as her property The complaint is in the usual form of complaints in actions of trover. The answer of the defendants is (1) a general denial, and (2) certain facts alleged by way of estoppel. It appeared on the trial that the plaintiff was the owner of a farm in Columbia county, upon which she and her husband, one William Stennett, resided. The grain in controversy was grown upon this farm, and the stock was kept upon it. The question of the ownership of this property was a disputed one on the trial. The plaintiff testified that she was such owner. There was other testimony, however, tending to show that the property belonged to her husband. The defendants purchased the property of the husband. The case is further stated in the opinion. There was a verdict and judgment for the defendants. Plaintiff appeals from the judgment.

Lander & Lander, for appellant. *J. H. Rogers*, for respondent.

Lyon, J. 1. In the brief of counsel for the plaintiff, we find the broad unqualified statement that there is no testimony in the case contradicting her ownership of the property in question, or tending to show that her husband owned, or ever claimed to own, the same. This is a strange and unaccountable misapprehension of the testimony in the case. The testimony tends to show that the plaintiff and her husband had occupied her farm about four years, and that she let the farm to her husband, who carried it on, and sold and appropriated the products thereof, and that the husband used and disposed of the crops and most of the stock raised and kept on the farm during that time as his own, without interference by the plaintiff. Also that the plaintiff admitted and stated that her husband owned the property; and there was proof of her acts in respect to it, which were only consistent with the hypothesis that her husband was such owner. The testimony is amply sufficient to sustain a special finding which would bring the case within the rule of *Lyon* v. *Railway Co.*, 42 Wis. 548. In that case, circumstances similar to those developed here were held to vest the products of the wife's farm in the husband, so that she could not call upon him to account therefor, or to maintain an action of trespass for injuries thereto. There is other evidence tending in the same direction which it is unnecessary to state. We can conclude that the verdict, which necessarily was to the effect that the husband was the owner of the property in controversy, is sustained by the testimony.

2. Certain facts were pleaded in the defendant's answer, which it was claimed should estop the plaintiff to deny that her husband was the owner of the property. It seems, also, that some claim was made upon the trial that the husband, in selling the property to the defendants, was acting as the authorized agent of the plaintiff. Several instructions were proposed on behalf of plaintiff on the subjects of estoppel and agency, but the court refused to give them, and said, in substance, that these quuestions of estoppel and agency were not in the case; that the case turned entirely upon the question of ownership; and that, unless the jury found that the husband was the owner of the property, the plaintiff was entitled to a verdict for its value. It is perfectly

obvious that the instruction given was most favorable to the plaintiff, and rendered entirely unnecessary the instructions proposed and refused. Had the court retained the questions of estoppel and agency, it would have given the defendants a chance to prevail in the action, although the jury might find that the property in question really belonged to the plaintiff. But, by eliminating those questions from the case, the court lessened the chances of the defendants to defeat the action. Of course, this was favorable to the plaintiff, and she has no ground of complaint because the court refused to give her proposed instructions, even though they contain correct propositions of law.

3. Error is assigned upon the following passage in the charge to the jury: "The verdict will either be for the whole amount of the property,—its value as standing in the field,—in favor of Mrs. Stennett, or it will be no cause of action." The objection to this instruction is that it places the crops and the stock on the same footing, and was a ruling that the plaintiff could not recover for the one unless she was entitled to recover for the other also; whereas the testimony relating to her title was not the same in both cases. There is some apparent force in this objection; but there was a stipulation made by the parties on the trial, and entered of record, which seems to obviate any objection to the instruction. Such stipulation is as follows: "It is agreed by counsel for the respective parties that, if the jury find for the plaintiff, they shall value the crops taken by the defendants as uncut and standing in the field, and the stock taken shall be valued as at the time when it was taken." We think this stipulation places the stock and crops on the same footing just as effectually as did the instruction complained of. If the plaintiff desired to preserve a distinction between the two classes of property after having made the stipulation, it was incumbent upon her to ask the court to give an instruction which would accomplish that object. This she failed to do.

The foregoing observations dispose of all the alleged errors which are deemed worthy of consideration adversely to the plaintiff. The judgment of the circuit court is affirmed.

COOPER v. FINKE and others.

(*Supreme Court of Minnesota.* December 16, 1887.)

1. POWERS—OF ATTORNEY—TO CONVEY "ALL PERSONAL AND REAL PROPERTY"—CERTIFICATE OF MORTGAGE SALE.
   A power of attorney "to grant, bargain, sell, and convey any and all personal or real property," gives authority to sell and convey, by assignment of the certificate of sale, the interest or estate which a purchaser at a mortgage sale has in the premises prior to the expiration of the period of redemption.

2. DEED—IMPEACHMENT OF RECITALS—PAROL EVIDENCE.
   In an action to set aside a certificate of redemption executed by a sheriff, its recitals may be impeached by parol evidence, showing that no redemption was in fact made, and no money paid to the sheriff.

3. SAME—IMPEACHMENT FOR FRAUD.
   So, in an action to set aside a deed on the ground that it was obtained by fraud, parol evidence of the fraud is admissible to impeach the deed.

(*Syllabus by the Court.*)

Appeal from district court, Nobles county; PERKINS, Judge.

Daniel Rohrer, for Cooper, respondent. *Geo. W. Wilson*, for Finke and others, appellants.

MITCHELL, J. The record chain of title to the land in controversy, as far as here material, is as follows: Halverson, the owner of the whole quarter section, executed to the Edinburgh American Land Mortgage Company a mortgage for $400, and a second mortgage to plaintiff for $65, and subject to

these two mortgages subsequently conveyed one 80 to the defendant Edward Cooper, and the other 80 to defendant Nelson, who conveyed to the defendant Finke, taking back a purchase-money mortgage. Default having been made in the first mortgage, the Edinburgh Company foreclosed, and on August 2, 1884, bid in the premises. In April, 1885, this company, by one Paton, as its attorney in fact, assigned the certificate of sale to plaintiff. On May 13, 1885, defendant Miller, as sheriff, executed to defendant Nelson a certificate of redemption from the mortgage sale. On May 26, 1885, Nelson paid to plaintiff the second or $65 mortgage, receiving from him a written release or satisfaction. The last fact is, however, unimportant, except as explaining a subsequent transaction. In September, 1885, plaintiff executed to Nelson a quitclaim deed of the premises. The contest is really between plaintiff and Nelson, as Finke, the only other appellant, must stand or fall with the title of his grantor, Nelson.

Plaintiff's pleadings are somewhat irregular, part of the relief which he asks being set up in the reply, which ought properly to have been set up in a supplemental complaint. But as no objection on that ground was made, either here or in the court below, we shall consider the action, as it has been by both parties, as one brought by plaintiff claiming title under his assignment of the certificate of mortgage sale, to set aside as clouds on his title the certificate of redemption executed by the sheriff, and the quitclaim deed executed by the plaintiff to the defendant Nelson,—the former on the ground that it is false, and was executed without any redemption having in fact been made; and the latter on the ground that it was obtained by fraud.

1. Of Paton's authority under his power of attorney from the Edinburgh Company to execute this assignment, there can be no question. It authorizes him "to grant, bargain, sell, and convey * * * any or all *personal or real property*, now or hereafter owned or held by the said Edinburgh, etc., Company, and in their name to make, execute, acknowledge, and deliver good and sufficient deeds and conveyances for any real estate so sold, either with or without covenants of warranty."

Under this it is unimportant whether the interest of the company in the land under the certificate of sale was real or personal property. The power to sell is ample in either view. It was, however, an interest or estate in the land capable of being conveyed by deed. *James* v. *Wilder*, 25 Minn. 305; *Lindley* v. *Crombie*, 31 Minn. 232, 17 N. W. Rep. 372.

2. We turn now to the certificate of redemption issued by the sheriff to Nelson. The history of the matter is briefly this. Both plaintiff and Nelson (plaintiff first, and Nelson afterwards) had applied to J. C. Easton, the agent of the Edinburgh Company for certain purposes, to procure an assignment of the certificate of sale on the mortgage foreclosure. On the thirtieth of March, 1885, an arrangement seems to have been made between Nelson and Easton, by which the latter was to procure for the former such an assignment, if Cooper (who had applied first) did not take it, for a bonus of $40 over and above the amount then necessary to redeem, which was $593.75. Nelson paid these two sums to Easton, who gave him two receipts,—one acknowledging the receipt of $40, for furnishing an assignment of the certificate; and the other for $593.75, for the redemption of the land from the mortgage sale; the understanding being that if Easton procured Nelson the assignment he was to retain both sums for the purpose; but, if he did not obtain it, he was to return the $40, and Nelson might get a certificate of redemption from the sheriff, on presentation of the receipt for $593.75. Easton never in fact obtained for Nelson any assignment, one having been given, as already stated, to plaintiff. Easton then returned to Nelson the whole of the money, $613.75, by express, which he accepted, and took from the express office on the thirteenth of May, 1885, and appropriated to his own use. On the same day, on presentation of Easton's receipt of March 30th for the

$593.75, he induced the sheriff to execute and deliver to him the certificate of redemption in question; certifying that he had redeemed by paying $593.75, but in fact he had not and did not pay a cent.

Considerable was said, both in the court below and here, as to the effect of these transactions with Easton, and as to the extent of Easton's authority as agent for the Edinburgh company. The questions are wholly immaterial and unimportant, for the reason that whatever was done with Easton was undone by Nelson's accepting and taking back his money. It is wholly unimportant that he deferred (evidently purposely) taking the money out of the express office until after he procured the certificate of redemption from the sheriff. He is estopped from claiming anything whatever from what occurred with Easton. He must stand or fall on what took place between himself and the sheriff. That the certificate of redemption issued to him by the sheriff is false and void needs no argument. The sheriff had no authority whatever to issue it. No redemption whatever was in fact made. In contending that, in an action to set aside the certificate for this reason, its recitals cannot be contradicted by parol evidence, the appellant has certainly forgotten a very elementary rule of evidence. Parol evidence is always admissible in such cases to show that an instrument is altogether void, or that it never had any legal existence or binding force. The rule which allows a party to impeach a written instrument as illegal and void is as old as the other general rule which disallows parol evidence to contradict or vary a written instrument, and both are alike conducive to the ends of justice,—the one for giving security and effect to valid instruments, and the other for annulling and putting an end to those that are illegal and ought never to have existed. If this power of impeaching such instruments by means of extrinsic evidence did not exist, the other rule would be a mere shelter for fraud. 1 Greenl. Ev. § 284; 2 Phil. Ev. 682.

3. After Nelson discovered that plaintiff had procured from the Edinburgh Company an assignment of the certificate of sale, he prepared a quitclaim deed, and sent it to one S. E. Hagadorn, in Yates, New York, where plaintiff lived, with instructions, written in pencil upon the deed, to the effect that the release of the mortgage (the $65 one) which plaintiff had previously executed was not sufficient under the laws of this state, and that it required a quitclaim deed to discharge the mortgage of record; and asking him to have plaintiff execute it, and then return it. In the absence of S. E. Hagadorn, his son received the letter, and took the deed to plaintiff, and communicated to him these instructions or statements as to the alleged purpose for which the deed was desired. Cooper, who was an illiterate old man, who could neither read nor write, not knowing the contents or legal effect of the instrument, believing these statements to be true, and supposing it to be a mere release of the mortgage to correct the one previously given, executed the deed without receiving any consideration whatever. Hagadorn then returned it to Nelson, who, after erasing the penciled instructions, placed it on record. That such a state of facts justified the court in finding that this deed was obtained by fraud is too plain to merit discussion.

The deed could be impeached by parol evidence of all these facts for the same reason already suggested in regard to the impeachment of the certificate of redemption. It is unimportant that these false and fraudulent representations were communicated by Hagadorn the younger, instead of Hagadorn the elder, to whom Nelson sent them. They were sent for the purpose of being communicated to plaintiff, in order to get him to sign the deed; they were so communicated; and through them Nelson procured the deed. The point that parol evidence was inadmissible to prove what instructions Nelson sent is without force, in view of the fact that the written originals were erased from the deed on its return. What has been said covers all that there is in defendant's 25 assignments of error that is entitled to any special consideration.

There was no error in the rulings of the court during the trial. The findings of fact are abundantly supported by the evidence, and the conclusions of law warranted by the findings of fact. Judgment affirmed.

RILEY *v.* MITCHELL, Adm'r.

(*Supreme Court of Minnesota.* December 16, 1887.)

1. APPEAL-BOND—FORM—SUFFICIENCY.
   If the condition of an appeal-bond substantially covers the provisions of the statute, and secures to the respondent all that the law designed for him, it is sufficient, although not in the exact words of the statute.
2. SAME—BOND ON APPEAL FROM PROBATE COURT—ONE SURETY.
   In an appeal from the probate court to the district court, under Gen. St. c. 53, a defect in the appeal-bond in being executed by only one surety does not go to the jurisdiction of the appellate court over the subject-matter of the appeal, but is a mere irregularity, which the respondent may waive, or which the district court may allow to be remedied by amending the bond or filing a new one.

(*Syllabus by the Court.*)

Appeal from district court, Stearns county; COLLINS, Judge.

H. S. Locke and *Bruckart & Reynolds*, for Jane Riley, respondent. *Searle & Lamb*, for Mitchell, appellant.

MITCHELL, J. The plaintiff appealed to the district court from an order of the probate court disallowing her claim against the estate of defendant's intestate for services rendered by her to the deceased in his life-time. The appeal was tried on its merits; but upon appeal to this court, the order of the district court was reversed, and a new trial awarded. 29 N. W. Rep. 588. Upon the case being again reached for trial in the district court, but before the trial commenced, the defendant moved to dismiss the appeal, on the ground, then for the first time raised, that the district court had never acquired jurisdiction of the cause, for the reason that no appeal had ever been taken and perfected as required by law. That an appeal in such cases is governed by the provisions of Gen. St. c. 53, was decided in *Auerbach* v. *Gloyd*, 34 Minn. 500, 27 N. W. Rep. 193. That this appeal was taken, or attempted to be taken, in due time, and that the notice of appeal and the filing and service thereof, together with the order of the probate court thereon, were all in due form, and constituted a sufficient application for an appeal under the statute, is not seriously questioned, and, indeed, could not be. The object of attack is the appeal-bond. In drawing it, the plaintiff evidently had in mind the provisions of Gen. St. c. 49. Its condition is that the appellant "shall prosecute her appeal *with due diligence to a final determination*, and pay all *costs* that may be adjudged against her in the district court," while the condition required by chapter 53 is that the appellant "shall prosecute his appeal *with effect*, and pay all *damages and costs* which may be awarded against him on such appeal." In cases of this kind, if the bond substantially covers the provisions of the statute, and secures to the respondent all that the law designed for him, it is sufficient, although not in the exact words of the statute. *Kasson* v. *Estate of Brocker*, 47 Wis. 79, 1 N. W Rep. 418; *Doolittle* v. *Dininny*, 31 N. Y. 351; *Creighton* v. *Harden*, 10 Ohio St. 579; *Bentley* v. *Dorcas*, 11 Ohio St. 398. In the present case there is no substantial difference between the condition of the bond given and that required by the statute. The words "with effect" evidently do not mean to a successful issue in favor of the appellant, but merely that he will prosecute the appeal with due diligence to a final determination. The word "damages," as used in the statute, is evidently synonymous with "costs," because, in the very nature of things, the only damages that could be awarded against appellant "on such appeal" would be the taxable costs. *Kasson* v. *Estate of Brocker*, *supra*.

A more substantial objection to the bond is that, although approved by the

probate judge, it was executed by the plaintiff and only *one* surety, while the statute requires a bond with *sureties*. *Blake* v. *Sherman*, 12 Minn. 420, (Gil. 305;) *State* v. *Leslie*, 30 Minn. 532, 16 N. W. Rep. 408. Defendant's contention is that the jurisdiction of the district court in such matters being appellate, it can obtain jurisdiction of the subject-matter only by an appeal perfected in the manner provided by law; that, unless all the requirements of the statute in every particular are pursued with exactness, no jurisdiction is conferred upon the appellate court. There are cases that hold thus strictly, but such a doctrine is technical in the extreme, and is characterized with a degree of illiberality which does not obtain anywhere else in the practice in civil actions, and is not in accordance with the maxim that appeals from inferior tribunals are favored in law. It is undoubtedly true (and most of the cases cited by defendant only go that far) that jurisdiction cannot be conferred, even by consent on courts, over a subject-matter on which the law does not confer it, as, for example, on a justice of the peace over a case involving the title to real estate. But it is quite another thing to hold that every irregularity or defect in matters intended solely for the benefit of the respondent, such as the appeal-bond, goes to the jurisdiction of the court over the subject-matter. It seems inconsistent that, when the original jurisdiction of a court is invoked over a subject-matter, within such jurisdiction it should have power, in furtherance of justice, to amend any process, pleading, or proceeding, and yet, when its appellate jurisdiction is invoked under like circumstances, it should have no such power in any case. It is unnecessary here to determine just what defects or irregularities in appeal proceedings are jurisdictional, and what are not. Confining ourselves to the facts of this case, we are of opinion that where the other proceedings in an appeal from probate court are in due form a defect in the appeal-bond, filed in due time, does not go to the jurisdiction of the district court over the subject-matter of the appeal, but is a mere irregularity, which the respondent, for whose benefit alone the bond is required, may waive, or which the appellate court may allow to be remedied, either by amending the bond or giving a new one. Such a rule is so eminently just and reasonable that many states have adopted it by statute as applicable to all appeals in judicial proceedings from one court to another. While we have no such provision expressly applicable to appeals from probate court under chapter 53, yet we have substantially similar ones as to appeals from justice's court to the district court, and from the district court to the supreme court; and a somewhat similar power seems to be conferred on the district court in case of appeals from the probate court under chapter 49, all of which goes to show that the general policy and theory of our statutes relating to appeals in judicial proceedings is that the defect in the appeal-bond does not go to the jurisdiction, but may be waived by the respondent, or remedied in the appellate court. In a special proceeding, where the statute makes the right of the appellate tribunal, not strictly judicial in its character, dependent upon the doing of certain acts as an essential prerequisite, of course a different rule might obtain. See *State* v. *Leslie*, *supra*.

In the present case, the defendant, having once gone to trial in the district court on the merits, and afterwards argued the appeal in this court, without raising any objection to the bond, the district court might well hold that he had waived the defect, and for that reason denied his motion to dismiss the appeal. Order affirmed.

COLLINS, J., having tried the case in the court below, took no part.

MASON *v.* TAYLOR.

(*Supreme Court of Minnesota.* December 20, 1887.)

1. PRINCIPAL AND AGENT—GENERAL AGENCY.
Contract examined and construed. *Held* to create a general agency.
2. SAME.
Facts, independently of said contract, *held* sufficient to warrant the findings in plaintiff's favor.

(*Syllabus by the Court.*)

Appeal from district court, Otter Tail county; BAXTER, Judge.

Chas. D. Kerr, for Mason, respondent. *Clapp & Woodard*, for Taylor, appellant.

COLLINS, J. This is an action to recover compensation for legal services alleged to have been rendered by plaintiff, an attorney residing at Fergus Falls, for defendant, a resident of Scotland. He contends that said services, the value of which is not in dispute, were performed for Miller & McMaster, a real-estate firm at said Fergus, and not for him. That they were so performed in connection with certain investments made for defendant, and property owned by him, the care of which he had intrusted to said firm, is conceded.

While a determination of the purport and effect of the contract under which Miller & McMaster acted is not, in our judgment, necessary to an affirmance of the conclusions of the court below, it was the foundation of all that subsequently transpired, and must therefore characterize the nature of the relations which actually existed between the three parties thereto,—this defendant, of the first; Hay, of the second; and Miller & McMaster, of the third part,—in all that was done under it, and may well be discussed, and the *status* of each party settled. In brief, it bestowed upon Miller & McMaster plenary power to invest in town lots and farm lands in Minnesota and Dakota such sums of money as defendant and his undisclosed constituents might see fit to transmit through Mr. Hay; to erect buildings thereon, rent the same, and collect said rents; to insure said buildings; and to sell such property, without consulting their principal, whenever they could do so at a profit. Titles were to be taken in Taylor's name; the instruments thereof to be sent him when recorded. It was to continue for four years, and then, within one year after notice, the firm was to realize from their investments the defendant's capital and return it to him. This they covenanted to do, thus becoming guarantors of the principal intrusted to them. Taylor reserved no rights whatsoever, but all was left to the judgment of the men with whom he was dealing, who were to be compensated by retaining one-fourth of the excess of the earnings over 10 per cent. per annum upon the capital, and in case of sale under notice to realize and account for one-fourth of the profits derived, which should be in full to them for their own and their attorney's charges and expenses.

The pertinent inquiry is, did this in fact constitute Miller & McMaster the general agents of Taylor? The relation of principal and agent arises whenever one authorizes another to do acts or make engagements in his name, and is of several distinct kinds. A general agency exists when there is a delegation to do all acts connected with a particular trade or business. Story, Ag. § 17. It is true that in the case at bar the agents guarantied a return to Taylor of his entire capital; that they were not to receive compensation except from the profits; and that, in case of sale upon notice after four years, a share of the profits should cover all expenses, as well as their own pay. But this did not vary or limit the authority delegated by defendant to his agents to do all and every act requisite to the particular business contemplated—the investment of money in land, the sale thereof, the erection of houses, the insurance, leasing, and collection of rents. They simply, as such agents, undertook to keep the capital unimpaired by guarantying its return, and by looking to its

earnings for their remuneration,—not an uncommon thing to do in some lines of trade, and in nowise changing the relationship. *Dows* v. *Morse*, 62 Iowa, 231, 17 N. W. Rep. 495. Of this feature of the contract plaintiff had no knowledge until after he performed the services. If he had, it would have been sufficient to prevent recovery in this action; but such knowledge would not have made the agency itself anything but general. It can belong to no other class. But, independently of the fact that a general agency was created, the finding for plaintiff must be upheld. Having no knowledge whatever of the contract, plaintiff was justified in relying upon the apparent authority enjoyed by defendant's agents.

The principal resided in Scotland, carried on his large business through the firm of Miller & McMaster for over three years. They bought and sold, they built and leased houses, they did a general real-estate business, in his name; investing about $200,000. Titles were examined by plaintiff; he was consulted generally in regard to the matters that might be expected to arise in such an extensive business; and lawsuits in which Taylor was defendant as well as plaintiff were managed by him professionally from the beginning of such agency to its termination. In so employing plaintiff, the agents were acting within their apparent authority, and their principal is liable. *Gillis* v. *Railroad Co.*, 34 Minn. 301, 25 N. W. Rep. 603. They were keeping within the general scope of their authority, although acting contrary, perhaps, to private instructions. This made their principal liable, and such a rule is necessary to prevent fraud, and encourage confidence in dealing. 2 Kent, Comm. par. 620.

Order refusing a new trial is affirmed.

WALKER and others *v.* CROSBY and others.

(*Supreme Court of Minnesota.* December 20, 1887.)

1. CONTRACT—PERFORMANCE.
   The facts in this action, as found by the trial court, examined, and held not to warrant its conclusions of law.
2. APPEAL—REMAND.
   The judgment of said court vacated and set aside, and the case remanded, with instructions to cause judgment to be entered for plaintiff in accordance with the views herein expressed.

(*Syllabus by the Court.*)

Appeal from district court, Nobles county; PERKINS, Judge.

Geo. W. Wilson, *P. E. Brown*, and *L. S. Nelson*, for Crosby and others, respondents. *Daniel Rohrer*, for Walker and others, appellants.

COLLINS, J. Action to satisfy and discharge of record two judgments,—one for $402.97, the other for $150.59,—entered and docketed in the clerk's office for Nobles county, Minnesota, on the tenth day of January, 1885, in favor of defendant Crosby, and against plaintiff Harris, and to restrain and enjoin the collection thereof by the defendants, Crosby, his alleged assignee, Mellick, and Miller, the sheriff of said county. Upon the findings of the trial court, judgment was entered in defendants' favor, from which plaintiffs appeal.

The sole question is, are the conclusions of law, as determined by said court, justified by its findings of fact? and for that reason these facts must be stated at length.

For some years prior to the time said judgments were entered and docketed, the plaintiff Harris owned 160 acres of land in said county, upon which he resided, with his family, and which he had, in the year 1880, mortgaged to the American Freehold Mortgage Company. About April 1, 1885, said Harris, wishing to pay the amount of said mortgage, said judgments, and certain taxes then due and delinquent upon his said land, applied to plaintiff

Day and defendant Thompson, then copartners in the banking business, for a loan upon his said land sufficient to liquidate and satisfy said claims. These parties then had in their possession money to loan belonging to plaintiff Walker, and the court finds that "it was thereupon agreed by and between said Thompson, Harris and Crosby, among other things, that the said Day & Thompson should make or negotiate a loan to said Harris on the said premises sufficient in amount to pay off and satisfy the amount due on said mortgage, * * * to free said land from taxes thereon for the years 1883 and 1884, to pay said judgment for $402.97, in favor of said Crosby and against Harris, and the expenses of making said loan," in all $1,315. It is further found as a fact, that "it was also agreed that no part of the amount of said loan should be paid directly to said Harris, but the same should be applied by the said Day & Thompson to pay and satisfy said mortgage, judgment, taxes, and expenses." The judgment for $402.97 was held by Crosby to indemnify and protect him from loss by reason of his liability to the firm of D. M. Osborne & Co. upon a judgment for over $900, in their favor, and against said Thompson and said Crosby, but which was in fact the debt of Thompson only. So these two persons, Crosby and Thompson, agreed,—again using the words of the trial court,—"that, upon Thompson paying the amount due on said judgment for $402.97 upon the judgment recovered by D. M. Osborne & Co., * * * against said Thompson and Crosby aforesaid, and having the same applied in part payment thereof, that the said Crosby would satisfy and discharge said $402.97 judgment of record." There was also an agreement between the debtor and creditor about the securing of the smaller judgment; but as the court finds it was not consummated, no further mention need be made of it.

In pursuance of the agreement between Harris, Crosby, and Thompson as to the loan, the former, with his wife, duly executed, acknowledged, and delivered to Walker a mortgage upon his said land to secure the payment of the sum of $100, which was duly recorded April 22, 1885. This sum being insufficient to cancel these various liens, Mr. and Mrs. Harris executed, acknowledged, and delivered to said Day another mortgage upon said premises for the sum of $135. Thereupon the mortgage to the Freehold Company was settled, the delinquent taxes and expenses paid, and to Thompson then was paid an amount sufficient to liquidate the judgment in question. Although the findings are silent upon the point, it is safe to presume that the money was disbursed by Day & Thompson, as had been stipulated when the loan was negotiated. Thereafter Thompson refused to account to Crosby for the money secured by him, and refused to apply it, or any part of it, to the partial payment of the Osborne judgment. The judgment against Harris remains unsatisfied of record. It has been assigned by the judgment creditor to the defendant Mellick, who has caused an execution thereon to be issued and delivered to the defendant sheriff, who has levied upon and offered for sale the land before mentioned. Hence this action.

Several questions have been discussed by counsel, which we think need not be commented upon in disposing of the case. The vital one to be considered is the legal effect of the agreement between Crosby, the judgment creditor, Harris, his debtor, and Thompson, a member of the firm which was to lend or negotiate a loan of money sufficient for the desired purposes. This agreement has three prominent features: *First*, that the parties agreed that Harris should mortgage his land for sufficient to pay off the incumbrances and liens, including the judgment; *second*, that Harris should not receive, handle, or disburse the funds; and, *third*, that Day & Thompson, the bankers, should see that the several creditors were duly paid. To this Harris and Crosby consented, and it is wholly immaterial in determining the rights of the former to discuss the differences which may have arisen between the other parties to the compact. What was required of him? Was he to see that Day & Thompson

paid Crosby, or did his liability as a participator in the agreement end when he delivered a properly executed mortgage to Day & Thompson? We think there can be but one answer to the interrogatory. His duty to Crosby ceased when he placed the mortgage in the hands of the bankers. When he did all that was exacted of him by the terms of the agreement under which it was made, assented to by those specially interested in the payment of the judgment, he could do no more. He had been deprived of the right of personally distributing the funds among his creditors, and to others selected by and satisfactory to Crosby had been delegated the authority to pay over the money in his stead. He ought not and cannot be held responsible for the delinquencies of those designated by Crosby to make the payments.

Again, it will be seen that Thompson and Crosby made another contract, of which Harris was undoubtedly ignorant,—that the former was to apply the amount received as settlement of this judgment in partial discharge of the Osborne debt. To do this, Thompson must first receive the same from Day & Thompson, and this he was permitted and authorized to do by Crosby, when the latter stipulated that Thompson (not the firm of which he was a member) should remit the money to Osborne & Co. If anything more is needed to indicate that Harris' obligation ended as before stated, it may be found in the fact that the money provided by Harris by mortgaging his home, designed by him to meet the judgment left in the bank at Crosby's request for proper application, has, by the latter's acquiescence, gone out of the possession of Day & Thompson, and is beyond their control as a firm. It seems hardly necessary to add that Harris, having provided for the payment of the judgment in the manner directed by his creditor, the plaintiffs are entitled to have it discharged and satisfied of record.

The judgment appealed from is vacated and set aside, and the case remanded, with instructions to cause judgment to be entered for plaintiffs in accordance with the views herein expressed.

KRAGER v. PIERCE.

(*Supreme Court of Iowa.* December 10, 1887.)

1. TROVER AND CONVERSION—EVIDENCE.
In an action for conversion of a bank-check, it appeared that defendant gave plaintiff the check in consideration of a warranty deed from plaintiff of certain land; but before plaintiff had the check cashed, and when about to indorse it, defendant snatched it from her hands, claiming that she had no title to the land conveyed, and put the deed in her hands; but plaintiff shortly returned the deed, and the evidence was not satisfactory to show that plaintiff voluntarily accepted the deed, and rescinded her bargain. *Held*, in an action for the conversion of the check, that plaintiff was entitled to the relief asked.

2. TRIAL—CROSS-EXAMINATION—EXTENT OF.
Two witnesses testified, upon their direct examination, as to occurrences in a bank and at their own home, and it appeared by other evidence that they were also at a lawyer's office, and that at all of these places business connected with the subject in controversy was transacted. *Held*, that the refusal to permit cross-examination as to what occurred at the lawyer's office, which was not touched upon in the direct examination, was not error.

Appeal from district court, Woodbury county; G. W. WAKEFIELD, Judge.

This is an action at law by which the plaintiff, Catherine Krager, seeks to recover the value of a bank-check which she alleges the defendant, John Pierce, unlawfully obtained from her, and converted the same to his own use. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

Swan & Pardoe, for appellant. *S. F. Lynn* and *J. N. Weaver*, for appellee.

ROTHROCK, J. The undisputed facts of the case are as follows:

On the second day of June, 1886, the plaintiff was the owner of a tract of land of about six acres, situated a short distance from Sioux City. The defendant was president of the Sioux City & Des Moines Railroad Company, a corporation which was then engaged in procuring the right of way and grading a railroad, which was surveyed through the plaintiff's land. The Chicago, Milwaukee & St. Paul Railroad Company were also engaged in procuring the right of way and building a road on or near the same line. There was a rivalry between the two companies as to acquiring the right of way, as both desired to occupy substantially the same line. Some time in May, 1886, the Chicago, Milwaukee & St. Paul Company instituted proceedings under the statute, and condemned a right of way across the plaintiff's land. The proceedings did not describe the line of road by giving the points where it entered the land, and the course and distance through it. The whole tract was described, and the line was designated as a strip 100 feet wide through the land; being 50 feet on each side of the center line of the railway, as then located across the land.

The defendant, Pierce, was president of the Sioux City & Des Moines Railroad Company, and was actively engaged in its interest. On the second day of June he went to the plaintiff's residence on the land, with a right of way deed to his company, with covenants of general warranty, prepared for the plaintiff's signature and acknowledgment. This deed described the right of way in the same manner as the proceedings condemning the land, except the name of the grantee. It was a grant of the right of way over the land of a strip of 100 feet in width, being 50 feet on each side of the center line of the Sioux City & Des Moines Railroad, as the same was then located over and across the land. The plaintiff executed and acknowledged the deed, and delivered it to the defendant, for the agreed price of $500; and, instead of paying the plaintiff in currency, he drew his personal check for the amount upon the Sioux National Bank, of Sioux City, payable to the plaintiff, and delivered it to her. The defendant returned to Sioux City. On the same day, and before the close of banking hours, the plaintiff and her daughter went to the bank and presented the check for payment. She was advised by an officer of the bank that it would be necessary for her to sign her name on the back of the check. She was provided with a pen and ink, and just as she was about to sign it the defendant came in the room, and walked up behind the plaintiff, and reached over her shoulder, and took the check. He did not speak to the plaintiff until after he had the check in his possession, and he then told her he wanted her to go with him to an attorney's office. She complied with this request, and at the attorney's office she was advised that she had no title to the land which she had conveyed for right of way. The deed was redelivered to her. It does not appear that she agreed to rescind the contract. She said but little, if anything, but took the deed, and went home. Within a day or two thereafter she sent the deed back to the attorney, and left it with some one in his office. It was allowed to lie on a table in the office until this suit was commenced, when it was taken charge of by the attorney. There is no question but that the defendant had funds in the bank, and the amount of the check would have been paid to the plaintiff if the defendant had not obtained possession of it.

Pierce did not know, when the deed was delivered to him, where the located line of the Chicago, Milwaukee & St. Paul road was, nor that said company had condemned the right of way. He stated as a witness on the trial that he did not think that the line of his own road had been permanently located through the land at that time. But it was a fact that the condemned

land covered part of the land upon which the Sioux City & Des Moines Company desired to construct their road, so that the two strips of 100 feet width would overlap each other about 50 feet, which would leave but 50 feet of right of way for defendant's road.

The defendant averred in his answer, in substance, that the check was not delivered to the plaintiff as payment, but before payment thereof, and, before the acceptance of the deed, it was agreed that the title to the property conveyed should be investigated. This averment is not sustained by the evidence. On the contrary, the preponderance of the evidence is to the effect that the deed and check were delivered without any parol conditions whatever. It seems to us, therefore, that it is very plain that when the check was delivered it was the absolute property of the plaintiff, and she could not be divested of her right to the same without her consent, except by some legal proceeding to rescind the contract, and stop the payment of the check.

1. The principal question discussed by counsel for appellant is that the jury disregarded the instructions of the court. The instructions are to the effect that if the plaintiff accepted the return of the deed, and acquiesced in the defendant keeping the check, she is not damaged, and cannot recover. The jury must have found that there was no rescission of the contract, and we are not prepared to say that they were not warranted in so finding. It cannot be said, that the manual possession of the check was obtained with the consent of the plaintiff. It is true that, after being conducted to the lawyer's office, she took the deed, and carried it home with her. But it might fairly be found that she was at a great disadvantage, to say the least, in what took place after the check had been surreptitiously taken from her, and then she returned the deed with reasonable promptness; and we may say in conclusion, on this point, that we are impressed with the thought that the methods adopted to procure a rescission of this contract are not such as to induce either a court or jury to find that it was all done with the consent of the plaintiff.

2. The plaintiff and her daughter were examined as witnessess in chief, as to what occurred in the bank, and at their house, when the deed and check were delivered. The defendant insisted on cross-examining them as to what occurred in the lawyer's office. The court, on the objection of the plaintiff, refused to permit this cross-examination. This ruling is claimed to be erroneous. We think it was correct. It appears to us that it was not proper cross-examination. It pertained to a conversation not referred to in the examination in chief.

We have disposed of all the questions which we regard as material in the case, and reach the conclusion that the judgment ought to be affirmed.

WEST v. CHICAGO & N. W. RY. CO.

(*Supreme Court of Iowa.* December 13, 1887.)

1. RAILROAD COMPANIES—FIRES—INSTRUCTIONS—EVIDENCE TO SUPPORT.
   Where the evidence in an action against a railroad company, for damages sustained by a fire which it was alleged started on the railroad right of way, tended to show that the fire did start there, an instruction submitting the question as to where the fire started, and whether the company negligently allowed combustible matter to accumulate on its right of way, was warranted.

2. SAME—CONTRIBUTORY NEGLIGENCE NO DEFENSE.
   Under Code Iowa, § 1289, in an action against a railroad company for setting a fire on its right of way, from which plaintiff suffers damage, the fact that plaintiff was guilty of negligently exposing certain stacks of hay by failing to protect them by plowing around them, and thus contributed to his own loss, is not material, as, under that statute, plaintiff's contributory negligence will not release defendant from liability for its own negligence.

3. SAME—INSTRUCTIONS—COMMENT ON EVIDENCE.
   An instruction "that if you find from the evidence that the engine which set out the fire in question set out several successive fires on the same day and same trip,

this should be regarded as evidence that the engine was not properly constructed or in good repair, or was improperly used," is not erroneous, either (1) because these facts are improperly stated as to be regarded *as evidence;* nor (2) because it assumes that the jury might find that there were several fires, as it appeared from the evidence that there were more than two fires set; nor (3) because the court called the attention of the jury to this particular evidence, thus emphasizing it.

4. SAME—OWNERSHIP OF PROPERTY BURNED—EVIDENCE.
Where the evidence was conflicting as to whether plaintiff, who claimed damages for property destroyed, was the sole owner thereof, the refusal of an instruction that the jury could not find for plaintiff because the evidence did not show definitely that he was the sole owner, was not erroneous, as the ownership was a question of fact to be determined by the jury from the conflicting testimony.

Appeal from district court, Cedar county.

Action by Eli H. West to recover for damages sustained by a fire alleged to have been set out by the defendant in the operation of its road. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Hubbard, Clark & Dawley, for appellant. *Platt & Carr* and *Charles E. Wheeler*, for appellee.

ADAMS, C. J. 1. The court gave an instruction in these words: "You will determine from the evidence whether the defendant permitted such an accumulation of dry grass and weeds and other combustible matter within their right of way, exposed to ignition by their engines, as would be permitted or done by an ordinarily prudent man upon his own premises, if exposed to the same hazard from fire as an accumulation of dry grass and weeds upon the right of way of the defendant. If you find that the defendant in this respect acted as an ordinarily careful and prudent man would have done under the same circumstances, then it is not in law guilty of negligence in thus acting. But if the evidence fully satisfies you that the defendant did in fact permit such an accumulation of combustible matter, as above mentioned, upon its right of way, as would not have been permitted by an ordinarily prudent man upon his own premises, if exposed to the same hazard from fire escaped from an engine operated by the defendant setting fire to the accumulated grass and weeds within the right of way of the defendant's road, in consequence of which the plaintiff's property was destroyed, then the defendant is liable." The defendant assigns the giving of this instruction as error. It is insisted that there is no evidence that the fire started in the right of way, and no evidence even that there was combustible material there. We think that the testimony of Jasper West and Rosa West tended to show the fire started in the right of way. The former said: "When I got there it was half way between the track and the fence." It is true that he said that when he first saw it he could not tell where it was; but he was not at the right of way when he first saw the fire, but afterwards went there. Now, if the fire caught in the right of way, that fact of itself would be some evidence that there was combustible material there.

One other question may be disposed of in connection with the instruction above set out, though the question is raised under an instruction asked by the defendant, and refused. The property burned consisted of stacks of hay. The plaintiff had not plowed around them, and the defendant averred that he was guilty of negligence in not so doing. The evidence was such that we think that the jury might have so found. The instruction above set out made the defendant liable, if negligent, regardless of the question of the plaintiff's negligence. We have, then, the question as to whether, in a case of this kind, arising under the statute, (Code, § 1289,) the defendant can escape liability for its own negligence, if it appears that the plaintiff was negligent also, and that his negligence contributed to the loss. The defendant contends that it can. It may be conceded that, prior to the statute, contributory negligence

on the part of the plaintiff in a case like this would defeat his recovery. *Kesee* v. *Railway Co.*, 30 Iowa, 78. But the statute, we think, changes the rule. It is doubtful, indeed, whether even at common law the preponderance of authority is not against the ruling in the case above cited; but it is not material to inquire whether this is so or not. The statute, we think, was designed to settle a vexed question upon which the courts had been divided. The language used is clear. In construing the statute in *Small* v. *Railroad Co.*, 50 Iowa, 338, a minority of the court thought that the company could not escape liability in any way, not even by showing itself free from negligence, and that the loss was due wholly to the negligence of the plaintiff. We are now asked to go an important step further than the majority went in that case. In our opinion, we should not be justified in doing so. It is claimed that language was used by way of argument, in the opinion in *Small's Case*, inconsistent with the liability of the company for setting out fires where the plaintiff was guilty of contributory negligence; but what was said was said by way of argument against the liability of the company, as claimed by plaintiff, where the loss occurred solely through the plaintiff's negligence.

2. The court gave an instruction in these words: "If you find from the evidence that the engine which set out the fire in question set out several successive fires on the same day and same trip, this should be regarded as evidence that the engine was not properly constructed or in good repair, or was improperly used." The giving of this instruction is assigned as error. The defendant insists that the court went too far in saying that the jury should regard the fact of setting out other fires as negligence. It contends that the rule is that the jury are at liberty to regard it as evidence. Its argument is that it was shown that the season was unusually dry, and that the jury should have been at liberty to attribute wholly to the dryness of the season the fact that other fires were set out. We have to say, however, that we do not think that the instruction is open to the objection made. Whatever is admitted as evidence should be regarded by the jury as evidence. This is not inconsistent with the fact that they may regard it as overcome or explained away by other evidence.

It is further urged as an objection to the instruction that it assumes that the jury might find that there were several successive fires set out by the engine on that trip, whereas it is said that there were only two, and that two is not several. It may be conceded that "several" means more than "two;" but we think that the evidence showed that there were two besides the one which did the injury, and it is claimed by the plaintiff that there was evidence tending to show that there were more than that.

It is further urged as an objection to the instruction that the court had no right to single out this evidence, and instruct upon it, and give it additional emphasis by so doing. But we cannot reverse because the court told the jury that they should regard as evidence what in fact is evidence, and what the jury must necessarily regard as such. The practice of emphasizing evidence by an instruction is not, we think, as a rule to be commended. Sometimes, doubtless, the court may properly call the attention of the jury to evidence which is obscure and might escape their attention. The court should exercise a wise discretion in this matter; and we think that this is all that can properly be said.

3. There was evidence tending to show that the plaintiff was not the sole owner of the hay burned. As applicable to this point the defendant asked an instruction as follows: "The plaintiff cannot recover in this action for the stacks burned, because the evidence does not show definitely what his interest in the hay was, and verdicts cannot be based upon guess-work, but must have evidence to sustain them. If you find that the evidence does not show what the plaintiff's interest in the stacks was, but leaves the same in doubt, then he cannot recover anything for the stacks." The court refused to so in-

struct, and the defendant assigns the refusal as error. While there was evidence tending to show that the plaintiff was not the sole owner, there was other evidence tending to show that he was. Now, it was for the jury to reconcile this evidence as best they could, and render a verdict upon it, notwithstanding there might be some doubt about it. We think that the instruction was properly refused.

4. The defendant asked an instruction in these words: "The burden of proving that the fire started on the defendant's right of way is upon the plaintiff, and he cannot recover on the ground that the defendant was negligent in regard to its right of way, unless he affirmatively shows by a preponderance of the evidence that the fire started on said right of way." The court refused to give this instruction, and the defendant assigns the refusal as error. It seems possible, under the evidence, that the defendant was negligent in leaving combustible material on the right of way, and yet the fire did not originate there, and that the combustible material had nothing to do with the loss. But the danger that the jury might find the defendant liable in such case by reason of the combustible matter was not, we think, such as to render it reversible error to refuse the instruction. The court might trust somewhat to the common sense of the jurors. We see no error in any of the rulings. Affirmed.

HURLBURT, HESS & CO. *v.* FYOCK and others.

(Supreme Court of Iowa. December 16, 1887.)

1. INTOXICATING LIQUORS—SALES WITHOUT PERMIT—EVIDENCE.
   Plaintiff, a corporation engaged in the wholesale drug business, brought action to recover a balance on account for drugs sold and delivered. Defendant admitted the account, and set up a counter-claim for money paid for intoxicating liquors alleged to have been unlawfully sold by plaintiff to defendant. The evidence showed that plaintiff dealt with defendant in the belief that he had a permit to sell liquors for lawful purposes; also that plaintiff had no permit, but that H., one of its stockholders, held permits to sell liquor for lawful purposes; that part of H.'s liquors were kept in the building occupied by plaintiff, but that plaintiff had no interest in that part of the business; that defendant ordered his liquors from plaintiff, but that the orders were turned over to H., who rendered the bills to defendant, and that, though defendant was directed by H. to remit to plaintiff, there was no evidence that plaintiff had any interest in the transaction; that plaintiff procured no liquors for any one but its drug customers, and in such cases settled with H., and looked to the customers for reimbursement; that plaintiff sent defendant certain statements of account, in which some of the claims for liquors were included, but that plaintiff was the mere assignee of H. *Held*, that a judgment in favor of defendant on his counter-claim should be reversed.

2. APPEAL—BILL OF EXCEPTIONS—SHORT-HAND REPORT—CERTIFICATE OF JUDGE.
   On an appeal, the record showed that there had been two trials of the cause; that, at the first, the evidence was taken down by the short-hand reporter, and certified by the judge, and properly filed; that, at the second trial, a transcript of the short-hand notes was used by consent of the parties as evidence, and a short-hand record was kept of other proceedings. This last short-hand report, including the transcript of the former report, was certified by the trial judge as being "all of the evidence that was offered or introduced on the trial of said case, and all of the objections and rulings made and exceptions taken; and the said official report in short-hand is hereby made a part of the record in the above-entitled cause." This certificate was filed within the proper time. On a motion to strike the evidence from the files, on the ground that it had not been preserved by a bill of exceptions, *held*, that the bill of exceptions was sufficient.

Appeal from district court, Dallas county; A. W. WILKINSON, Judge.

This is an action at law by which the plaintiff seeks to recover of D. E. Fyock & Co. a balance due upon an account for drugs sold and delivered. The defendant admitted the amount of the account, and set up a counter-claim to recover of the plaintiff a large amount of money the defendant paid the plaintiff for intoxicating liquors, which it is alleged the plaintiff unlawfully sold to the defendant. The suit was commenced by attachment, and a stock of

drugs was seized upon the writ. The defendant had made an assignment of property for the benefit of creditors a few days before the suit was commenced, and J. L. Townsend, the assignee, intervened in the action, and claimed to be lawfully in possession of the goods as such assignee, and he also demanded judgment against the plaintiff for the amount paid to plaintiff for intoxicating liquors unlawfully sold to the defendant. There was a trial to the court. The amount of the plaintiff's account for drugs was admitted, and the court found that the intervenor was entitled to recover of the plaintiff on the counter claim the sum of $1,311.50, which being set off against the account for drugs left a balance in favor of the assignee and intervenor of $792.99, for which judgment was rendered for the intervenor. Plaintiff appeals.

Cole, McVey & Clark, for appellant. *Cardeel & Shortley*, for defendants. *White & Clark*, for intervenor.

ROTHROCK, J. 1. The first question in the case arises upon a motion of the appellee to strike the evidence from the files, because it has not been preserved by a bill of exceptions. There were two trials of the cause. The record shows that at the first trial the evidence was taken down by the short-hand reporter, and certified by the judge, and properly filed. At the second trial a transcript of the short-hand notes was used by the consent of the parties as evidence upon the trial, and a short-hand record was kept of other proceedings. This last short-hand report, including the transcript of the former report, was certified by the trial judge as being "all of the evidence that was offered or introduced on the trial of said case, and all of the objections and rulings made and exceptions taken; and the said official report in short-hand is hereby made a part of the record in the above-entitled cause." This certificate was filed within the proper time. Under the former rulings of this court, this must be regarded as a sufficient bill of exceptions. *State* v. *Fay*, 43 Iowa, 651; *Gibbs* v. *Buckingham*, 48 Iowa, 96; *McFarland* v. *Folsom*, 61 Iowa, 117, 16 N. W. Rep. 863; *Hahn* v. *Miller*, 60 Iowa, 96, 14 N. W. Rep. 119; and *McCarthy* v. *Watrous*, 69 Iowa, 260, 28 N. W. Rep. 586. It becomes necessary, owing to this dispute as to the record, to file a transcript in this court. By agreement of the parties, the original papers were filed, but they were not copied and certified by the clerk. In examining the record as we have been compelled to do, we think that the appellant's abstract, with an omission supplied by the abstract of appellee, fairly presents the case upon its merits, and we will proceed to determine it in that way.

2. The plaintiff is a corporation engaged in the wholesale drug business in the city of Des Moines. It was formerly known and designated by the name of Mitchell, Crane & Co. The change of name, however, did not operate as a reorganization of the corporation, but it still retained its identity as a body corporate. The defendant, D. Fyock & Co., was a retail druggist in Dallas county, and a customer of the plaintiff, and from about October 1, 1884, to May 5, 1886, purchased from the plaintiff substantially all of the goods used in their retail business. The defendants claim that a large part of the purchases made were intoxicating liquors, sold for unlawful purposes. The plaintiff claims that it never at any time sold any intoxicating liquors to the defendants. As we think the appeal must be disposed of on this question, it is unnecessary to determine any of the other points discussed by counsel. In determining the case, we have not only considered the evidence presented in the abstract, but we have carefully examined the transcript, and from it we find that the defendant, D. Fyock & Co., was composed of D. Fyock alone. During part of the time he was dealing with the plaintiff he represented that one A. W. Font was his partner. Defendant was at one time arrested for an alleged violation of the prohibitory liquor law, and upon the trial he testified as a witness that Font was his partner. This appeared to him to be necessary to his defense, because Font was a registered pharmacist, and Fyock

was not. It is true, defendant denied that he represented Font to be a partner; but the evidence that he did was so overwhelming that there cannot be said to be any conflict therein; and we think that the evidence that the plaintiff dealt with him in the belief that he had a partner who was a registered pharmacist, and that he was authorized by a proper permit to sell intoxicating liquors for the purposes permitted by law, ought not to admit of any question. We think, also, that the evidence does not warrant the finding that the plaintiff at any time sold intoxicating liquors to the defendant. The plaintiff, being a corporation, held no permit to sell intoxicating liquors. At one time one Mitchell, and, later, one Hess, who, it is true, were stock-holders in the corporation, held permits to sell liquors for lawful purposes; and, while it is true part of the liquors were kept in the building occupied by the plaintiff, the evidence is conclusive and uncontradicted that the plaintiff had no interest in that branch of the business. It is true that the defendant ordered his liquor from the plaintiff; but the evidence shows that in nearly every instance bills were rendered to the defendant showing that his purchase was not made from the plaintiff. The following is a copy of one of the bills.

"DES MOINES, IA., July 1, 1885.

"D. E. Fyock & Co., Perry, Iowa, bought of S. H. Hess, 224 and 226 Second St.

"Book 4. Terms, ———. Shipped, ———. Salesmen, ———.

"4⅞ Gal. alcohol, 2.25, - - - - - - 10.99

"Please remit the above amount to Hurlburt, Hess & Co., which will be honored by Yours, very truly, etc., S. H. HESS."

We find no evidence in the case that the use of the names of Hess & Mitchell were adopted as a cover for the sale of intoxicating liquors by the plaintiff. It is true, the plaintiff turned over the orders for liquors to Hess and Martin, but there is no evidence that plaintiff had any interest therein, nor in the profits arising from the sale thereof. The evidence upon this point is all the other way. These accounts or bills for liquors were sent to the defendant. They show on their face that they were sales made by Hess to him. It is true, the defendant was directed to remit to the plaintiff; but this did not show that the sales were made by the plaintiff. If they tended to show that the plaintiff was using the name of Hess as a cover for dealing in liquors, they are fully explained by the fact, which is uncontradicted, that the plaintiff procured no intoxicating liquors for any one but their drug customers; and in such cases, as Hess sold only for cash, plaintiff settled with Hess, and looked to the customer for reimbursement. The plaintiff sent to the defendant certain statements of account, in which some of the claims for liquors were included. But the evidence shows that plaintiff was the mere assignee of Hess; and whatever was done in the way of showing plaintiff's connection with the sales by the use of its bill-heads, on a few occasions, are shown to have been done by mere inadvertence. It must be remembered that defendant is seeking a recovery upon a claim which he is bound to establish by affirmative evidence. His demand is purely statutory. He has had the liquors sold them in violation of law, failed in business, and he and his assignee are attempting to pay this drug bill, and recover quite an amount besides, by asserting a right of action which, to say the least, is not attended with any violation of his rights tending to arouse sympathy in his behalf.

The judgment will be reversed, and the cause remanded for a new trial.

BAKER and others *v.* CRABB and others.

(*Supreme Court of Iowa.* December 14, 1887.)

1. TAXATION—SALE—REDEMPTION—EXPIRATION—SERVICE OF NOTICE—PRESUMPTION—LOSS OF AFFIDAVIT—FAILURE TO RECORD.

Code Iowa, § 894, requiring the service of notice of the expiration of the time for redemption of land sold for taxes, provides that the holder of the certificate of pur-

chase may cause such notice, signed by him, his agent or attorney, to be served upon the person in possession of such land, and also upon the person in whose name the same is taxed, in the manner provided by law for the service of original notices. Service on non-residents may be made by publication in a newspaper. "Service shall be deemed completed when an affidavit of the service * * * shall have been filed with the treasurer authorized to execute the tax deed. Such affidavit shall be filed by said treasurer and entered upon the records of his office, and said record or affidavit shall be presumptive evidence of the completed service of notice * * *." *Held*, that the presumption of proper notice, arising from the possession of a treasurer's deed, when supplemented by positive testimony showing that an affidavit making due proof of service by publication on a non-resident owner was properly filed, cannot, in the absence of evidence contradicting the presumption, be overthrown by the mere fact that the affidavit cannot be found in the proper custody, and that no record thereof was made by the treasurer.

2. SAME—PERSONAL SERVICE ON NON-RESIDENT.
In an action for the possession of land, the defendant claiming title under a tax deed, plaintiff insisted that there were fatal defects in the service of notice of expiration of the time for redemption by publication. Defendant gave testimony, which was uncontradicted, showing personal service of notice upon the non-resident owner while within the county. *Held*, that Code Iowa, § 894, does not restrict the notice to non-residents to publication exclusively, and that the service was sufficient.

3. SAME—SERVICE BY AGENT—PROOF OF AGENCY.
The affidavit of service of notice upon the person in possession recited that, on a certain date, the owners of the tax certificate "appointed me their agent to serve the within notice on W., [the person in possession;] that * * * I served it on him by reading it to him, and asking him to accept service, which he did by signing the acceptance on the back of this notice." The acceptance was as follows: "I hereby accept due, legal, timely, and sufficient service of the within notice on me, and waive copy." *Held*, that the fact that the person serving the notice was the agent of the holder of the certificate was sufficiently shown, and that the service was properly made.

4. SAME—FAILURE TO RECORD AFFIDAVIT—ORIGINAL ADMISSIBLE IN EVIDENCE.
When the statute directs that the affidavit of notice shall be entered upon the record, the failure of the proper officer to so enter it will not be allowed to defeat the right of the parties, and the original affidavit is admissible in evidence, or, if lost, may be shown by copy duly proved.

Appeal from circuit court, Marion county.

Action by Emily S. Baker and others against James Crabb and others to recover the possession of lands, and damages for the rents and profits thereof, and for timber taken therefrom, and to enjoin defendants from further cutting and removing timber from the lands. There was a decree and judgment against plaintiffs in favor of an intervenor. Plaintiffs appeal.

Stone & Gamble, for appellants. *L. Kinkead*, for appellees.

BECK, J. 1. It appears probable, in view of the allegations of the petition, that the action was commenced at law. It seems to have been conducted and tried, and is now regarded by the parties, as an action in chancery, triable *de novo* in this court. It will be so regarded in the disposition of it here. The petition seeks to recover the lands, and damages, for rents and profits, and for timber taken by defendants. The plaintiffs claim as the heirs at law of E. H. Baker, who died seized of the land. The defendants claim the lands under a tax sale and deed. Viana McBride intervenes, claiming to have acquired title to the lands under an execution sale thereof, on a judgment against defendants, and a sheriff's deed executed in pursuance thereof. The case is presented to us in 15 separate printed volumes or pamphlets, varying from 2 to 75 pages. These contain the abstract, amended abstract, and additional abstracts of the record, motions, and amended motions, and arguments of counsel upon the various aspects of the case. The motions are to strike portions of the plaintiffs' abstract, and to affirm the judgment of the court below, and were submitted for decision with the case. We find it unnecessary to pass upon these motions, for the reason that, in our opinion, the judgment of the circuit court ought to be affirmed on the merits in consideration of the

facts shown by plaintiffs' abstract, and not disputed, but admitted, in argument by counsel on both sides.

2. It is shown that plaintiffs claim under the patent title, and that defendants' and the intervenor's title is based upon a tax deed made upon an assessment and sale of the lands for taxes, while they were owned and held by plaintiffs' ancestor. The decision of the case turns wholly upon the validity of the tax title under which defendants claim. The grounds upon which the objections urged by plaintiffs to the tax title are based are these: The lands were taxed to plaintiffs' ancestor. They were sold for delinquent taxes, and, in 1881, at a time prescribed by the statute, a treasurer's deed was executed to the assignee of the purchaser. In 1885 another treasurer's deed was made to the same person, for what reason we need not inquire. These deeds, it is insisted, are void, upon the ground that the notice of the expiration of the time for redemption required by Code, § 894, was not lawfully given. Whether this position be sound as to the first deed we will now proceed to inquire. Code, § 894, provides for notice of the expiration of the time for redemption, and the service thereof, in the following language: "After the expiration of two years and nine months after the date of sale of the land for taxes, the lawful holder of the certificate of purchase may cause to be served upon the person in possession of such land or town lot, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided by law for the service of original notices, a notice signed by him, his agent or attorney, stating the date of sale, the description of the land or town lot sold, the name of the purchaser, and that the right of redemption will expire, and a deed for said land be made, unless redemption from such sale be made within ninety days from the completed service thereof. Service may be made upon non-residents of the county by publishing the same three times in some newspaper printed in said county, and if no newspaper is printed in said county, then in the nearest newspaper published in this state. But any such non-resident may file with the treasurer of the county a written appointment of some resident of the county where his lands or lots are situated, as agent upon whom service shall be made, and in such case personal service of said notice shall be made upon said agent. Service shall be deemed completed when an affidavit of the service of said notice, and of the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent or attorney, shall have been filed with the treasurer authorized to execute the tax deed. Such affidavit shall be filed by said treasurer, and entered upon the records of his office, and said record or affidavit shall be presumptive evidence of the completed service of notice herein required, and, until ninety days after the service of said notice, the right of redemption from such sale shall not expire. * * *"

When the notice of expiration of the time for redemption was given, plaintiff's ancestor, to whom the lands were taxed, did not reside in the county. The lands at that time were in the possession of one Wakefield. A notice was served upon plaintiffs' ancestor by publication, which counsel for plaintiffs insist is insufficient for the reason that proof of service thereof is shown alone by the affidavit of the publisher of the newspaper in which it was printed, and not by the affidavit of the holder of the certificate, his agent, or attorney, as required by Code, § 894. Such an affidavit was not found in the proper custody, or elsewhere, nor was any record thereof found. The deed operates as presumptive evidence that the notice was given. Code, § 897; *Fuller* v. *Armstrong*, 53 Iowa, 683, 6 N. W. Rep. 61. There is no evidence before us contradicting the presumption created by the deed, unless the fact that no affidavit or proof of service made by the holder of the certificate is found either upon the files or upon the record. If this fact is to be regarded as evidence contradicting the presumption raised by the deed,—a question we do

not decide,—such evidence is overcome by positive and direct testimony which we find in the record, showing that the affidavit of the holder of the certificate, making due proof of service of the notice, was filed, which is supported by corroborating evidence. We have, then, the presumption arising on the deed, together with the positive and direct evidence of the fact that the required affidavits were filed, which outweigh any inference ensuing from the absence of the affidavits from the files, and the fact that no record thereof was made or is found. But counsel for plaintiffs insist that the record of the case shows that the notice published in the newspaper was not addressed to plaintiffs' ancestor by his correct name, E. S. Baker, and in fact was addressed to H. Baker, and that, for this misnomer, the notice is void. Let counsel's position be admitted for the purpose of the case. The deed raises the presumption that a lawful notice was given. Such notice need not be by publication exclusively, but may be served personally. The language of Code, § 894, authorizing such notice, does not prescribe that personal service may not be made. It prescribes that the notice shall be served in the manner provided for the service of original notice in actions at law, which may be either by publication or upon the person, according to the residence or non-residence of defendant, and the fact that he is not found in the county. If the land-owner is found in the county, the notice of expiration of the time for redemption may be personally served upon him. The presumption of the tax deed is not exclusively restricted to service by publication, but is of lawful service in either form authorized by law. The presumption is not overcome by any evidence in the case; indeed, it is not attempted to be shown that there was no personal service of a lawful notice. On the other hand, the presumption of the deed is supplemented and supported by positive and direct evidence that proof by affidavit was filed, showing that the land-owner, plaintiffs' ancestor, was served personally in the county while on or near the land in controversy. Upon these facts and considerations, the law requires us to hold that the prescribed notice was served, and that proof thereof was made and filed in the manner prescribed by law.

3. A notice to Wakefield, the person in possession of the lands, as to the form and substance whereof no objection is made, was served. The proof of service is shown by the abstract as follows: "SWAN, May 18, 1881.

"I hereby accept due, legal, timely, and sufficient service of the within notice on me, and waive copy. G. W. WAKEFIELD."

"*State of Iowa, Marion County—ss.:* I, Robert Anderson, being duly sworn, depose and say that on the seventeenth day of May, 1881, Elliott & Cathcart appointed me their agent to serve the within notice on Geo. Wakefield; that on the eighteenth day of May I served it on him by reading it to him and asking him to accept service, which he did by signing the acceptance on the back of this notice. ROBERT ANDERSON.

"Sworn to before notary public, May 28, 1881."

The service is shown by this proof to have been made in the language of the statute just quoted, "in the manner provided by law for the services of original notices." See Code, § 2603. And the affidavit of service shows that the person making it was the agent of the holder of the tax-sale certificate, complying in this regard with the requirements of the statute above quoted. The record thus shows that the notice required was served upon the person, and in the manner prescribed by statute. But the sufficiency of the service of notice is otherwise shown. The deed is presumptive evidence of the service of notice, required by Code, § 894. *Fuller* v. *Armstrong*, 53 Iowa, 683, 6 N. W. Rep. 61.

4. The notice served upon Wakefield, as we infer from the record, was not found, but was proved by copy, though counsel for plaintiffs say in their argument that it was found in the proper place. It seems to have been lost from the files of the county officers, as we understand the record. It clearly

appears that this was the case with the notice directed to the person to whom the land was taxed, to plaintiffs' ancestor, but it is not so clearly shown as to the notice to Wakefield. If we are correct in our inference on this point, a copy of the notice was proved, and introduced in evidence, by which the service was sufficiently shown.

5. The statute above quoted directs that the affidavit showing service shall be entered upon the record. This was not done. Upon this fact counsel for plaintiffs base an objection, claiming that a failure to comply with the statute in this regard invalidates the deed. The provision of the statute upon which counsel rely directs the treasurer as to the discharge of his duty, by providing for a record to be made of a paper, which it wisely provided shall be preserved in that manner. But the rules of the law will not defeat the rights of parties by reason of the failure of officers to discharge their duties imposed by statute. The section quoted cannot be construed to mean that the record alone shall be evidence of the service of the notice. But, indeed, on the other hand, it in express language declares that "the record or affidavit shall be presumptive evidence of the completed service of notice," thus plainly providing that the notice, as well as the record, is to be taken as evidence of the fact. If the affidavit may be admitted in evidence when the record exists, it surely may be admitted when there is no record, and if the affidavit is admissible in evidence, if lost, it may be shown by copy duly proved, under familiar rules of the law. In our opinion, the evidence sufficiently establishes that proof of service of the notices in accord with the requirements of the law, both as to the person in whose name the land was taxed and the person in possession, was filed in the proper office.

These considerations lead us to the conclusion that the tax title upon which defendants rely is valid. The judgment for defendants must be affirmed.

McGarvey v. Roods, Adm'r.

(*Supreme Court of Iowa.* December 10, 1887.)

1. Parent and Child—Support of Parent—Implied Promise to Pay.
   When a daughter claims pay from the estate of her mother for board furnished to the latter, who resided with the daughter, no promise to pay can be implied in favor of the claimant, but an expectation must be shown on the part of both that compensation should be rendered therefor. The claimant must show, by affirmative evidence, that the services were not gratuitous, as the presumption arising from the relationship that they were gratuitous must be overcome; but the amount to be paid need not have been expressly agreed upon.[1]
2. Same—Evidence of Promise—Finding of Jury.
   Where the evidence tends to prove these requisite facts, and is not clearly insufficient, the verdict of a jury giving the compensation sought will not be set aside.
3. Appeal—Failure to Take Exceptions.
   Where the record shows that the trial court failed either to sustain or overrule certain objections to testimony, but it does not appear that exceptions were taken to this action of the court, its conduct will not be reviewed on appeal.

Appeal from circuit court, Henry county.

The plaintiff, Rebecca McGarvey, presented for allowance a claim against the estate of Amelia Dameal. There was a trial by jury, verdict for the plaintiff, and judgment. The defendant, A. Roods, administrator, appeals.

L. G. & L. A. Palmer, for appellant. *Woolson & Babb*, for appellee.

[1] Respecting the presumption of the existence of contract obligations between parent and child to pay for maintenance or services, see Moyer's Appeal, (Pa.) 3 Atl. Rep. 811, and note; Wall's Appeal, (Pa.) 5 Atl. Rep. 220, and note; Sawyer v. Hebard's Estate, (Vt.) 3 Atl. Rep. 529, and note; Brown's Appeal, (Pa.) 5 Atl. Rep. 13, and note; Leary v. Leary, (Wis.) 32 N. W. Rep. 623; Dodson v. McAdams, (N. C.) 2 S. E. Rep. 453; Young v. Herman, (N. C.) 1 S. E. Rep. 792; Ormsby v. Rhoades, (Vt.) 10 Atl. Rep. 722.

SHEVERS, J. The plaintiff is the daughter of the decedent, and the claim presented for allowance is for boarding and taking care of the decedent for some years prior to her death. The decedent was upwards of 80 years old, and quite infirm. At the time the services were rendered, the decedent was living with, and making her home with, the plaintiff. The defendant insists that the plaintiff cannot recover, for the reason that the decedent lived with the plaintiff as a member of the family, and no such promise to pay as is required in such case has been established. The plaintiff concedes that no express promise to pay has been shown, but she claims she has introduced evidence tending to show the services were not rendered gratuitously, but that she expected to receive compensation, and that the decedent expected to pay for such services.

1. Counsel for the appellant have assigned errors based on the rulings of the court in admitting evidence given by Mrs. Clark. The abstract states that the questions asked the witness were objected to as incompetent, immaterial, and irrelevant, and that the "decisions of the court were reserved by the court; the evidence to be controlled by instructions." We do not understand this to show affirmatively that the court either sustained or overruled the objections; nor does it appear that any exceptions were taken to what the court did, or refused to do. If there was any doubt as to this, it is dispelled by the additional abstract filed by the appellee, which states that no exceptions were taken, and that the court neither sustained nor overruled the objections made to the questions asked Mrs. Clark. It is therefore apparent that we cannot review the rulings of the court reserving the question as to the admissibility of the evidence until the instructions were given, and thus correcting the error, conceding one has been committed, for the reason the action of the court was in no manner excepted to. Counsel for appellant insist, in argument, that the court overruled an objection to interrogatory 17, asked Mrs. Howard, but the abstract fails to state that any objection was made to this interrogatory, or that the court made any ruling in relation thereto. Objections were made to a certain question asked Mrs. Berry and Mr. Carmichael, but we think the evidence elicited was clearly admissible. In argument, it is said objections were made to certain questions asked Mrs. Faulkner which were overruled. The questions so objected to are not indicated by counsel, and we are unable to ascertain from the abstract the specific questions or rulings to which counsel now take exception.

2. The court instructed the jury, in substance, that the burden was on the plaintiff to establish the service, and an "express promise on the part of the intestate to pay for the same, or facts and circumstances that satisfy the jury that the services, if any, were rendered in the expectation, by Mrs. McGarvey, of receiving compensation therefor, and that the intestate also expected to pay therefor at the time;" and in another instruction the jury were told that there was no sufficient evidence of an express promise. The instructions, therefore, were in accord with *Scully* v. *Scully*, 28 Iowa, 548. This case has been repeatedly followed. See *Rogers* v. *Millard*, 44 Iowa, 466; *Wence* v. *Wykoff*, 52 Iowa, 644, 3 N. W. Rep. 685; *Chadwick* v. *Devone*, 69 Iowa, 637, 29 N. W. Rep. 757; *Hart* v. *Flinn*, 36 Iowa, 366; *Smith* v. *Johnson*, 40 Iowa, 308.

Counsel for appellant claim that *Scully* v. *Scully* holds there must be an express promise, and that the last two cases cited support this view. This is a mistake. The rule established by the decisions of this court is that where the family relation exists, and services are rendered by one person to another at a time when both sustain such relation to each other, no promise to pay can be implied because the services were performed by one and accepted by the other, as would be the case if such relation did not exist. The person claiming compensation must go a step further, and establish there was an expectation by both parties that a compensation should be paid. In other

words, the person seeking compensation must establish that the services were not performed gratuitously, and the presumption which prevails because of the existence of the family relation must be overcome by affirmative evidence. It is not essential that the amount of the compensation should be agreed upon. This view, we think, is in accord with the weight of authority in this country; but whether this is so is immaterial, for the reason that such is the view adopted by this court. While counsel do not concede this, they, however, claim that, if it be conceded, then the verdict is not sustained by the evidence, which we have separately read, and separately reached the conclusion that we cannot interfere with the finding of the jury. There is considerable evidence tending to prove that the intestate expected to pay for the services rendered by the plaintiff, and that the latter expected to be compensated we feel sure. The intestate frequently spoke of the matter, and said the plaintiff should be compensated; that all the property she had was devoted to this purpose, and that she had given her other children all that she intended to. It is true, that sometimes, when she spoke of the matter, she evidently meant she would so provide in her will; but the jury were expressly instructed that an intention to so provide for or compensate the plaintiff was not sufficient, and that all such declarations should be disregarded. We deem it sufficient to refer to the evidence in this general way, without setting it out, and such is not our custom.

The court declined to give the instructions asked by the appellant; and in relation thereto we deem it sufficient to say that the charge of the court, it seems to us, covers the whole ground, and therefore the court did not err in refusing the instructions asked. Affirmed.

SEARLE and others *v.* HILL.

(*Supreme Court of Iowa.* December 10, 1887.)

PATENTS FOR INVENTIONS—PAROL AGREEMENT TO ASSIGN—SPECIFIC PERFORMANCE.

A parol agreement to assign a patent-right, which both parties to the agreement have shared the expense of procuring, is good, and specific performance thereof will be granted in equity, "notwithstanding the provisions of Rev. St. U. S. § 4898, that patents shall be assignable in law by an instrument in writing."[1]

Appeal from district court, Mahaska county.

This is an action in equity, C. P. Searle and others against A. H. Hill, to compel the specific performance of a contract to assign an interest in a patent-right. There was a decree as prayed in the petition. Defendant appealed.

Bolton & McCoy, for appellant. *John F. Lacey* and *Searle & Scott*, for appellees.

REED, J. There is no controversy as to the facts in the case. The parties each owned an interest in a patent-right covering a window-blind; plaintiffs' interest covering certain states and territories, and defendant's covering certain other states and territories. They were desirous of procuring a patent on a device that was regarded as an improvement on the article covered by the original patent, and it was agreed that defendant should proceed to Washington city, and prosecute an application for said patent, and that plaintiff should pay one-half the expenses incident to the application, which it was agreed would include the fees of the patent-office, and of the attorney who should be employed to prosecute the application, and defendant's personal ex-

[1] Section 4898, Rev. St. U. S., providing that "every patent, or any interest therein, shall be assignable in law by an instrument in writing," does not prevent the acquiring of an equitable interest in a perfected invention by parol, nor does it apply to a parol executory agreement to transfer an interest in an invention contemplated, but not perfected, and not cognizable under the patent laws when the agreement was made. Burr v. De La Vergne, (N. Y.) 7 N. E. Rep. 366.

penses and salary while engaged in the business. It was also agreed that the letters patent should be taken, if procured, in defendant's name, and that he would thereafter assign to plaintiffs the interest therein covering the states and territories which are covered by their interest in the original patent. Defendant did proceed to Washington, and caused an application for the patent to be made and prosecuted, and the letters patent were issued in his name. Plaintiffs paid the proportion which they agreed to pay of the cost and expense of procuring the patent, but defendant refuses to assign to them any interest in the right, and it is to compel a specific performance of the contract that this action is prosecuted.

It is shown that defendant is now insolvent. The question arising on these facts is whether a court of equity can afford the remedy which is sought in the action. It is provided by statute (section 4898, Rev. St. U. S.) that patents "shall be assignable in law by an instrument in writing," and it is contended that the agreement of the parties is incapable of enforcement because it was in parol. But that does not follow. The provision merely prescribes the means or instrument by which the title may be passed. It does not forbid the making of a parol executory contract for the sale of the property. Such contract can be performed, it is true, only by executing the prescribed instrument. But it occurs in many cases that the parol agreement of a party is enforceable when the thing contracted for can be done only by executing a writing. A party contracts by parol for the sale and conveyance of real estate, and receives the stipulated price. The title can be passed to the purchaser only by a written conveyance. Courts of equity have always afforded relief in such cases by compelling the execution of the conveyance. Defendant's agreement was that he would execute the written instrument requisite to pass to plaintiffs the interest contracted for. The object of the suit is to compel him to do that thing. The judgment commands him to perform his undertaking by executing and delivering the conveyance. He may be compelled by process of contempt to obey the mandate, or the conveyance may be executed in his name by the commission appointed by the court. The validity of a parol assignment of a patent, as between the parties, has frequently been determined by the courts. *Burke* v. *Partridge*, 58 N. H. 349; *Springfield* v. *Drake*, Id. 19; *Pitts* v. *Whitman*, 2 Story, 609; *Blakeney* v. *Goode*, 30 Ohio St. 350. In *Binney* v. *Annan*, 107 Mass. 94, specific performance of an executory contract for the assignment of a patent was decreed. In that case the agreement was in writing, it is true, but it was for the assignment of the patent, and was executory. If such an agreement, when in writing, is enforceable, we know of no reason why a similar agreement in parol may not be enforced. It was held in *Ager* v. *Murray*, 105 U. S. 126, that a patent-right may be subjected by bill in equity to the payment of a judgment debt of the patentee. In such case the conveyance to the purchaser would be executed by an officer or commissioner of the court. The case is important as declaring the power of the court to direct the execution of the instrument necessary for the transfer of the title. We think the judgment is well sustained by reason and authority. Affirmed.

BEYRE v. ADAMS.

(*Supreme Court of Iowa.* December 12, 1887.)

PLEADING—DENIAL FOR WANT OF INFORMATION SUFFICIENT TO FORM A BELIEF—EFFECT.

In an action for the value of a cow, plaintiff alleged that the animal died in consequence of the negligence of defendant's servant. Defendant's answer alleged "that of the alleged negligence of said [servant,] and the death of said cow, the defendant has no knowledge or information to form a belief that said cow died in consequence of such negligence, and therefore denies the same." *Held* that, under Code Iowa, § 2655, par. 3, which provides that a "defendant may put in issue the allegations of the petition * * * by a denial of knowledge or information thereof

sufficient to form a belief," the answer is sufficient to put upon plaintiff the burden of proving that "said cow died of such negligence," but that it does not put in issue the allegation that the servant was guilty of the negligence charged, and that allegation is to be deemed true.

Appeal from circuit court, Clayton county.

Action by Anna B. Beyre, guardian, against James Adams, for the recovery of the value of a cow. It is alleged that defendant had the animal in possession as bailee, and that she died in consequence of the negligence of his servant. There was a verdict and judgment for defendant.

Murdock & Davidson and *J. Larkin*, for appellant. *J. O. Crosby*, for appellee.

REED, J. It is alleged in the petition that defendant's servant was guilty of certain negligent acts which caused the death of the animal. The answer is as follows: "That of the alleged negligence of said Smith, [the servant,] and the death of said cow, the defendant has no knowledge or information to form a belief that said cow died in consequence of such negligence, and therefore denies the same."

The question presented is whether an issue is formed as to the negligence of the servant by this answer. The circuit court ruled that the burden was on plaintiff to prove the acts of negligence alleged in the petition. Under our statute, (Code, § 2655,) the defendant may put in issue the allegations of the petition, either by or a general, a special denial, or a denial of knowledge or information thereof sufficient to form a belief. The answer in question does not, either specifically or generally, deny the allegations of the petition. In express terms, it denies that defendant has any knowledge or information to form a belief "that said cow died in consequence of such negligence." As to that averment, it is sufficient to put upon plaintiff the burden of proving it; but it clearly does not put in issue the allegation that Smith was guilty of the negligence charged, and that allegation is to be deemed true.

The judgment of the circuit court will be reversed.

WILSON *v.* RUSSELL and others.

(*Supreme Court of Iowa.* December 13, 1887.)

1. TAXATION — SALE — NOTICE OF EXPIRATION OF REDEMPTION — DIRECTING NOTICE TO STRANGER.

   In an action to quiet title, plaintiff alleged that he was the owner of the patent title, that defendant claimed under a tax sale; that the land was taxed to plaintiff at the time the notice of expiration of redemption was given; that the notice described only a small part of the land, and was addressed to a third party, and was not properly served. The answer admitted these facts, but pleaded the statute limiting actions to recover land conveyed by tax deeds. *Held*, that a demurrer to the answer should have been sustained.

2. APPEAL—CERTIFICATE OF EVIDENCE—INCORRECT DESIGNATION OF JUDGE.

   The fact that an appellant's abstract incorrectly designates the judge making the certificate of the evidence, can have no effect in the determination of the appeal.

Appeal from circuit court, Ringgold county.

Action by J. G. Wilson against Alfred Russell and others to quiet the title of land. There was a decree for defendants, upon a demurrer to their answer being overruled. Plaintiff appeals.

J. W. Brackett, for appellant. *Laughlin & Campbell*, for appellees.

BECK, J. 1 The petition alleges that plaintiff is the owner of the patent title of the land in controversy,—80 acres; that defendants claim title under a quitclaim deed from one to whom the land was conveyed by the county treasurer under a tax sale; that the land was taxed to plaintiff at the time the notice of the expiration of redemption was given; that such notice described

only two and one-half acres of the land, and was addressed to James T. Wilson, and that the notice was not in fact served as shown in the proof of service thereof. The answer of defendants admits these facts, but, in avoidance thereof, pleads the statute limiting actions to recover land conveyed by tax deeds. A demurrer to this answer was overruled.

2. The demurrer should have been sustained. As to all the land, except two and one-half acres, there was no notice at all. As to that much of it, the notice was not directed to the persons to whom the land was taxed. The statute of limitations, under the decisions of this court, does not cut off the right of redemption of plaintiff, the owner of the patent title. *Hillyer* v. *Farneman*, 65 Iowa, 227, 21 N. W. Rep. 578; *Slyfield* v. *Barnum*, 32 N. W. Rep. 270. An amended abstract filed by defendants shows that the plaintiff's abstract incorrectly designates the judge making the certificate of the evidence. This matter can have no effect in the determination of the case, as it is of no importance. The abstract would be good without giving the name of the judge who certified to the evidence.

The decree of the circuit court is reversed, and the cause will be remanded for a decree in harmony with this opinion. Reversed.

RAND and others v. PARKER and another.

(*Supreme Court of Iowa.* December 13, 1887.)

MECHANIC'S LIEN—PROPERTY OF MARRIED WOMAN—HUSBAND AS CONTRACTOR.

Where a material-man sought to establish a mechanic's lien on a house, and one of the defendants claimed that she owned the house; that she let the contract for building it to her co-defendant, her husband; and that he contracted with plaintiff; and that plaintiff gave no notice of his claim as required by statute; but other evidence showed that a carpenter who worked on the house was directed by both husband and wife how to build it, was addressed by the husband, not as if he were the contractor, but as if he and his wife were controlling the building jointly, and other evidence discredited the defendants' claim: *held*, that a judgment for defendants should be reversed.

Appeal from circuit court, Taylor county.

Action by E. D. Rand & Co. to establish a mechanic's lien. Judgment for the defendants, and plaintiffs appeal.

Crum & Haddock, for appellants. *L. T. McCoun*, for appellees.

SEEVERS, J. The defendants are husband and wife, and the lien is sought to be established on real estate belonging to Mrs. Parker for lumber furnished by the appellant, which was used in the construction or repair of a building on such real estate, and in making other improvements thereon. The lumber was purchased by Stephen Parker, and was charged to him by the plaintiff, and he gave his note for the amount found due, and the theory of the defendants is that Mrs. Parker contracted with her husband to make the improvements for a named sum of money, which she paid him, and that her husband was the contractor, and the plaintiff a subcontractor; and, as the requisite notice required in such case has not been given, therefore the appellant is not entitled to the relief demanded. We have carefully read and considered the evidence, and think the claim of the defendants has not been established. It is true, the defendants both so testify in general terms; but when the whole of their evidence is considered, we think such claim is an after-thought, now perhaps honestly entertained. The story told by Mrs. Parker is improbable, and she is directly contradicted in material matters by George Campbell, a carpenter who in fact did much of the work. He testifies that he constructed an addition to a house for "Mr. and Mrs. Stephen Parker. At the time of making the contract I gave uncle Stephen our bid, and he said he would see about it. * * * He said, 'We intend for you and Webster to do the work.' I went to the house that evening, and talked about the contract. * * *

They told me to go ahead. * * * Mrs. Parker said put in the window and they would pay us for it, and collect it of Mr. Whipple. The directions for doing the work were largely given by both Mr. and Mrs. Parker before we commenced; but she gave directions with regard to doors, * * * and in regard to how the folding doors should be fixed. * * * I think Mrs. Parker knew who was furnishing the lumber and material from the conversation we had there. * * * Mrs. Parker never made any objections to the improvements being made, and was perfectly satisfied with the work, and would give advice whenever I would ask her how it should be done." This evidence clearly shows that, as far as Campbell was concerned, Mrs. Parker was a contractor. It may be that both she and her husband were; but, if so, both were principals, and whichever theory is adopted, Campbell clearly would have been entitled to a mechanic's lien on the real estate in question. We believe the truth to be that no contract was let by Mrs. Parker to her husband or any one to construct the house, but that Mr. Parker undertook to superintend the improvement as any husband would for his wife, and that she was to pay therefor, and this clearly appears, we think, from the evidence of Campbell, whose evidence is entitled to full faith and credit, while that of the defendants is not.

The plaintiff is entitled to the establishment of a mechanic's lien, and such decree will be entered here or in the court below as the plaintiff may elect, and the judgment of the circuit court is reversed.

SOUTHERN WHITE LEAD CO. *v.* HAAS and others.

(*Supreme Court of Iowa.* December 18, 1887.)

1. FRAUDULENT CONVEYANCES—PREFERENCE—MORTGAGE.
   In Iowa a debtor in failing circumstances may mortgage the whole of his property, for the security of a portion of his creditors, even though the effect of the transaction is to defeat the collection of his unsecured debts.
2. PARTNERSHIP—EXISTENCE OF—FAILURE TO PAY IN CAPITAL.
   Where it is clear from the articles that the parties contemplate an immediate commencement of business as a firm, the failure of one of them to pay in his part of the capital as agreed, does not render him any the less a partner as of the date of the execution of the articles.
3. SAME—EVIDENCE OF DISSOLUTION.
   Where, by the terms of the articles, the partnership is to continue for five years, the presumption is that it remained in force for that length of time, and the burden to show an earlier dissolution is upon those setting it up. Proof that the partners agreed between themselves that the contract should be rescinded, and that one of the copartners should remain on a salary, is not sufficient to rebut such presumption, where such copartner, after such agreement, continued to exercise the same authority and control in the management that he had done before, and where the books show no credits for his services.
4. SAME—EVIDENCE OF PARTNERSHIP—DECLARATIONS.
   In a suit by judgment creditors of a firm to set aside chattel mortgages on the firm property on the ground that they were executed by only two of the three partners composing the firm, and were therefore *ultra vires* and void, admissions of such third partner that, when the mortgages were given, the partnership had been terminated, are no evidence of that fact, as against the plaintiffs, but are admissible only to discredit his testimony given on the trial that he was then a member.
5. DEPOSITION—ADMISSIBILITY—SEPARATE ACTION.
   R. sued H. and J., his partners, for the purpose of winding up the partnership. The deposition of J., which tended to show that at a certain date the firm had been dissolved, was taken and used in the action. *Held*, that the deposition was not admissible in a subsequent action by judgment creditors of the partnership seeking to set aside mortgages of the firm property, and to subject it to their claims, on the ground that the mortgages which were made at the said date, were executed by H. and J. alone, and that R. was then a partner.

Appeal from district court, Dubuque county.

On rehearing. See 33 N. W. Rep. 657.

Henderson, Hurd & Daniels, George W. Kusel, Longueville & Lenehan, Graham & Cady, Powers & Lacy, and *Utt Bros.*, for appellants. *Fouk & Lyon* and *McCeney & O'Donnell*, for appellee.

BY THE COURT. Counsel for the appellee, in a petition for a rehearing, with much force and vigor contend that the former opinion is erroneous as as to the main point determined. We have looked into the record again, and feel constrained to say that we think the decision is right, and must be adhered to.

Our attention is called to the fact that we failed to say in words that our ruling did not affect certain persons who were made defendants, but not served with notice, and did not appear. We supposed counsel would concede it could not have such effect.

It is also deemed proper to say, to the end that our ruling may not be misunderstood, that the mortgage identified in the record as Exhibit A has priority over the attachment liens and judgment of the plaintiffs, except as to the indebtedness therein named, as being due William Stoleben, which we find is not a partnership debt. Subject to what we have herein said, the former opinion is adhered to.

WING v. EVANS.

(*Supreme Court of Iowa.* December 13, 1887.)

1. LIMITATION OF ACTIONS—WRITTEN PROMISE TO PAY.
When goods are contracted for by means of a written contract and promise to pay, the right of action for the recovery of the agreed price is not barred in five years, but runs for ten years, under Code Iowa, § 2529, subd. 4, as it is a right of action upon the written promise to pay.

2. SALE—DELIVERY—ACKNOWLEDGMENT OF BY ONE VENDEE NOT BINDING UPON CO-VENDEE.
An acknowledgment of the receipt of goods, by one of two joint makers of a contract for the goods, is not binding upon the other joint maker, who is the only party defendant to an action for the value of the goods, and therefore such acknowledgment indorsed upon the contract for the goods is not admissible in such action, and neither is it admissible when the signature thereto is not proved to be genuine.

Appeal from district court, Buena Vista county; LOT THOMAS, Judge.

Action at law by S. J. Wing against Joseph Evans for the recovery of the price of certain charts. The district court entered judgment for plaintiff, and defendant appealed.

Robinson & Milchrist, for appellant. *T. D. Higgs*, for appellee.

REED, J It is alleged in the petition that goods for the price of which this action is brought, were sold and delivered under a written contract as follows:

"NOVEMBER 22, 1879.

"*S. J. Wing, Chicago, Ill.*—SIR: Please deliver at your earliest convenience to O. H. Sterla, at his residence, four sets National Business and Primary Charts, at $36 per set, $144; and we hereby agree to pay for said goods on the first day of May, 1881, with interest at the rate of six per cent. from the date of delivery. JOSEPH EVANS, Secretary of School Board.

"O. H. STERLA, President of School Board."

It is also alleged that the charts mentioned in the contract were delivered on the first day of December, 1879. The action was commenced on the fourteenth of October, 1886. In one division of his answer, defendant denied all the allegations of the petition. In another division he alleged that the cause of action arose more than five years before the institution of the suit, and that the right of action thereon was barred by the statute of limitations. The district court sustained a demurrer to this latter division.

1. Is the action barred by the statute of limitations? We think not. It is true that plaintiff, before he will be entitled to recover, must prove a delivery of the goods, and that fact must be established by evidence other than the writing. But the action is upon the written promise of defendant to pay for them a specified time after delivering. He is liable, if at all, not simply because the goods were delivered, for they were neither delivered to him nor to another, for his use, but because he promised to pay for them. That promise, and not the fact of delivery, is the ground of his liability, and that promise is in writing. And the action thereon would not be barred until the expiration of 10 years from the time it arose. Code, § 2529, subd. 4.

2. A copy of the contract was attached to the petition as an exhibit. There was also set out in the exhibit what purported to be a written acknowledgment by O. H. Sterla that he had received the goods mentioned in the contract. On the trial, plaintiff offered, and against defendant's objection was permitted to introduce, this written acknowledgment in evidence, and it was the only evidence of the delivery of the goods which was introduced. The objections made to the introduction of this writing were that the signature thereto was not shown to be Sterla's genuine signature. As the acknowledgement, even if the genuineness of the signature was established, was not binding on the defendant, these objections should have been sustained. The written acknowledgment, although indorsed upon the contract, was no part of it. The petition contained no reference to the acknowledgment, although a copy of it was indorsed upon the exhibit. It cannot, therefore, be regarded as constituting part of the petition; nor can the signature thereto be deemed genuine, because its genuineness was not denied under oath. But if it should be admitted that Sterla executed the written acknowledgment, it would not be competent evidence, as against this defendant, of the delivery of the goods. It amounts to no more than an admission by Sterla of a fact which must be established before he could be held liable for the price of the goods. But his admission is binding only on himself. It would hardly be contended that his verbal admission would be admissible against defendant. The fact that the admission in question is in writing, gives it no higher character as evidence.

Reversed.

COWAN v. MUSGRAVE, Ex'r, etc.

(*Supreme Court of Iowa.* December 12, 1887.)

1. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED—PARENT AND CHILD—AGREEMENT FOR DEVISEES.
In an action against an executor to recover for work and labor performed by plaintiff for her deceased father after she had attained her majority, the issue being whether the deceased had promised to pay her for her services, plaintiff, while testifying in her own behalf, was asked by her counsel to state the kind of work she performed for her father, and whether she expected compensation therefor. *Held*, that the question came within the prohibition of Code Iowa, § 3639, and was properly excluded.

2. PARENT AND CHILD—CONTRACT FOR SERVICES—EVIDENCE—WILL.
On the trial, the defendant executor was permitted, over plaintiff's objection, to introduce in evidence the will of the deceased, executed after the alleged service had been performed, from which it appeared that the testator had bequeathed to each of his children, including plaintiff, the sum of $50, and the balance of his estate to certain grandchildren. *Held* error, the will not being competent evidence on the question of contract.

3. SAME—COMPENSATION FOR SERVICES—PRESUMPTION.
In an action to recover for labor performed, where it is shown that the person rendering the service is a member of the family of the person served, and receiving support therein, either as a child, a relative, or a visitor, a presumption of law arises that such services were gratuitous; and in such case, before the person rendering the service can recover, the express promise of the party served must be shown, or

such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making, compensation therefor. Following *Scully* v. *Scully's Ex'r*, 28 Iowa, 548.[1]

4. TRIAL — EVIDENCE — RECALLING WITNESS AFTER CASE CLOSED — WHEN PARTY ENTITLED TO.

After the evidence was closed, plaintiff asked leave to recall a witness for the purpose of asking whether, on a certain date, she had not heard the deceased "protest against the marriage of plaintiff to any one, and * * * state that plaintiff must not get married; that she must stay at home and care for him; * * * that he had abundance of property to compensate her for her services, and that she should be amply and fully paid." The court refused the request, on defendant's objection that the case was closed. *Held*, that there being no objection to the question as leading, or on the ground of surprise, and good reason being given for the omission to ask the question when the witness was first examined, the request should have been granted.

Appeal from district court, Harrison county; G. W WAKEFIELD, Judge.

This is an action by Agnes J. Cowan to recover for work and labor alleged to have been performed by her for Richard Musgrave, deceased, of whose estate the defendant, George Musgrave, is executor. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

L. R. Bolter & Sons, for appellant. *S. H. Cochran*, for appellees.

ROTHROCK, J. 1. The plaintiff is a daughter of Richard Musgrave, deceased. She claims that she attained her majority in the year 1859, and was at that time a member of her father's family; that she continued to be a member of the family until September, 1884, and that during all that time she worked and labored continuously for her father, performing nearly all of the household duties, including the washing, making, and mending, caring for her father when ill, and, in addition thereto, fed the stock, consisting of cattle, horses, and hogs, both in winter and in summer, and frequently, and mainly with her own hands, prepared the fuel necessarily used in doing the cooking, and warming the rooms in which she and her father resided; that decedent frequently told plaintiff that he would pay her a reasonable compensation for her services, but the exact dates of said promises she is unable to state; that decedent expected to compensate plaintiff, and that plaintiff expected compensation for her services, and relied thereon during the entire time she worked for decedent as aforesaid. The defendant denies the averments of the petition generally, and especially those relating to the alleged contract for payment for the alleged services, and averred that plaintiff lived with decedent as a member of his family, and was clothed and supported by him, and did not expect payment for her services, and that decedent neither promised nor expected to pay the plaintiff anything for her services. Defendant also pleaded the statute of limitations.

The evidence taken upon the trial shows quite conclusively that the plaintiff performed the service as alleged; that she was a most diligent and faithful laborer, both in the house and field; and a number of witnesses testified that the decedent had stated to them during the time that the service was being performed that he would provide or recompense or pay the plaintiff for her labor. Some of these declarations appear to have been to the effect that provision would be made for the plaintiff for her labor in the final disposition of the decedent's estate; but other statements of a purpose to pay do not appear to have reference to that event. The plaintiff was a witness in her own behalf, and her counsel asked her to state the kind of work she performed for

[1] Respecting the presumption of the existence of contract obligations between parent and child to pay for maintenance or services, see Moyer's Appeal, (Pa.) 3 Atl. Rep. 811, and note; Wall's Appeal, (Pa.) 5 Atl. Rep. 220, and note; Sawyer v. Hebard's Estate, (Vt.) 3 Atl. Rep. 529, and note; Brown's Appeal, (Pa.) 5 Atl. Rep. 13, and note; Leary v. Leary, (Wis.) 32 N. W. Rep. 623; Dodson v. McAdams, (N. C.) 2 S. E. Rep. 453; Young v. Herman, (N. C.) 1 S. E. Rep. 792; Ormsby v. Rhoades, (Vt.) 10 Atl. Rep. 722.

her father, and whether she expected compensation therefor. The questions were objected to, and the objections were sustained. The plaintiff claims that these rulings were erroneous. We do not understand counsel to claim, in argument, that it was competent to prove by the plaintiff that she expected compensation for her labor. There can be no question that she could not be allowed to give evidence which would tend to prove a contract between herself and her father, the action being against his executor, (Code, § 3639;) and we think that evidence of the kind and character of work done should be regarded as coming within the prohibition of the statute. Such appears to have been the rule announced by this court in *Peck* v. *McKean*, 45 Iowa, 18. We think these rulings of the court were correct.

2. Richard Musgrave made a will in the month of June, 1885, and after the plaintiff had left home and married. The defendant offered the will in evidence, and it was admitted as such, over the plaintiff's objection. It appears from the will that the testator bequeathed to each of his children, including the plaintiff, the sum of $50, and to the children of his son George Musgrave all the residue of his estate. It is not stated in the record upon what ground, or for what purpose, the will was admitted in evidence. It must have been for the purpose of showing that the decedent had no intent or expectation to pay the plaintiff for her services. It surely could not have been intended to show thereby that the plaintiff was paid for her labor by the legacy of $50. We cannot conceive of any fact in issue between the parties which the will would be competent to prove. If the decedent was liable to pay the plaintiff for her labor by acts and declarations amounting to a contract, he could not escape liability, nor exonerate his estate from making payment, by any recital in his will; especially when made after the service was performed. We think the will should not have been admitted in evidence.

3. After the evidence was closed, the plaintiff asked leave to recall a witness for the purpose of propounding to her the following question: "State if some time in September, twelve years ago, at the house of Richard Musgrave, now deceased, and in the presence and hearing of the witness, one Noah Bolter, and of the plaintiff, the decedent, Musgrave, did not then and there protest against the marriage of his daughter, the plaintiff, to any one, and there and then, in the presence and hearing of these parties, state that Agnes (meaning the plaintiff) must not get married; that she must stay at home and care for him and her mother in their old age; that he had abundance of property to compensate her for her services, and that she should be amply and fully paid." The defendant objected to recalling the witness, on the ground that the case was closed, and it was a reopening of the case on the part of the plaintiff's counsel. The objection was sustained. The plaintiff complains of this ruling of the court. As the judgment must be reversed for the error in admitting the will in evidence, it is unnecessary to determine this question, as it will not likely arise upon a new trial. We may say, however, that as defendant did not object to the question as leading, and as no claim was made that an answer to the question adverse to the defendant would have taken him by surprise, as not being then prepared to meet it, and as what seems to be a good reason was given for the omission to ask the question of the witness when first examined, we incline to think the court, in the exercise of its discretion, should have allowed the witness to be recalled. It was not claimed that an answer favorable to the plaintiff would have been incompetent evidence in the case. Indeed, it is apparent that it would have been an important item of evidence on the very matter in issue between the parties.

4. Counsel for the respective parties do not agree as to the facts necessary to be established to enable a child to recover of a parent for labor performed by the child after arriving at the age of majority. The true rule appears to us to be well stated in *Scully* v. *Scully's Ex'r*, 28 Iowa, 548, as follows:

"Ordinarily, and without more, where one person renders services for another which are known to and accepted by him, the law implies a promise on his part to pay therefor. But where it is shown that the person rendering the service is a member of the family of the person served, and receiving support therein, either as a child, a relative, or a visitor, a presumption of law arises that such services were gratuitous; and in such case, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making, compensation therefor." And in Schouler's Domestic Relations it is said that the presumption that the parties do not contemplate payment for such services "may be overthrown by proof of an express or implied contract; an implied contract being proven by facts and circumstances which show that the parties, at the time the services were performed, contemplated or intended pecuniary recompense." As the plaintiff insists that the instructions are erroneous, we have thought it proper to give what we regard as the law applicable to the case; and we may say, further, that the fourth instruction, of which plaintiff complains, is in part in the same language as the above quotation from *Scully's Case*, and we do not think that any part of the instruction is inconsistent therewith.

For the error above pointed out, the judgment of the district court will be reversed.

RISING v. TEABOUT and another.

(*Supreme Court of Iowa.* December 14, 1887.)

1. NEGOTIABLE INSTRUMENTS—NON-NEGOTIABLE NOTE—ACTION BY ASSIGNEE.
   A party holding a non-negotiable note, having an indorsement by the payee to him, can maintain an action for the payment thereof.
2. APPEAL—OBJECTIONS NOT RAISED BELOW—ENTRY OF EXCESSIVE JUDGMENT.
   Where it was claimed that the amount of a judgment rendered upon a note, which had been computed by the clerk of the court, was for three dollars too much, but where no request of the court or motion to correct the mistake had been made, *held*, that the appellate court would not consider the alleged mistake.
3. SAME—REVIEW OF RULINGS AGAINST SUCCESSFUL PARTY.
   Rulings upon a branch of a case composed of two causes, which branch is decided in favor of the party complaining of the alleged errors, are not grounds for reversal.

Appeal from district court, O'Brien county.

Action by George M. Rising against Teabout & Valleau. There are two counts in the petition,—one on a promissory note, and the other on an account. Trial to the court. Judgment for the plaintiff on the note, and for the defendants on the account. The latter appeal.

Warren Walker, for appellants. *W. D. Boies*, for appellee.

SEEVERS, J. 1. Several of the errors assigned and argued by counsel relate to rulings having reference alone to the account. As the court found for the defendants on that branch of the case, the rulings, however erroneous they may be conceded to be, cannot be regarded as prejudicial.

2. The note is payable to J. H. Isilin & Co., and is not negotiable. It was indorsed as follows:

"Pay the within to G. M. Rising, without recourse.

"JOHN H. ISILIN & CO.
"By C. H. BULLIS."

The allegations of the petition are simply denied by the answer, which is not verified. When the note was offered in evidence, the defendants objected to its introduction, on the ground that it was not shown the note was the property of the plaintiff, and no authority is shown for the assignment thereof, which objection was overruled. This ruling is assigned as error. Mr. Bullis,

against the objection of the defendant, testifies, in relation to his authority to indorse the note, that "Harry Isilin left the note and account with me, and left the whole matter in my charge, to do with it just as I deemed best." The admission of this evidence is assigned as error. Conceding this last ruling to have been erroneous, we do not think it was prejudicial, for the reason that the plaintiff had possession of the note, and therefore was authorized to bring suit thereon in his own name. This was ruled in *Younker* v. *Martin*, 18 Iowa, 143, and *Pearson* v. *Cummings*, 28 Iowa, 345. It is true that in these cases the notes were payable to the order of the payee therein named; but this difference is immaterial, for the reason it was held the plaintiff could maintain the action because he was the holder. We need not repeat the reasoning of the cases cited.

3. The amount due upon the note was assessed by the clerk under the direction of the court, and for such amount the judgment was rendered. The appellants insist that the jndgment was rendered for about three dollars more than was due. If this is so, (which is doubtful,) the mistake was made by the clerk, and the court was not asked to correct it, and therefore it cannot be corrected in this court. Code, § 3167. Or if it can be said to have been a mistake or error of the court, it cannot be corrected by this court, for the reason no motion was made to correct it in the court below. Code, § 3168.

4. Evidence was introduced by the defendants tending to show they did not sign the note. But such evidence is not so convincing as to justify us in setting aside the finding of the court. Affirmed.

COOK v. FEDERAL LIFE ASS'N.

(*Supreme Court of Iowa.* December 14, 1887.)

1. INSURANCE—MISREPRESENTATIONS—DEFENSE—FAILURE OF COMPANY TO ATTACH COPY OF APPLICATION TO POLICY.
   In an action upon a life insurance policy, defendant pleaded certain false representations contained in the application for insurance as a bar to the action. Plaintiff demurred, on the ground that such answer was no defense; no copy of such application having been indorsed upon, nor attached to, the policy, as required by acts 18th Gen. Assem. Iowa, *c.* 211, § 2, providing that "all insurance companies * * * shall * * * attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which * * * may in any manner affect the validity of such policy," and that, "if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging, or proving such application or representation." *Held*, that the demurrer was properly sustained.

2. SAME—APPLICATION OF STATUTE.
   Acts 18th Gen. Assem. Iowa, *c.* 211, entitled "An act relating to insurance and fire insurance companies," published by the secretary of state in the usual way, first giving the number of the chapter, but followed by a heading in these words, "Relating to Fire Insurance," and as arranged in the Annotated Code, and provided with marginal notes, does apply to "all insurance companies," as provided in section 2 of this act.

Appeal from district court, Scott county; G. J. LEFFINGWELL, Judge.

Action by Amanda M. Cook upon a life insurance policy. There was a demurrer to the answer, which was sustained. Defendant appeals.

Geo. E. Hubbell, for appellant. *Cook & Dodge* and *Nathaniel French*, for appellee.

ROTHROCK, J. The policy upon which this action is founded was issued to William E. Cook, and payable to the plaintiff, Amanda M. Cook, who is his widow. The answer pleads several defenses, one of which is that the insured, at the date of the policy, was afflicted with piles. Another defense is that the insured was, at the date of the policy, addicted to the immoderate use of intoxicating liquors, and that, as a result thereof, he had a disease called "*delir-*

ium tremens." It appears from the averments of the answer that, when the contract of insurance was entered into, the insured, in a written application therefor, was interrogated as to his physical health, and as to his habits, and that he answered therein that he was not addicted to the immoderate use of intoxicating liquors, and that he did not have the disease called "piles." It is alleged that the answers to these questions were false and fraudulent, and that by reason thereof the plaintiff had no right of action upon the policy. The demurrer was upon the ground that the matters averred in the answer were not a defense to the action, because a copy of the application for the insurance was not indorsed upon, nor attached to, the policy. Whether the defendant may avail itself of the defenses pleaded, conceding the fact to be that a copy of the application is not indorsed upon, nor attached to, the policy, is the sole question presented for determination.

The question involves an examination of chapter 211 of the acts of the eighteenth general assembly. The title of the act is in these words: "An act relating to insurance and fire-insurance companies." The first section is as follows: "Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." Section 2 is as follows: "All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representations of the assured, which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but, if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging, or proving such application or representations, or any part thereof, in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representations, but may do so at his option." Section 3 of the act appears to refer to fire insurance companies. It has several provisions which are inapplicable to life insurance; such as that, in case of loss of any insured building, "the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy." The closing sentence of the section is as follows: "All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

Considering the title of the act, and all of its provisions, it seems to us to be very clear that it applies in its first and second sections to all kinds of insurance. There can be no doubt that section 1 applies to any and all classes of insurance, whether life, fire, marine, insurance of live-stock, or any other kind of insurance; and the same may be said of the second section. To hold otherwise would, it seems to us, be inconsistent and repugnant to the title of the act. If all insurance was not contemplated, the title would have been simply "An act relating to fire insurance companies." The general term, "relating to insurance," if all insurance was not intended, would not have been used. We are not disposed to hold that such unnecessary repetition would have occurred in the title. The publication was made by the secretary of state in the usual way. He first gives the number of the chapter, followed by a heading in these words: "Relating to Fire Insurance." There are also the marginal notes required by section 35 of the Code. The marginal notes are no part of the statute. They are merely for convenience in examining it. The headlines are not provided for by statute, and yet they are inserted, probably for the same purpose as the marginal notes. But these are not to be considered

in construing the statute, for the simple reason that they are not a part of the law. We are asked to hold, because of the head-line, and because of the arrangement of this statute in our Annotated Codes, with reference to other statutes, that the act in question has no reference to life insurance companies. We cannot so hold, in view of the fact that the second section requiring the application to be attached to, or indorsed on, the policy, applies in terms to "all insurance companies," and there is no good reason why it ought not to apply to life insurance companies. Affirmed.

KITERINGHAM v. BLAIR TOWN LOT & LAND CO.

(*Supreme Court of Iowa.* December 14, 1887.)

1. PUBLIC LANDS—HOMESTEAD ENTRY—OMISSION OF TRACT—TITLE.
Plaintiff settled upon certain government land in 1867, and applied to the land-office in 1872, and claimed the right to enter it as a homestead, but omitted to insert in his application one 40-acre tract. *Held*, that his right and title thereto have failed.

2. SAME—POSSESSION PRIOR TO APPLICATION—STATEMENTS BY LOCAL LAND-OFFICE.
Plaintiff settled upon certain land in 1867, and in 1872 filed an application to enter it as a homestead. At that time the title of the land had vested in a railroad company under the railroad grants. *Held* that, prior to his application, he was in possession by sufferance only, and neither his occupancy nor anything said by the local land-office could prejudice the rights of the railroad company.

Appeal from district court, Harrison county; C. H. LEWIS, Judge.

Henry Kiteringham, plaintiff, sued the Blair Town Lot & Land Company, defendant, to determine the ownership of certain real estate. Judgment for the defendant, and plaintiff appealed.

S. H. Cochran, for appellant. *E. S. Bailey*, for appellees.

SEEVERS, J. The petition states that the plaintiff settled upon the N. ½ of the N. E. ¼, the N. E. ¼ of the N. E. ¼, and the S. E. ¼, of the N. E. ¼, of section 15, in township 78 N., of range 54 W., in Harrison county, Iowa, in April, 1867, and then commenced improving and cultivating the same, with a view of obtaining the title thereto under the pre-emption or homestead laws of the United States, and that on the eighth day of July, 1872, he made an application to enter said land at the United States land-office, and on the fourteenth day of September, 1872, received the duplicate receipt of the register thereof for the entry of such land under the act of congress to secure homesteads to actual settlers on the public domain; that he presented the register's certificate to the receiver of the land-office, and paid him $14, in full of all legal charges for said land; that the receiver wrongfully refused to give the plaintiff a duplicate receipt, on the ground that the Chicago, Rock Island & Pacific Railroad Company pretended to have some claim thereto; that in January, 1875, he again tendered all legal fees to such receiver, and was wrongfully informed by the receiver that the Cedar Rapids & Missouri River Railroad Company pretended to have some claim to said land; that at the time the plaintiff settled upon said land, and at all times, he has been legally entitled to the possession thereof under the homestead laws of the United States. The relief asked is that the plaintiff's title to said land be quieted. The defendant answered the petition, and disclaimed any interest in the N. E. ¼ of the N. E. ¼ of said section 15, and, as to the residue, claims title under the Cedar Rapids & Missouri River Railroad Company, to whom the land was granted, as the defendant claims, under the acts of congress known as the "railroad land grants." It is stated in the answer that said lands were duly selected by the railroad company, and the selection of the N. W. ¼ of the N. E. ¼, and the N. E. ¼ of the N. W. ¼, was approved by the secretary of the interior on the eighteenth day of July, 1868, and that the S. W. ¼ of the N. E. ¼ was selected by said company, and on the second day of September, 1872, the same was ap-

proved by said secretary, and thereby the title to said lands vested in said railroad company in pursuance of said acts of congress. A prior adjudication is also pleaded by the defendant, and it asks that its title to said land be quieted.

1. When the plaintiff applied to the land-offices in July, 1872, and claimed the right to enter the land as a homestead under the act of congress, he only sought to enter the N. E. ¼ of said section 15. Therefore, as he never sought to enter N. E. ¼ of N. W. ¼ of said section, his right and title thereto have failed, and that tract, and also the one to which the defendant disclaimed any title, cannot be regarded as being in controversy in this action.

2. We find that the right and title to the S. W. ¼ of the N. E. ¼ of said section was in controversy in *Lot & Land Co.* v. *Kitteringham*, 43 Iowa, 462. The parties in that action were the same as in this. The issues in that case are the same as in this, and therefore the adjudication in that case barred the right to litigate the same question again.

3. As to the remaining tract, it will be observed that the plaintiff made an application to enter it as a homestead in 1872. It is sufficient to say, at that time, the land did not belong to the United States, but that the title had vested in the railroad company under the railroad grants, unless the occupancy of the land, which commenced, it will be conceded, in 1867, vested in him some equity or right to the land under some act of congress. Our attention has not been called to such an act, and we know of none. Prior to the time the application was made to enter the land as a homestead, the plaintiff was in possession by sufferance merely, and it did not have the effect to create in him any right, title, or interest. Nothing that was said by the local land-officers could in any way or manner prejudice the rights of the railroad company. Affirmed.

ECK v. SWENNENSON.

(*Supreme Court of Iowa.* December 14, 1887.)

MORTGAGES—PURCHASE AT TAX SALE BY MORTGAGEE—EFFECT.

Judgment of foreclosure was obtained March 30, 1881, on a mortgage dated May 27, 1878, and on the same day the judgment was assigned to plaintiff. The premises were sold under execution in February, 1885, and bid in by plaintiff, to whom a sheriff's deed duly issued. In November, 1879, the property was sold for taxes of 1878, and bid in by the mortgagee, who assigned to a third person. A tax deed issued to this person, who afterwards conveyed to defendant. *Held* that, as the mortgagee had the right to pay the taxes in order to protect his mortgage, his purchase at the tax sale must be regarded as such payment merely, and cannot operate to give him title, and thus defeat the senior lien of the mortgage.

Appeal from district court, Chickasaw county; L. O. HATCH, Judge.

This was an action in equity by George Eck against John S. Swennenson to set aside a treasurer's deed of certain lands, and quiet plaintiff's title thereto. The judgment was for plaintiff, and defendant appealed.

A. C. Boylan, for appellant. *Hiram Shaver*, for appellee.

REED, J. On the twenty-seventh of May, 1878, Ole J. Overwold, who was then the owner of the premises in controversy, executed to S. Swennenson a mortgage to secure an indebtedness of $1,200. On the thirtieth of March, 1881, Swennenson recovered a judgment against Overwold foreclosing said mortgage, and on the same day he assigned said judgment to plaintiff. In February, 1885, plaintiff caused the premises to be sold on special execution issued on said judgment; and bid them in for the amount of the indebtedness, and costs; and on the seventh of April, 1886, the sheriff executed a deed to him under said sale. On the tenth of November, 1879, the property was sold by the county treasurer for the delinquent taxes of 1878, and was bid in by Swennenson; and on the twenty-third of March, 1883, he assigned the certificates of purchase to John J. Swennenson, to whom the

treasurer gave a deed on the thirteenth of September, 1884; and he subsequently gave to defendant a conveyance of the premises.

It will be observed that S. Swennenson was the owner of the mortgage when he bid in the premises at the tax sale, and that he still held the certificates of purchase when he assigned the judgment of foreclosure to plaintiff. One of the grounds upon which plaintiff demands relief against the tax deed is that, as Swennenson had the right to pay the taxes for the protection of his security, his purchase at the tax sale should be regarded merely as a payment of them, made for that purpose, and consequently, neither he, nor any person holding under him, could acquire title under the certificates; and we think this position should be sustained. It was held in *Fair* v. *Brown*, 40 Iowa, 209, and *Garrettson* v. *Scofield*, 44 Iowa, 35, that a junior mortgagee cannot, by bidding the property in at tax sale, acquire title, and thereby defeat the senior mortgage; and in the former case it is said that he cannot by that means acquire title as against the mortgagor. The ground of the holding is that, as the party had the right to pay the taxes for the protection of his security, it would be inequitable to permit him to acquire title by purchasing the property for the delinquent taxes, and thereby defeat the lien of the senior mortgagee, and cast upon the mortgagor the weight of both his own and the senior lien. Plaintiff's equities are equally as strong as would be those in favor of a senior mortgagee or the mortgagor. He in fact stands in the place of the latter, for by his purchase under the foreclosure he acquired all his estate and rights in the land.

The judgment of the district court will be affirmed.

WADSWORTH and others *v.* FIRST NAT. BANK OF INDIANOLA.

(*Supreme Court of Iowa.* December 14, 1887.)

1. APPEAL—ASSIGNMENTS OF ERROR—FAILURE TO DESIGNATE PARTICULAR ERROR.
Assignments of error did not designate the particular errors objected to, as required by Code Iowa, § 3207. *Held*, that such assignments could not be considered.
2. SAME—RECORD—BILL OF EXCEPTIONS—EVIDENCE—CERTIFIED AFTER TIME.
Assignments of error were based upon the insufficiency of the evidence to support the verdict, and, by order of the court, plaintiffs had 90 days in which to file a bill of exceptions. A bill was filed within the time allowed, but it did not certify the evidence taken at the trial, a copy of which was, however, certified by the judge and filed after the time allowed. *Held*, that the evidence did not constitute a part of the record, and that it must be stricken out.

Appeal from district court, Warren county; O. B. AYRES, Judge.

This action was brought by W. C. Wadsworth & Co. against the First National Bank of Indianola, Iowa, upon a check drawn on that bank by one Jones, and payable to plaintiffs' order. The judgment below was in defendant's favor. Plaintiffs appeal.

Bryan, Seevers & Stewart, for appellants. *W. H. Berry* and *Mitchell & Dudley*, for appellee.

BECK, J. 1. The assignment of errors is in the following language: "(1) The court erred in rejecting evidence offered by the plaintiffs, as shown by the record. (2) The court erred in admitting evidence objected to by plaintiffs, as shown by the record. (3) The court erred in overruling plaintiff's motion to direct a verdict for the plaintiffs. (4) The court erred in refusing to give each of the instructions asked for by the plaintiffs. (5) The court erred in giving each of the instructions given on its own motion. (6) The court erred in overruling the plaintiffs' motion for a new trial. (7) The court erred in rendering judgment against the plaintiffs." The first, second, fourth, fifth, and sixth assignments are not as specific as the case will allow, and fail to point out the very errors objected to, and, in this regard, violate the requirements of Code, § 3207. These assignments we cannot, therefore, con-

sider. See *Wood* v. *Whitton*, 66 Iowa, 295, 19 N. W. Rep. 907, and 23 N. W. Rep. 675, and cases cited.

2. The third and seventh assignments are based upon the consideration that the evidence is not sufficient to support the verdict. The abstract shows that the evidence was taken by a short-hand writer, who, within the proper time, certified and filed the short-hand notes. By an order of the court, the plaintiffs had 90 days to prepare and file a bill of exceptions, which was filed within that time, but does not certify the evidence. After the expiration of the time, the translation of the short-hand notes were certified by the judge and filed. Defendant moves this court to strike out that part of the abstract containing the evidence, on the ground that the abstract shows that it was not certified within the time required by law. The motion must be sustained.

The translation of the short-hand notes of evidence, duly certified by the judge, may be regarded as having the effect of a bill of exceptions. But it must be certified by the judge during the time or within the time prescribed by the order of the court. Code, § 2831. As the evidence was not certified by the judge and filed within the time prescribed by the order of the district court, it constitutes no part of the record, and must be stricken out. *McCarthy* v. *Watrous*, 69 Iowa, 260, 28 N. W. Rep. 586; *Gibbs* v. *Buckingham*, 48 Iowa, 96; *Harrison* v. *Charlton*, 42 Iowa, 573; *Lynch* v. *Kennedy*, Id. 220. The motion to strike being sustained, no part of the evidence is left in the record. The third and seventh assignments of error have therefore no support in the record. There remains nothing for consideration in the case.

The judgment of the district court must be affirmed.

EDMONDS v. EDMONDS and others.

(*Supreme Court of Iowa.* December 14, 1887.)

BONDS—GUARDIAN AND WARD—ACTION ON BOND BY ONE OF THREE WARDS—AMOUNT OF RECOVERY.

In an action against the sureties on a guardian's bond in the penal sum of $4,000, by one of three wards, two of whom had recovered $3,546.04 on the same bond in a former action, *held*, that plaintiff was not entitled to judgment in excess of one-third of the penalty of the bond.

Appeal from district court, Benton county; JAMES D. GIFFEN, Judge.

Action by Cyrenus Edmonds against Luana M. Edmonds, guardian, and Eliza R. Kearns, S. B. Crane, and Samuel Aungst, sureties on her bond, to recover $463.52, with interest at 6 per cent. per annum from December 22, 1883, and $903.22, with interest at 10 per cent. from the same date, which the guardian had failed to pay over. The case was tried before a jury and judgment rendered for plaintiff on the verdict, against all the defendants except Luana M. Edmonds, for $525.77, with 6 per cent. interest from date of judgment, and for $1,105.42, with 10 per cent. interest from date of judgment. The sureties on the bond appeal.

Nichols & Burnham, for appellants. *Gilchrist & Haines*, for appellee.

REED, J. The penalty of the bond sued on is $4,000, and it was given for the benefit of three wards. The sureties pleaded that an action had been brought on the bond by the present guardian of the other two wards, and that there had been a recovery in that action of $3,546.04. The district court sustained a demurrer to the division of the answer in which those facts were pleaded. The position urged by counsel for the appellants is, that as there has already been a recovery on the bond for that amount, and as the sureties cannot be held for any greater amount than the penalty, plaintiff is not in any event entitled to recover more than the difference between the penalty and the amount of that judgment. We held in *Hooks* v. *Evans*, 68 Iowa, 52,

25 N. W. Rep. 925, and *Knox* v. *Kearns*, 34 N. W. Rep. 861, October term, (which is the cause in which the former recovery was had,) that when the bond is for the benefit of several wards, and the defalcation is for an amount in excess of the penalty, neither of them is entitled to recover, as against the sureties, more than his *pro rata* share of the penalty. It may be that it follows logically from that holding that each ward would in such case be entitled to recover the full amount of his *pro rata* share of the penalty, regardless of the fact that the others had already recovered an amount in excess of their share. But we need not go into that question, for, if the correctness of that proposition should be admitted, the ruling of the district court on the demurrer could not be sustained. Plaintiff was seeking to recover, and by the judgment was permitted to recover, an amount considerably in excess of one-third of the penalty of the bond. Under the division of the answer to which the demurrer was sustained, defendants, while they were not entitled to the full measure of relief demanded, were entitled to some relief against plaintiff's claim. The demurrer should therefore have been overruled.

The other questions in the case are disposed of in *Knox* v. *Kearns, supra*. Reversed.

WILSON *v.* SMITH and another.

(*Supreme Court of Iowa.* December 14, 1887.)

FRAUDS, STATUTE OF — PROMISE TO PAY DEBT OF ANOTHER — AGREEMENT TO PAY COSTS OF APPEAL.

Plaintiff and the deceased were defendants in a certain action, from the judgment in which plaintiff appealed, and deceased verbally agreed to pay one-half of the costs of the appeal. *Held*, that this was not a promise to pay the debt of another, as the promisor was interested in the result of the appeal, and might have been benefited by a reversal of the judgment.[1]

Appeal from district court, Harrison county; G. W. WAKEFIELD, Judge.

The defendants, Joseph H. Smith and C. S. Parker, are executors of the estate of Ezra Perry, deceased. The plaintiff, Allen Wilson, filed a claim against the estate for money paid as attorney's fee in an action of *Annis Mitchell* v. *Allen Wilson et al.* The claim was allowed, and the defendants appeal.

Jos. H. Smith, for appellants. *H. H. Roadifer*, for appellee.

ADAMS, C. J. The fact appears to be that Annis Mitchell brought an action to establish a boundary line, and made defendants, not only this plaintiff, Allen Wilson, but the deceased, Ezra Perry, and one other person. From the judgment establishing the boundary, the defendant, Allen Wilson, (present plaintiff,) appealed. The evidence, we think, tends to show that Perry also felt aggrieved by the judgment, and desired that an appeal should be taken, and told Wilson that he would pay one-half of the cost of the appeal. His promise to pay, however, was a mere verbal promise, and the defendants insist it was merely a promise to pay the debt of another, and was therefore within the statute of frauds. But, in our opinion, the promise was made by the deceased, not with the view of benefiting Wilson alone, but with the view of benefiting himself also. We have no doubt that the deceased thought that a reversal would give him, as well as Wilson, a different and more favorable boundary line. Whether such would have been the result of a reversal upon Wilson's appeal alone, we need not determine. It is sufficient, we think, that

[1] When the main purpose of a promisor is, not to answer for another, but to subserve some pecuniary and business purpose of his own, involving either benefit to himself or damage to the other contracting party, his promise is not within the statute of frauds, although, in form, it is to pay the debt of another, and although the fulfillment of his promise may incidentally have the effect of extinguishing that liability. Crawford v. Edison, (Ohio,) 13 N. E. Rep. 80. See Green v. Burton, (Vt.) 10 Atl. Rep. 575; Railroad Co. v. Houston, (Tenn.) 2 S. W. Rep. 36, and note.

the deceased expected to secure a benefit and entered into the contract with a view to such result. It is quite possible that Wilson would not have appealed but for the promise made by the deceased. It is certain that the amount of Wilson's interest involved could hardly be said to justify it. In making the promise, it was for the deceased to judge whether he would be benefited or not, and we do not think that his estate can escape liability, even if it should appear that he was mistaken. We think that the promise was made with a view to securing a benefit, and that we must assume that the appeal was prosecuted in part for his supposed benefit, if it was not originally taken at his instance.

In our opinion the claim was properly allowed. Affirmed.

BROWN and others *v.* BROWN and others.

(*Supreme Court of Iowa.* December 14, 1887.)

MORTGAGES—FORECLOSURE—SEPARATE MORTGAGES UNDER ONE EXECUTION—VALIDITY—SUBROGATION.

Plaintiff and his brother owned each an undivided two-fifths of certain real estate, and owned other land jointly. They gave their notes to two creditors, secured by mortgages, each on different pieces, in which they owned four-fifths interest. Plaintiff's brother gave an individual note and mortgage, secured on his interest in all this and some other real estate. The mortgages were foreclosed, and the decree in the foreclosure of the individual mortgage provided for the sale under all the foreclosures under one execution, and that, upon the sale of a four-fifths interest in a lot, the joint mortgage secured on that piece, should be paid, and the balance applied on the individual note and mortgage. Defendant purchased at the sale, and plaintiff sought to enjoin the issuing of a sheriff's deed. *Held*, that the entire sale was invalid, but, inasmuch as the joint mortgages had been paid by the purchaser, he should be subrogated to the rights of the mortgagees.

Appeal from district court, Louisa county; A. H. STUTSMAN, Judge.

Action for an injunction to restrain the defendant J. C. Smith from executing a sheriff's deed in such way as to purport to cover more than two-fifths of certain real estate. The defendant James Brown was the purchaser at the execution sale, and is the holder of the certificate of sale. He files a cross-petition, and prays that, if the conveyance by sheriff's deed be limited to two-fifths of the property, the sale be set aside, and he be decreed to be the owner by subrogation of certain judgments which were satisfied in form by money paid by him in pursuance of the sale. The court rendered a decree virtually setting aside the sale, and granting the defendant James Brown the relief prayed for by him in his cross-petition. The plaintiff J. K. Brown appeals.

Power & Huston, for appellant. *Newman & Blake*, for appellee.

ADAMS, C. J. The controversy in this case grows out of an irregularity in the foreclosure of a mortgage, and of a sale made in pursuance thereof. The decree provides for the sale of a larger interest than was covered by the mortgage. It provides for the sale of four-fifths of certain land, while the mortgagor owned only two-fifths, and the decree was so drawn as to lead to an inference that the intention was that a two-fifths interest belonging to the plaintiff should be sold in connection with the mortgagor's interest. The defendant brings this action for the purpose of limiting the conveyance expressly by its terms to the two-fifths interest owned by the mortgagor, in order that no cloud may be cast upon his own interest, or his title be in any way embarrassed. The irregularity grew out of a desire on the part of attorneys to accomplish by one execution sale what could not properly be thus accomplished. The mortgagor in the mortgage foreclosed, as above mentioned, was one Joshua Brown. He and the plaintiff J. K. Brown each owned an undivided two-fifths of the tracts. They owed a joint debt to one Dee, and another joint debt to one Boner. They united in mortgaging their four-

fifths interest in one tract to Dee, and in the other tract to Boner. Dee and Boner had each obtained a decree of foreclosure. The mortgage in question, under which the sale was made, was executed to James Brown by Joshua Brown and wife alone. It covered Joshua Brown's interest mortgaged to Dee, and his interest mortgaged to Boner, but the mortgage was junior to their mortgages. It also covered other land, upon which it was the first lien. The land mortgaged to Dee was in section 16, and the land mortgaged to Boner was in section 21, and will be designated hereafter by the number of the sections. The attorneys, in preparing the decree in James Brown's foreclosure, conceived the idea that that decree, and also the one in favor of Dee, and the one in favor of Boner, could be satisfied by one sale. They accordingly drew the decree so as to provide that there should first be offered and sold the individual four-fifths of the tract in section 16, and the proceeds be applied, first, in payment of Dee, and any excess in the payment of James Brown, the plaintiff in execution; and that there should then be offered and sold the undivided four-fifths of the tract in section 21, and that the proceeds be applied, first, in the payment of Boner, and any excess in the payment of James Brown. The sale was made under this decree.

Now, this was wrong; because J. K. Brown's land could not be properly sold, even to pay his own debt, under a decree to which he was not a party, and much less to pay a debt not due from him, nor a lien upon his land. The court was right, therefore, in treating the sale of J. K. Brown's interest invalid. We think it was right, also, in treating the sale, as an entirety, invalid. This action was brought by him for the purpose of obtaining a decree to the effect that the sale *as to him* was invalid, and he complains of the court because the court went further, as prayed in the cross-petition, and entered a decree treating the sale, as an entirety, invalid. He claims that the joint debt due from him and Joshua Brown to Dee, and the joint debt due from them to Boner, should remain satisfied, as in form they appear to be; and he insists that this is right, even though the purchaser gets only the undivided two-fifths interest of Joshua Brown. His position is that that was all that could be properly sold under the purchaser's decree, and all that was in fact sold, and that there was no necessity that the purchaser should make any mistake about it, and no evidence that he did make any mistake about it, and that, if he bid too much, it was his own folly. In support of his position that only Joshua Brown's two-fifths interest was in fact sold, he relies upon a provision in the decree that Joshua's interest should be sold, and also upon the fact that the execution ran against his interest. But the transaction, taken as a whole, shows clearly enough that the intention was to sell the undivided four-fifths. Indeed, the plaintiff himself avers in his petition that, in making the sale of the interest of Joshua Brown in said real estate, such interest was described as the undivided four-fifths. This, we think, is not strictly true; but it does appear to be true to this extent: that what was sold was regarded as the undivided four-fifths interest; and the plaintiff cannot, we think, be heard now to claim to the contrary. The sale having been so made, it was properly, we think, held invalid in its entirety. This ruling left the decree in favor of Dee, and the decree in favor of Boner, virtually still in force, to be satisfied, as they should have been originally, by an execution issued upon each. And, inasmuch as Dee and Boner had been paid by the purchaser, James Brown, it was proper that he should be subrogated to their rights. This, it seems to us, does substantial equity, and the decree below must be affirmed.

DILLON v. SHUGAR and others.

(*Supreme Court of Iowa.* December 14, 1887.)

1. VENDOR AND VENDEE—BONA FIDE PURCHASER—NOTICE—INADEQUATE CONSIDERATION.
A person sold certain land to the grantor of defendants' ancestor, and, not having received his patent, assigned his certificate of location. The grantor conveyed by deed, but the record showed no title in him. The land was worth $2,000. One P. obtained for $25.00 a deed from the original owner, and conveyed to plaintiff, both knowing of the deed to defendants' ancestor. *Held*, that plaintiff had such notice of defendants' title as to put him on inquiry, and he only obtained the interest that the original owner of the land had at the time he gave the deed.

2. MORTGAGES—BONA FIDE PURCHASER—FORECLOSURE—SUBROGATION.
Plaintiff, knowing defendants had an interest in certain land, bought from his grantor the legal title of the patentee, who had sold the land to another, but had never given a deed, and gave a note, secured by mortgage, in payment, which was sold to one who did not know of defendants' equitable interest; the record showing a legal title in plaintiff. *Held*, that the owner of the mortgage was entitled to a decree of foreclosure and a judgment against the maker and indorser of the mortgage, and that he should first exhaust his remedy against them, and, if the land was sold or defendants paid the mortgage, they should be subrogated to his rights under the judgment.

Appeal from district court, Guthrie county; J. H. HENDERSON, Judge.

W. F. Dillon, plaintiff, brought an action against Sarah Shugar and others to quiet title. E. R. Sayles intervened, asking for foreclosure of a mortgage. The court dismissed plaintiff's petition, refused Sayles' right to foreclose, and quieted title in Shugar and others. Sayles appealed.

Kauffman & Guernsey, for appellant. *Platt & Carr*, *C. A. & J. G. Berry*, and *W. L. Read*, for appellees.

ADAMS, C. J. The land was entered by one Snavely. He sold it to one Maria Wenrick, and she sold it to one John Shugar. He died intestate, and Sarah Shugar and others, made defendants hereto, are his heirs. After Snavely had sold the land to Mrs. Wenrick, he executed a deed of it to Lyman Porter, made defendant hereto, and he executed a deed of it to the plaintiff, Dillon, who claims to have bought the same without knowledge of the rights of the Shugars. He gave his promissory notes for the purchase money, and a mortgage upon the land to Porter, and Porter sold the notes and transferred them by indorsement to the intervenor, Sayles. The court below held that the plaintiff was not an innocent purchaser of the land, and that Sayles was not an innocent purchaser of the notes and mortgage.

The controversy in this case has arisen out of the fact that the sale by Snavely to Mrs. Wenrick was not evidenced by a deed, and the plaintiff claims that, at the time his grantor, Porter, took a deed from Snavely, the latter did not appear from the record to have made any previous sale of the land to any one, and that neither he nor Porter had any knowledge of such sale. In our opinion, both the plaintiff and Porter knew that Snavely had parted with all beneficial interest in the land, or, at least, had knowledge of such facts as put them upon inquiry; and that in equity they must be charged with knowledge.

The land was worth about $2,000, and Porter paid Snavely only a nominal consideration,—$25 or less. This alone was sufficient evidence to him that Snavely did not claim to be the owner, and must have parted with his interest to some one. Besides, it is shown that both the plaintiff and Porter knew that the record showed a conveyance from Mrs. Wenrick to John Shugar, and the deed showed the residence of Shugar to be in Cedar county, Iowa, and the plaintiff, at least, if not Porter, knew Shugar, or knew of him by reputation. In our opinion, neither Porter nor the plaintiff acquired any greater interest than Snavely had when he made his deed to Porter, and Snavely, at best, was the holder of the mere legal title.

As to Sayles' knowledge, we have to say that the case appears to us to be

somewhat different. It is shown, to be sure, that he had in his possession at one time the deed from Snavely to Porter. Now, as that deed showed a consideration of only $25 for a tract of land worth about $2,000, he would, if he had observed the consideration and the description of the land, and knew its value, have seen enough to lead him to the inference that Snavely did not execute the deed upon the supposition that he was the owner of the property; but at the time Sayles held the deed he had no interest in it or the land, and it does not appear that he contemplated acquiring any interest in the same. He testifies that he did not even observe what land was covered by the deed, and we see no reason to doubt the truthfulness of this statement.

The court below seemed to think that the record was in such condition that Sayles was bound to take notice of the defect in Dillon's title. After the entry of the land by Snavely, a patent for the land was duly executed to him, and held for some years by the department. After the execution of the patent to him, he probably, without knowing that it had been executed, having occasion to sell to Mrs. Wenrick, simply assigned to her his certificate of location. After that, by virtue of the assigned certificate, or in some other way, John Shugar, Mrs. Wenrick's grantee, acquired the possession of the patent. It was probably delivered directly to him, and never was delivered to the patentee, Snavely. The court below seems to think that, to pass the title to Snavely, there should have been a delivery of the patent to him, and that, as this was not done, the title remained in the United States, and so, as Snavely had neither the legal nor equitable title at the time he made his deed to Porter, the latter took nothing, and conveyed nothing to the plaintiff, who is Sayles' mortgagor. But it appears to us that, when the patent was duly executed and recorded, and delivered to Shugar, the legal title passed to the patentee, if, indeed, it did not pass prior to delivery. *U. S.* v. *Schurz*, 102 U. S. 378. In that case it was held that delivery was not essential. But here there was a delivery intended, evidently for the benefit of the patentee, or of some one through him. So far as we can see, then, Snavely appeared, at the time he made his deed to Porter, to hold the legal title, and we have failed to find that Sayles had knowledge that the equitable title was held by any one else. We think, then, that Sayles must be protected. But, as we have found that Porter and the plaintiff were not innocent purchasers, it is their duty to pay the debt due Sayles, and relieve the land. While, therefore, Sayles has judgment against the plaintiff and Porter, and rightly so, and appears to be entitled to a decree of foreclosure, we think that his decree should provide that he shall first exhaust his remedy against Porter and the plaintiff upon their personal liability, and, in case of his inability to collect his debt from them, and the same shall appear by the return of an execution that no property of theirs can be found, he may then enforce his lien against the mortgaged land by sale thereof; and, in case the property shall be sold for the amount of the debt, or in case the heirs of John Shugar shall pay Sayles the amount, they shall be subrogated to his rights under the decree, and be entitled to an execution against Porter and the plaintiff. Modified and affirmed.

JENKINS *v.* BARROWS and others.

(*Supreme Court of Iowa.* December 14, 1887.)

1. SET-OFF AND COUNTER-CLAIM—WHEN ALLOWED.

In an action against partners for services rendered, the plaintiff set out in his petition a contract for a certain amount per month and board. The defendants denied the contract, and one of them, alleging that the plaintiff boarded with him, set up a counter-claim therefor. *Held* that, having denied the contract set up in the petition, the defendant could not claim that the counter-claim arises out of the contract or transaction, as claimed and alleged in the plaintiff's petition, and that the counter-claim was properly stricken out.

2. PARTNERSHIP—EVIDENCE OF.
In an action against two defendants as partners, the testimony showed that one of the defendants and a third person had been running a livery and sale stable.—defendant owning the stable, and the third person the horses; that the other defendant bought out the third person; that this defendant told plaintiff he had made the purchase, and had assumed the contracts of the old firm. *Held* that, on this evidence, a finding that the defendants were partners would not be set aside.

3. PLEADING—VARIANCE—OBJECTION MUST BE MADE AT TRIAL.
In an action against partners for services rendered, the plaintiff alleged in his petition that he had worked for defendants from December 2, 1881, to September 22, 1882. The evidence showed that a portion of this time he had worked for one of the defendants, and a third person, whose interest in the business the other defendant had purchased. *Held*, that this was a variance between the pleadings and the proof, which, in order to be taken advantage of, must be objected to on the trial.

Appeal from district court, Clark county; JOHN W. HARVEY, Judge.

This was an action by O. D. Jenkins against D. C. Barrows and Mosely Chase to recover for work done, and for horses sold. There was a trial to a jury, and a verdict and judgment for the plaintiff. Defendants appeal.

Woodbury & White and *Shinn & Booth*, for appellants. *McIntyre Bros.* and *H. L. Karr*, for appellee.

ADAMS, C. J. The plaintiff alleges that he worked for the defendants, D. C. Barrows and Mosely Chase, as partners, from December 2, 1881, to September 22, 1882, for which there has become due him the sum of $173.33; and, also, that he sold and delivered to the defendants two horses, at the agreed price of $100 each. The defendants denied the allegations of the petition, and the defendant Barrows filed a counter-claim for board of the plaintiff and his horses.

1. The plaintiff moved to strike out the counter-claim, and the motion was sustained. The defendants assign the sustaining of the motion as error. The motion was made upon the ground, among others, that "the counter-claim, as alleged, did not arise out of the contract or transaction, as claimed and alleged in the plaintiff's petition." The defendants do not deny that it should so arise to properly constitute a counter-claim under the statute, (Code, § 2659;) but they insist that the fact is that it did so arise. The plaintiff alleged in his petition that by his contract with Barrows and Chase he was to receive for his services a certain amount of money per month and his board; but the defendants deny this contract altogether in their answer, and do not admit it in pleading their counter-claim. So far, then, as the answer and counter-claim show, it is an independent claim, or new matter, constituting a cause of action against the plaintiff in favor of one of the defendants. In our opinion, the court did not err in striking out the counter-claim.

2. The defendants moved for a new trial, on the ground that the verdict is not sustained by the evidence. The court overruled the motion, and the defendants insist that in so doing there was error. Under the instructions of the court the jury must have found that the defendants were partners, or held themselves out as such. They insist that there was no evidence to support such findings. The evidence shows that in December, 1881, the defendant Barrows and one Harrison kept a sale-stable in Osceola; that Harrison owned the horses, and Barrows the stable; that Barrows was an expert in buying horses, and rendered services in that respect. The understanding was that, if there were any profits, Barrows should have such share as would be right. About the first of February, 1882, the defendant Chase bought Harrison out, and the business of keeping a sale-stable was continued. Barrows continued to render services in buying as he had done before; sometimes paying his own money for horses, but the evidence seems to show that the title to the horses was taken in Chase. As to what the arrangement between him and Chase was the evidence is conflicting. The plaintiff, during the time that Harrison had been interested in the business, had been employed in

taking charge of the horses in the stable. After Chase bought Harrison out, the plaintiff continued in the stable, working in the same capacity. The evidence tended to show that in the outset he worked for Barrows & Harrison at the agreed price of $15 per month. At the time Chase bought Harrison out, according to the testimony of the plaintiff, Chase told him that he had bought Harrison's interest in the horses, and that he and Barrows now owned them, instead of Barrows & Harrison, and that the plaintiff was to continue in the same work for him and Barrows, and that he had assumed the contracts of the old firm. The plaintiff testified that he informed Barrows of what Chase said, and that Barrows replied that that was all right. He also testified that it was agreed afterwards that he should receive for the future, $20 per month. This is the evidence relied upon in the main to sustain the verdict in respect to the relationship between the defendants; and, while it is rebutted to some extent, we cannot say that the verdict is without support. We may say, also, that we think that the verdict is not without support in respect to the time the plaintiff was employed, and the wages he was to receive.

The defendants contend that, according to the plaintiff's testimony, he did not work for the defendants during the time for which he was allowed. It is said that he testified that he worked more than two months with one Hanson, moving a house. But he expressly testified that he did not work for Hanson; and he testified, at another time, that he worked for the defendants until September, 1882, with the exception of 19 days. The plaintiff was allowed to recover from December 2, 1881. The evidence did not show that the plaintiff performed labor for the defendants from that time. His labor for them commenced about the first of February, 1882. His recovery for labor between December 2, 1881, and the time he commenced working for the defendants, must have been based upon the evidence that he performed labor for Barrows & Harrison, and that the defendants afterwards agreed to pay for it in consideration of his continuing in their service, and by assumption of Barrows & Harrison's debt when Chase bought Harrison out. This, we think, presents a case of variance between the allegations and the proof. The plaintiff sought to recover for a certain amount of labor at an agreed price. The labor and agreed price were proven, (taking the plaintiff's testimony to be true,) and the variance consisted in the fact that the labor was not performed for the defendants as averred. So far as the evidence is concerned, however, a right of recovery was established, and for the amount claimed; but the facts upon which the amount of recovery depended, differed in one respect from the facts pleaded. Taking this, then, to be a case simply of variance between the allegations and the proof, the case was to be governed by sections 2686 and 2687 of the Code. Whatever objections the defendants became entitled to raise, cannot, we think, properly be raised for the first time in this court.

It is insisted by the defendants that the verdict was the result of passion and prejudice. Our attention is called repeatedly to the testimony of Barrows and Chase, which upon many points was directly in conflict with that of the plaintiff. Possibly, this court would have found differently upon the facts; but the question as to the credibility of witnesses and weight of evidence was for the jury, and we cannot say that there was such indication of passion or prejudice that we should be justified in disturbing the judgment. We think that the judgment must be affirmed.

FOSTER and another v. BYRNE.

(*Supreme Court of Iowa.* December 15, 1887.)

CONSTITUTIONAL LAW—ACT IMPAIRING OBLIGATION OF CONTRACTS—EXEMPTION OF HOMESTEAD PURCHASED WITH PENSION MONEY.

A homestead purchased with pension money, and levied upon in satisfaction of a debt contracted prior to such purchase, is not exempt from execution, under Acts 20th Gen. Assem. Iowa, *c.* 23, providing for the exemption of pension money, or the property purchased therewith, and that such exemption "shall apply to debts of such pensioners contracted prior to the purchase of such homestead." The provisions of this act, as to such debts, are in conflict with Const. U. S. art. 1, § 10, which declares that "no state shall pass any law impairing the obligation of contracts." BECK and ROTHROCK, JJ., dissenting.

Appeal from district court, Clinton county.

Plaintiffs, Foster & Hannum, brought an action on an account for goods and merchandise sold to defendant, George W. Byrne. They sued out a writ of attachment, which was levied on certain real estate. Defendant moved to discharge the property from the levy, on the ground that it was exempt from seizure. The court sustained that motion, and the present appeal is from that order.

Pascal & Armentrout and *P. B. Wolfe*, for appellant. *Merrill & Lee*, for appellee.

REED, J. The debt for the recovery of which the suit was brought was contracted prior to March 1, 1884. The attached property was purchased by defendant on the thirty-first of January, 1887, and paid for out of money received by him from the government of the United States as a pension; a pension certificate having been issued to him on the nineteenth of October, 1886. He intended when he purchased the property to occupy it as a homestead, and, shortly after the attachment was levied, he entered into it with his family, and has since continued to occupy it as a place of residence.

This court has frequently held that the federal statute (section 4747, Rev. St. U. S.) does not have the effect to exempt from seizure, on execution or attachment, money paid to a pensioner after the same has come into his hands. *Webb* v. *Holt*, 57 Iowa, 712, 11 N. W. Rep. 658; *Triplett* v. *Graham*, 58 Iowa, 135, 12 N. W. Rep. 143; *Baugh* v. *Barrett*, 69 Iowa, 495, 29 N. W. Rep. 425. A majority of the court are content to adhere to that holding. It appears to us that the language of the act (which is set out in the opinion in *Webb* v. *Holt*, *supra*) precludes the idea that it was the intention of congress to exempt either the money, after it had gone into the hands of the pensioner, or the property which he may have purchased with it. The question, then, is whether the property is exempt under the provisions of any statute of the state. Before the enactment of chapter 23 of the Acts of the Twentieth General Assembly, there was no statute of this state exempting money paid by the federal government to pensioners, or the property purchased therewith. That statute, by its terms, exempts all money, received by any person resident of the state as a pensioner, whether the same be in the actual possession of the pensioner, or loaned, invested, or deposited by him. It also exempts the homestead of such pensioner purchased and paid for with pension money. The act took effect March 28, 1884, after the debt in question was contracted. But, by the express language of the act, the exemption created by it "shall apply to debts of such pensioners contracted prior to the purchase of such homestead."

The point urged by the appellant is that the act, in so far as it undertakes to exempt property acquired after a debt is contracted from seizure for the satisfaction of the debt, is in conflict with section 10, art. 1, Const. U. S., which declares that "no state shall pass any law impairing the obligations of contracts." The supreme court of the United States has frequently held that

statutes which undertake, after contracts are entered into, to exempt property from seizure for their satisfaction, which, but for the exemption created, would have been liable to seizure, were in conflict with that provision. *Edwards* v. *Kearzey*, 96 U. S. 595; *Walker* v. *Whitehead*, 16 Wall. 314; *Gunn* v. *Barry*, 15 Wall. 610. The holding in these cases is quite conclusive of the question before us. The provision of the statute in question cannot be sustained, and the order appealed from must be reversed.

BECK, J., (*dissenting.*) 1. Chapter 23, Acts 20th Gen. Assem., which took effect March 25, 1884, provides that the homestead of a pensioner, purchased with the proceeds of his pension, shall be exempt from seizure and sale for his debts, contracted either before o. after the purchase of such homestead. Defendant relies upon this statute to support his claim that the property is exempt. It is insisted by counsel of plaintiffs that the statute, so far as it applies to debts contracted before the purchase of the homestead, is in conflict with the constitution of the United States, in that it impairs the obligation of contracts. I need not consider the question thus raised, further than to inquire whether the pension is exempt by the statute of the United States from all debts of the pensioner. If it is, no creditor of the pensioner can react the pension, without regard to the time the debt was contracted. There can, therefore, be no impairment of contract by the statute of this state just referred to.

2. The act of congress under which defendant's pension was granted contains this provision: "Section 4747. No sum of money, due or to become due to any pensioner, shall be liable to attachment, levy, or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto; but shall inure wholly to the benefit of such pensioner." See Rev. St. U. S. § 4747. It is obvious that this provision was intended for the benefit and protection of pensioners, and not wholly of the officers of the United States, in view of the fact that, under the decisions of the United States supreme court, money appropriated by the government to a citizen cannot be reached by any process to subject it to his debts until it is actually paid into the hands of the citizen. It was held in *Buchanan* v. *Alexander*, 4 How. 20, that, "so long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasurer. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects." Pensions are only paid to the pensioner in person, or upon checks payable to his order. Rev. St. U. S. § 4765. It is impossible, under the case just cited, to reach money of a pensioner by any process until it is paid to him. The provision above quoted, being an enactment of a prior decision, must be presumed to have had other purposes than the protection of the government officers; for we will presume that congress knew that the officers were already fully protected by the decision of the supreme court. Indeed, the section quoted so declares in enacting that the pension "shall inure wholly to the benefit of the pensioner." It is plain that protection to the pensioner is a purpose of the enactment, and it is equally plain that such protection was not against attempts to subject the pension to the seizure upon process before it had reached the hands of the pensioner; for that protection was fully secured by the decision of the United States supreme court. The protection to the pensioner intended by the statute clearly begins after the pension money reached the hands of the pensioner, and its character and extent is expressed by the declaration that the pension "shall inure wholly to the benefit of such pensioner." That declaration cannot mean simply and only that he is to hold the money as his property, subject to liability for his debts, as other property. He would have that right without the statute. We will

not presume that congress, by a statute, would do the vain thing of conferring a right already possessed by the citizen. Nor can it mean that the money shall be protected from process; but that a homestead, which is recognized and protected under both national and state legislation, if bought with proceeds of a pension, shall be subject to process. The pensioner attempts to have the "benefit" of a homestead by purchase with his pension money. If the homestead becomes liable to his debts, his pension does not "inure wholly to his benefit." I am brought to the conclusion by these and other reasons that, under the statutes of the United States, a person may hold a homestead purchased with his pension money, free from all debts, without regard to the time they were contracted.

3. That it is competent for congress to grant this protection cannot be doubted. The pension, while earned by invaluable patriotic service, is a gratuity on the part of the government in the sense that it is not granted under any contract. Surely the government may provide that its gratuity to its patriotic defenders, given as a meager recompense for health lost, blood shed, and lives sacrificed in defense of the Union and the constitution shall "inure wholly to the benefit of the pensioner." Shall not the sovereign giver of a gratuity prescribe how it shall be used and enjoyed? In granting homesteads, congress has exercised this sovereign authority, and exempted them from debts contracted prior to their acquisitions. Rev. St. U. S. § 2296. I have never heard these provisions questioned on the ground of want of authority in congress to enact them, and am aware of no principles upon which objections thereto can be based. In support of these views, see *Folschow* v. *Werner*, 51 Wis. 85, 7 N. W. Rep. 911.

I reach the conclusion that defendant's homestead is exempt from plaintiffs' claim, which is in conflict with *Webb* v. *Holt*, 57 Iowa, 712, 11 N. W. Rep. 658, decided by a majority of this court. The decision in that case, in my opinion, ought to be overruled. See *Goble* v. *Stephenson*, 68 Iowa, 270, 26 N. W. Rep. 433.

ROTHROCK, J., concurs in this dissent.

HARMS v. PALMER.

(*Supreme Court of Iowa.* December 15, 1887.)

MORTGAGES—FORECLOSURE FOR INSTALLMENT—SECURITY EXHAUSTED BY SALE.

Plaintiff's husband purchased lands, and mortgaged them to secure payment of certain promissory notes given defendant. Some of these notes came into the possession of one M., who, upon their non-payment, obtained judgment and decree of foreclosure. On others of the notes, which matured later, defendant also obtained judgment and decree. M. sold, under his decree, a certain portion of said land occupied by plaintiff as a homestead, bidding it in himself. Subsequently plaintiff's husband conveyed said land to plaintiff, and she, as grantee of a judgment debtor, redeemed said land from M. *Held*, that the property in question, redeemed by plaintiff, became divested of defendant's lien. Its sale under foreclosure exhausted the property so far as the mortgage debt was concerned.

Appeal from district court, Hardin county; JOHN L. STEVENS, Judge.

Action in equity by Wobkelina Harms, to set aside an execution sale of 40 acres of land. There was a decree for the plaintiff. The defendant, H. D. Palmer, appeals.

Nagle & Birdsall, for appellant. *Williams & Baker*, for appellee.

ADAMS, C. J. The execution in this case was issued upon a judgment rendered in favor of the defendant, Palmer, against one Harm S. Harms. The property levied upon, however, belonged to the plaintiff Wobkelina Harms. So far there is no controversy. The controversy arises out of the fact that, at the time the defendant's judgment was rendered, the property belonged to

the judgment debtor. The plaintiff acquired title by purchase and conveyance from him, after the rendition of the judgment. The defendant contends that the lien of the judgment was in force upon the property after it passed into the plaintiff's hands. The plaintiff contends that it had been divested by reason of an execution sale.

The fact is that this property had been mortgaged to secure certain promissory notes. On a part of the notes one Morton obtained judgment and a decree of foreclosure. On others of the notes, which by their terms matured later, the defendant obtained judgment and a decree of foreclosure. Morton sold under his decree, and bid in the property for the amount of his judgment; and the plaintiff, as grantee of the judgment debtor, redeemed from Morton. In our opinion, the property became divested of the defendant's lien. The question presented has been substantially ruled upon several times. The purchaser of property from a judgment debtor, which has been sold upon execution, has the same right of redemption which the judgment debtor had. He may redeem by paying the amount for which the property was sold, with interest. The result of his redemption, however, is not the same as if the judgment debtor had made no sale and conveyance, and had made redemption himself. In such a case, of course, all the judgments against him, which would be liens upon the property if it had not been sold upon execution, would be liens after redemption. He would sustain the same relation to the land that he would to any other land which he might own in the same county. If Harm S. Harms had not sold and conveyed the land in controversy, but had himself redeemed, the defendant's judgment would have been a lien upon the property, and could have been enforced against it. The case is different in respect to the plaintiff, a grantee of the judgment debtor. The defendant's judgment was for a part of the same mortgage debt upon which Morton's judgment was rendered. The sale under Morton's judgment exhausted the property so far as that mortgage debt was concerned. It had been sold for all that Morton or the defendant was willing to give for it. It was probably sold for too little. We must assume, indeed, that the right of redemption was valuable, because it was sold, and the purchaser effected redemption. If it was impracticable for the judgment debtor to avail himself of the right on account of the balance of the mortgage debt due by judgment against him, his only resource was to sell his right of redemption for what he could get. The defendant has no reason to complain that he is not allowed to follow the land. He should have bid at the execution sale until the property brought its full value, and claimed a lien upon the balance of the proceeds after the payment of Morton. This court has persistently refused, as will be seen by the later decisions respecting judgment creditors' rights after execution sale, to lend itself to any scheme designed to sacrifice the judgment debtor's property. The rule contended for would have that result. *Clayton* v. *Ellis*, 50 Iowa, 590; *Escher* v. *Simmons*, 54 Iowa, 269, 6 N. W. Rep. 274; *Harms* v. *Palmer*, 61 Iowa, 483, 16 N. W. Rep. 574; *Hardin* v. *White*, 63 Iowa, 633, 16 N. W. Rep. 580, and 19 N. W. Rep. 822.

In our opinion, the defendant was not entitled to subject the land to his judgment. Affirmed.

HELLMAN *v.* KIENE.

(Supreme Court of Iowa. December 15, 1887.)

LIMITATION OF ACTIONS—ACKNOWLEDGMENT BY DEBTOR AFTER ASSIGNMENT FOR BENEFIT OF CREDITORS.

William Stolteben made assignment of his property to defendant for the benefit of his creditors. Plaintiff filed a claim with assignee, based upon six promissory notes made to him by assignor. The assignee and the other creditors filed exceptions to the allowance of one of these notes, on the ground that it was barred by the statute of limitations. After the claim of plaintiff was filed with the assignee, the

assignor made a promise in writing to pay this note. *Held*, it is competent for the assignor, and he is the only competent person, after assignment is made, to make a promise in writing to pay a debt otherwise barred by the statute of limitations, which written promise would have the effect of reviving the debt, and removing the bar of the statute.[1]

Appeal from circuit court, Dubuque county.

This is a proceeding under an assignment for the benefit of creditors. A claim filed by plaintiff, John H. Hellman, was rejected by the decision of the circuit court. Plaintiff appeals.

Graham & Cady, for appellant. *Fouke & Lyon*, for appellee.

BECK, J. 1. William Stolteben assigned his property to defendant for the benefit of his creditors. The plaintiff filed a claim with the assignee, based upon six promissory notes made to him by the assignor. As to five, there is no dispute, but the assignee and the creditors, other than plaintiff, object to the payment of the other one, on the ground that it was barred by the statute of limitations before the assignment. After the claim of plaintiff was filed with the assignee, the assignor made a promise in writing to pay this note. The circuit court held that this new promise does not remove the bar of the statute of limitations, which is set up by the assignee and the other creditors. The question for our determination in the case is this: Is it competent for the assignor, after the assignment is made, to make a new promise in writing to pay, which will have the effect to revive the debt, thus removing the bar of the statute? The circuit court held that it would not. We think the decision should have been the other way.

2. The assignment transferred the legal title of the property of the assignee, to be held in trust by the assignee for the payment of the creditors of the assignor, and, if any balance remains, to pay it to the assignor, who continued to hold a trust interest to that extent in the property. The assignment did not change the relation of the creditors and the assignor. He continued to be the debtor, and his contracts upon which his indebtedness arose continued binding upon him. The only effect of the assignment, as between the debtor and creditors, was to subject the property assigned to the payment of his debts. The assignee, under the law, is charged with the power and duty to devote the property to that purpose. He cannot by his acts or objections change the rights and relations existing under the contract between the assignor and his creditors.

The statute provides that an action on a promissory note is barred in 10 years, and that a cause of action thus barred is "revived * * * by a new promise to pay the same," made in writing. Code, § 2539. This new promise is, of course, to be made by the debtor. The statute does not contemplate the promise of any other person. Therefore it cannot be made by the assignee, and the statute of limitations conferring upon the debtor a personal right to protection, cannot, therefore, be invoked by any other person. See *Sanger* v. *Nightingale*, 7 Sup. Ct. Rep. 1109. An executor or an administrator may plead the bar of the statute, (*Sanders* v. *Robertson*, 23 Miss. 389,) on the ground, probably, that he stands in the place of the deceased, and may enforce all of the personal rights he held while living. But an executor or administrator cannot revive the debt after it is barred by a new promise to pay, for the reason, probably, that he was not the party making the original promise, and is not authorized to renew the promise of the decedent, and bind the estate thereby. See *Bloodgood* v. *Bruen*, 8 N. Y. 362; *Henderson* v. *Ilsley*, 11 Smedes & M. 9. The right to invoke or waive the protection of the statute,

[1]As to what acknowledgment of a liability is sufficient to remove the bar of the statute, see Jordan v. Jordan, (Tenn.) 3 S. W. Rep. 896, and note; In re Kendrick, (N. Y.) 13 N. E. Rep. 762; Augerais v. Naglee, (Cal.) 15 Pac. Rep. 371; Crane v. Abel, (Mich.) 34 N. W. Rep. 658.

being personal in its nature, can be exercised by the debtor, and by him alone. He may be required, in good conscience, to waive it and revive the debt. The law will in no manner impose a burden upon him by forbidding him to do that which his conscience directs him to do. If he revive the debt by a new promise, the other creditors have no ground to complain. They are deprived of no right which is paramount to the right of the creditor whose debt is revived. They possess no lien or priority which is defeated. They do not stand in the position of purchasers, and hold no equity superior to the other creditors.

3. *Day* v. *Baldwin*, 34 Iowa, 380, is not in conflict with our conclusions. The person making the admission, which in that case was set up as reviving the debt, had no interest in the event of the suit, and it was not sought to bind him by the judgment. In this case, the assignor is the debtor, notwithstanding the assignment, and he has an interest in the distribution of the proceeds of the property assigned, and is entitled to the surplus, should any remain after the debts are paid.

It is our opinion that the judgment of the circuit court ought to be reversed.

GRAHAM v. RUSH and another.

(*Supreme Court of Iowa.* December 15, 1887.)

1. NEGOTIABLE INSTRUMENTS—CONTRACT OF SURETY—ALTERATION—ADDITIONAL SIGNATURE.
   A note for a loan of money was signed by defendant as surety, but its acceptance refused unless a certain third person would sign it, which the latter did, without knowledge or consent of defendant, and the note was then accepted. *Held*, in an action on the note, that this was not such alteration of the contract as would avoid defendant's liability.
2. SAME—DISCHARGE OF SURETY—INSOLVENCY OF MAKER—NOTICE TO HOLDER TO SUE.
   Code Iowa, § 2108, provides that "when a person bound as security for another * * * apprehends that the principal is *about to become insolvent*, or to remove permanently from the state, without discharging the contract, * * * he may by writing require the creditor to sue upon the same, or permit the surety to sue upon the same. * * *" In an action upon a note, the evidence showed that defendant served such notice upon plaintiff, and was refused; the principal having become insolvent prior to the request. The trial court rendered judgment against plaintiff, and in favor of defendant, for costs. *Held* no error; the evidence not showing that the principal was insolvent at the time of service.[1]
3. SAME—PLEADING—ADMISSION OF SIGNING.
   Defendant's answer, after denying that he signed the note in suit, alleged that he was solicited to join on the note as security for the maker to the plaintiff, and did so join on the note in suit at or about its date. *Held*, a sufficient admission of the signing.

Appeal from district court, Washington county; J. K. JOHNSON, Judge.

Dewey & Eicher, for appellant Rush and appellee Furguson. *Folger & Phelps* and *H. & W. Scofield*, for plaintiff, Graham.

Action by John Graham upon a promissory note executed by the defendants, N. B. Rush and A. Furguson, and one Hamer. There was a trial to the court, and judgment was rendered for the plaintiff against Rush, and in favor of the defendant Furguson, as against the plaintiff, for costs. Both plaintiff and Rush appeal; the latter perfecting his appeal first.

ADAMS, C. J. The defendant Rush pleaded that he signed the note merely as surety, and that, after he signed it, it was materially altered by the signing of the same by the defendant Furguson. The facts are that the principal

[1] In the absence of any statutory provision, the non-compliance of a creditor with the request of a surety to sue the principal debtor, made after the debt is due, and while the latter is solvent, does not operate to discharge the surety, although the debtor subsequently becomes insolvent. Smith v. Freyler, (Mont.) 1 Pac. Rep. 214. See Benedict v. Thoe, (Minn.) 35 N. W. Rep. 10, and note.

maker, Hamer, applied to the plaintiff, Graham, for a loan of money, and tendered him the note in question, signed by himself and the defendant Rush, and no one else. Graham refused to accept the note without an additional surety. Hamer then procured Furguson to sign the note, and, after that, Graham accepted it, and made the loan upon it. In our opinion the note could not be said to be delivered until it was accepted. It did not become a contract until it was delivered, and it follows that the signing by Furguson before delivery was not an alteration of the contract. The cases relied upon are cases of the alteration of a contract. In our opinion they do not apply. It is insisted that there was no sufficient evidence that Rush signed the note at all; but in our opinion the signing was admitted by Rush in his answer. It is true that he denied the execution of the note, but evidently meant that he did not execute the note as it now stands. After denying the execution of the note, his answer contains these words: "The truth is that defendant Rush was solicited to join on a note as security for the defendant T. L. Hamer to plaintiff herein, Graham, and did so join on the note in suit at or about its date." This, we think, is sufficient admission of the signing. It appears to us that, on the pleadings and undisputed evidence, the defendant Rush was liable. Other questions raised by him it is unnecessary to consider.

We come, then, to the plaintiff's appeal from the judgment rendered against him for costs as against Furguson. The defendant Furguson pleaded that he served upon the plaintiff a written notice and request to commence suit upon the note, or allow him (Furguson) to do so, and that his request was refused. This plea appears to have been sustained by the evidence. The plaintiff, however, contends that Furguson was not discharged, because it appears that Hamer, the principal maker, had already become insolvent, and had permanently removed from the state. The statute under which the written notice was given and request made is section 2108 of the Code, and is in these words: "When a person bound as surety for another for payment of money, or the performance of any other contract in writing, apprehends that his principal is about to become insolvent, or to remove permanently from the state without discharging the contract, if a right of action has accrued on the contract, he may by writing require the creditor to sue upon the same, or permit the surety to commence suit in such creditor's name and at the surety's cost." The plaintiff's position is that Furguson could not have apprehended that his principal was about to become insolvent, or remove permanently from the state, because his insolvency and removal had already transpired. To this it is sufficient to say that the evidence does not show that Hamer was insolvent at the time of service of the written notice and request, but that he was insolvent some time prior thereto. We see no error.

Each party appealing must pay the costs of his own appeal, and the judgment on both appeals be affirmed.

McKENNA and another v. STATE INS. CO. OF DES MOINES.

(*Supreme Court of Iowa.* December 15, 1887.)

INSURANCE—NOTE FOR PREMIUM—NOTICE OF MATURITY—MAILING LETTER.

Laws Iowa 1880, c. 210, § 2, (McClain's Code, p. 299,) relating to forfeitures of policies, provides that where a fire insurance company shall take a note for the premium on a policy, written notice of the maturity of the note shall be given to the insured, and that "such notice may be served by registered letter, addressed to the insured, and no policy of insurance shall be suspended for non-payment of such amount until thirty-days after such notice has been served," *held*, that service is complete when the registered letter is mailed.

Appeal from district court, Buchanan county; C. F. COUCH, Judge.

Action by Anthony McKenna and James Maroney upon a policy of fire insurance. There was a trial to the court, and judgment was rendered for the defendant. The plaintiffs appeal.

E. E. Hasner, for appellants. *Lake & Harmon*, for appellee.

ADAMS, C. J. The policy in question was issued to the plaintiffs jointly, and covered a building and some personal property kept therein, which were afterwards destroyed by fire. The plaintiffs gave their promissory note for the premium, and the same, at the time of the loss, was due and unpaid. The policy contained a provision that, in case the premium was paid by note, the defendant should not be liable for any loss which should occur at a time when such note, or any part of it, should be due and unpaid. To enable an insurance company, however, to avail itself of this provision, it has been provided by statute that written notice of the maturity of the note shall be given to the assured; that "such notice may be served either personally, or by registered letter addressed to the insured at his post-office address, named in or on the policy, and no policy of insurance shall be suspended for non-payment of such amount until thirty days after such notice has been served." Laws Iowa 1880, c. 210, § 2.

The question presented in this case is as to whether a notice was served, within the meaning of the statute, 30 days prior to the loss. The plaintiffs contend that notice was not thus served 30 days prior to the loss, and that, such being the fact, the policy had not become suspended. The defendant relies upon a service made by a registered letter. The facts pertaining to the service, as found by the court, are that no post-office was named in the policy, but the plaintiff Maroney resided at Masonville, Iowa, where the property insured was situated; that 30 days before the note matured, to-wit, September 1, 1882, the defendant sent from Des Moines a joint notice to both plaintiffs, addressed to them in a registered letter at Masonville, which letter was taken from the post-office by one of the plaintiffs, September 13, 1882; that a letter should reach, by due course of mail, Masonville from Des Moines by the second or third day after the mailing of the same. The loss occurred October 9, 1882, being less than 30 days from the time the notice was taken from the post-office, but more than 30 days from the time the same reached the post-office if the same arrived by due course of mail. The plaintiffs do not, as we understand, dispute the validity of the service, but merely raise a question as to the time when the service should be deemed to have been made. Their theory is that the service was made when the notice was taken by one of the plaintiffs from the post-office. But, in our opinion, their position cannot be sustained. The statute provides for two kinds of service. One is called, in the statute, "personal service." This is to be made, of course, by the actual delivery in some way of the notice to the insured.

If the plaintiff's position is correct, that the service by mail is not made until the actual delivery of the notice to the insured, then that service would be personal service, and it would follow that the provision for service by mail is superfluous. It appears to us that the fair inference is that the legislature intended to provide for constructive notice, and that the service is to be deemed complete, either when the registered letter is mailed, or as soon thereafter as the letter should be received at the office of its destination by due course of mail. If this is not so, the insured would be able wrongfully to prevent his policy from becoming suspended by omitting to call for mail at the office where the registered letter might be expected, or perhaps by refusing to take from the office a registered letter addressed to him. It is contended that as the insured is allowed 30 days in which to pay if the notice is delivered to him otherwise than by mail, we have a legislative determination of the length of time which the insured ought to have in any case after he is actually notified. But we cannot attach much importance to this consideration. In no case can the insured be required to pay sooner than he has agreed to pay. The statute seems to have been enacted out of regard to the fact that insured is liable not to bear in mind the date of the maturity of his note, and

so might, through mere forgetfulness, be relying upon insurance which had been suspended. It is so important to insurance companies, to enable them to sustain themselves, that they should be able to collect, with reasonable certainty and promptness, the money upon which they rely to pay losses, we are reluctant to make any ruling which shall embarrass them in that respect.

We think that the judgment of the district court must be affirmed.

STATE v. STUBBS.

(*Supreme Court of Iowa.* December 15, 1887.)

APPEAL—NO ABSTRACT OR ARGUMENT.

Where an appeal is presented upon a transcript, without abstract or argument, and no error is discovered in the record, the judgment will be affirmed.

Appeal from district court, Story county; JOHN L. STEVENS, Judge.

The defendant, William Stubbs, was indicted, tried, and convicted of the crime of cheating by false pretenses, and he appeals.

No appearance for appellant. *A. J. Baker*, Atty. Gen., for the State.

ROTHROCK, J. The cause is presented to us upon a transcript, without abstract or argument. We discover no error in the record, and the judgment is affirmed.

STATE v. BRIGGS.

(*Supreme Court of Iowa.* December 15, 1887.)

CRIMINAL PRACTICE—APPEAL—RECORD MUST SHOW ENTRY OF JUDGMENT.

Under Code Iowa, § 4522, which provides that in criminal cases "no appeal can be taken until after judgment," the abstract on appeal must show that a judgment has been rendered in the case.

Appeal from district court, Hardin county; JOHN L. STEVENS, Judge.

The defendant, F. C. Briggs, was indicted and convicted of grand larceny. He now appeals to this court.

Williams & Baker, for appellant. *A. J. Baker*, Atty. Gen., for the State.

BECK, J. 1. The objections to the judgment urged in argument will be noticed in the order of discussion pursued by counsel. The defendant moved to quash the indictment, on the grounds that the names of all the witnesses examined before the grand jury are not indorsed on the indictment, and all the minutes of the evidence taken before the grand jury were not returned with the indictment. In support of this motion defendant filed the affidavits of himself, and another who was indicted with him. We need not inquire whether the cause alleged is sufficient to require the indictment to be quashed. The abstract fails to show that we have before us all the evidence submitted on the motion. We cannot presume that the facts brought to the knowledge of the court did not authorize the court to overrule the motion on the ground that it was not supported thereby. We cannot presume error, but rather must presume all matters which will support the decision.

2. Counsel claim that evidence of admissions of defendant were erroneously admitted, for the reason that they were induced by promises of immunity. But it is sufficient to say that the abstract and amended abstract show that no such inducements existed.

3. A witness in giving the time of a conversation, stated that it was after defendant had his trial on the preliminary examination, as we understand it. This is complained of for the reason that, as it is alleged, evidence of another trial was admitted. No evidence of the trial was given further than a reference to it in order to fix a date. The abstract does not show the matters on which the motion is based. The foregoing are specimens of numerous ob-

jections, all of as little merit as those we have noticed. They demand no attention.

4. It is insisted that the verdict is not supported by the evidence. We think there is no ground for interfering with the verdict. We cannot hold that it is not the honest, unbiased, and intelligent expression of the conclusion of the jury, based upon the evidence before them. On no point can it be said that there is such absence of proof as would authorize us to interfere.

5. But for another reason we cannot interfere in the case. The abstract upon which it is tried fails to show that a judgment was entered in the case. The defendant cannot appeal until after judgment, which must be shown, to give us jurisdiction. Code, § 4522. Counsel in their argument state that there was a judgment entered. We do not go to the arguments of counsel for the facts of a case, but to the abstract on which it is submitted.

The judgment of the district court must be affirmed.

CAMPBELL *v.* CAMPBELL.

(*Supreme Court of Iowa.* December 16, 1887.)

1. DIVORCE—ACTION BY WIFE—SUIT MONEY MAY BE ALLOWED THOUGH DIVORCE DENIED.
   In an action of divorce brought by the wife, it is not necessary for her to prove her right to a divorce to entitle her to an allowance for suit money.
2. SAME—SEPARATION AND DIVISION OF PROPERTY NO BAR TO CLAIM FOR ALIMONY.
   A husband and wife had separated, and made a division of property. *Held*, that the division of property did not bar the wife from setting up a claim for alimony, nor for suit money, after action for divorce brought.
3. SAME—SUIT MONEY—AMOUNT—DISCRETION OF COURT.
   In an action of divorce brought by the wife, upon an application for an allowance of suit money for her, the question of her necessities is a matter of discretion for the court, and in the absence of abuse of that discretion an appellate court will not interfere.[1]

Appeal from district court, Adair county; J. H. HENDERSON, Judge.

Action for a divorce and for alimony brought by the plaintiff, Susanna Campbell, against the defendant, James R. Campbell, on the ground of adultery. The defendant pleaded connivance and condonation, and the plaintiff denied the same. While this action was pending in the court below, the plaintiff moved for an order of allowance to enable her to defray her expenses in the prosecution of the suit. The court made an order allowing her $350, and from that order the defendant appeals.

H E. Don Carlos and *Willard & Fletcher*, for appellant. *R. Mickey* and *Grass & Storey*, for appellee.

ADAMS, C. J. 1. The defendant insists that the affidavits filed in resistance to the motion show that the plaintiff is not entitled to a divorce. But we do not think that upon the question of an allowance of suit money the plaintiff was bound to show that she was entitled to a divorce. The very object which she has in view in asking for the allowance is to put herself in a condition to show that she is entitled to a divorce.

2. It seems to be undisputed that the parties in 1885, or prior thereto, separated, and soon thereafter made a division of the property. It is insisted that the agreement for a division bars the plaintiff from setting up a claim for alimony; but in our opinion it cannot properly be allowed to have such effect. We think that the most that can be said is that the court below, in making her the allowance, should have taken into consideration, as probably it did, her pecuniary condition, and granted only such allowance, if any, as her necessities seemed to require. The defendant relies upon *Martin* v. *Martin*, 65

[1] See Wyatt v. Wyatt, (Idaho,) 10 Pac. Rep. 228, and note.

Iowa, 255, 21 N. W. Rep. 559, and *Blake* v. *Blake*, 7 Iowa, 46. But in those cases the agreement which was made was for alimony on the dissolution of the marriage. In the case at bar, the agreement was made upon a mere separation. We do not think that the plaintiff was precluded by it from setting up a claim for suit money after an action for a divorce was brought.

3. The defendant claims that the evidence shows that the plaintiff's pecuniary condition is such that she did not need an allowance for suit money. The evidence shows that the plaintiff is possessed of 120 acres of land, and a small amount of personal property. It shows, however, that only a part of the land is improved, and that she is in poor health. While there may be some doubt upon the question as to the plaintiff's necessities, the making of such an allowance as that in question is a matter of discretion, and it is not for an appellate court to set it aside, unless it shall appear that the discretion was abused. *Small* v. *Small*, 42 Iowa, 111; *Foss* v. *Foss*, 100 Ill. 576; *Harrison* v. *Harrison*, 49 Mich. 240, 13 N. W. Rep. 581; *Sumner* v. *Sumner*, 54 Wis. 642, 12 N. W. Rep. 21. We are not prepared to say that, in view of all the circumstances shown, the court below abused its discretion.

4. The plaintiff insists that this appeal was taken for delay, and that she is entitled to damages, and for an additional allowance in preparing an abstract and argument. We see no reason to think that the appeal was not taken in good faith. As to a further allowance of suit money, we have to say that, with the allowance already made, the plaintiff is not destitute, and we do not think that she is entitled to more now. Affirmed.

QUACKENBUSH v. CHICAGO & N. W. RY. CO.

(*Supreme Court of Iowa.* December 15, 1887.)

1. CARRIERS—OF PASSENGERS—NEGLIGENCE—EVIDENCE.
While plaintiff, a passenger in one of defendant's trains, was sitting in a chair in the caboose attached to the train, other cars were backed against the train with sufficient speed and violence to throw plaintiff from his seat against the stove, injuring his nose. In an action for damages, the jury found the defendant guilty of negligence. *Held*, that these facts sustained the verdict.

2. SAME—CONTRIBUTORY NEGLIGENCE.
Held, also, that since defendant allowed the chair to remain in the caboose, it was not contributory negligence for plaintiff to sit in it, instead of on the stationary seats around the sides of the car.

3. SAME—DAMAGES.
It appeared that plaintiff never had catarrh before the accident, but that he had it soon afterwards; and there was medical testimony that an injury such as the one received might produce catarrh under certain exceptional circumstances. *Held*, that the court properly refused to instruct the jury that there was no sufficient evidence that the catarrh was caused by the injury complained of.

4. SAME—EXPERT EVIDENCE—OBJECTIONS TO QUESTIONS.
An expert witness was asked to "state whether a blow upon the nose, which was sufficient to break the bones, would probably excite inflammatory action of any membrane of the nose." The question was objected to as irrelevant, immaterial, and leading, and the objection overruled. *Held*, that the appellate court could not say that the question was improperly allowed, on the ground that there was no evidence that any bones were broken, for this ground of objection was not suggested by the objections interposed at the trial.

5. EVIDENCE—ADMISSIBILITY—MEDICAL BOOK.
An extract from a medical book is admissible in evidence, if it has some bearing upon the question at issue, and its indefiniteness of statement goes to its weight in evidence, and not to its admissibility.

Appeal from district court, Hamilton county; S. M. WEAVER, Judge.

Action by John E. Quackenbush to recover for a personal injury, alleged to have been sustained by the plaintiff while a passenger on one of the defendant's trains. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Hubbard, Clark & Dawley, for appellant. *W. J. Covil* and *W. Martin*, for appellee.

ADAMS, C. J. The plaintiff was riding in a caboose. A stationary seat had been provided around the side of the car for the accommodation of passengers, but the plaintiff, at the time of the accident, was sitting in a chair. The caboose was a part of a train standing upon the track. Other cars, somewhat heavily loaded, were brought upon the track to be coupled to the part of the train which included the caboose. The moving cars were thrown back with such force against the standing cars that the plaintiff, while sitting in a chair in the caboose, was thrown against the stove, and received an injury upon the nose which is the injury for which the action is brought.

1. The defendant insists that the verdict is without support, in that there was no evidence tending to show negligence on the defendant's part. The plaintiff's allegation of negligence, as contained in his petition, is in these words: "Said negligence was caused by the defendant's servants in switching or otherwise moving cars. While the car in which the plaintiff was a passenger was standing upon the track, with other cars forming part of the train, a number of heavily loaded cars were backed at great speed against said standing cars, causing said cars to come suddenly and with great force against the car in which the plaintiff was a passenger, whereby he was thrown from his seat in the car violently forward upon the stove in the car." The defendant does not deny that the plaintiff was thrown from his seat upon the stove by reason of the moving cars being thrown against the standing cars; but it insists that there was nothing in this tending to show negligence. The defendant's contract was to carry the plaintiff safely, if it could do so in the exercise of the strictest care. Now, the evidence shows that the moving cars could have easily been moved back in such a way as not to injure the persons in the caboose. We think that the finding that the defendant was guilty of negligence is abundantly supported.

2. The next position taken by the defendant is that the undisputed evidence shows that the plaintiff, by his own negligence, contributed to the accident. The fact relied upon is that the plaintiff was sitting in a chair. It is said that a chair was a dangerous thing to sit in in such a place, and that the plaintiff should have avoided it, especially as abundant sitting accommodations had been provided by stationary seats around the side of the car. It is not to be denied, we think, that, in case of any sudden and violent propulsion of the caboose, a chair, not fastened to the floor or otherwise secured, was less safe than the seats around the sides; but it is not easy to discover what the chair was in the car for if not as a seat. We think that the plaintiff was justified in inferring that it was placed there as a seat, and, if so, that the defendant would so manage its train in switching as not to throw a passenger or any other person from the chair upon the stove. We cannot say that the plaintiff was guilty of contributory negligence.

3. Evidence was introduced by the plaintiff for the purpose of showing that the injury which he received upon his nose had produced catarrh. The defendant asked the court to instruct the jury that there was no sufficient evidence to warrant them in finding that the plaintiff's catarrh was caused by the injury complained of. The court refused to so instruct, and the defendant assigns the refusal as error. The plaintiff testified that the injury was followed by catarrh, and that he had never had catarrh before. One Dr. Eberle was examined as a witness, and was asked whether an injury upon the nose might produce catarrh, and, if so, how. To this he answered: "It might by progression. Any inflammatory action of the membrane may produce catarrh. A lacerated wound of the cartilaginous portion of the nose adjoining the nasal bones would produce inflammatory action." Another physician who had made an examination of the plaintiff's nose testified that he found it in a highly in-

flamed condition. Another physician testified that he found inflammation producing a sanguineous discharge. All testified, however, that they had never known a case where catarrh had been produced by an injury to the surface of the nose, and one testified that the books give no instance where catarrh was known to so originate, but he testified that the books say that there may be such a result. If the plaintiff received an injury which, according to the physicians and the books, might produce catarrh, and the plaintiff never had catarrh before, but had it soon afterwards, we think that there was some ground for an inference that the plaintiff's catarrh was caused by the injury, and we do not think that the court would have been justified in giving the instruction asked.

4. The court instructed the jury that an expert opinion that a certain result may possibly follow from a certain cause, that is, that such result is merely possible, and not the ordinary or usual consequence of like conditions, does not, in the absence of proved fact or circumstances tending to that end, contribute sufficient evidence that such exceptional or possible result did in fact follow in the given case. It is insisted that the verdict is contrary to this instruction. But, in our opinion, we cannot so hold. In addition to the evidence of the experts and the books, there was the proven fact that the plaintiff never had catarrh before, and did have it soon afterwards. Besides, it does not appear that the jury found that the catarrh was caused by the injury, or allowed any damages on account of the plaintiff's catarrh. It would seem, indeed, from the amount of the verdict, that they did not. The amount was only $395, and there was evidence that the plaintiff sustained considerable injury independent of the matter of the catarrh.

5. The defendant assigns as error the overruling of an objection, interposed to a certain question asked an expert witness by the plaintiff. The question is in these words: "State whether a blow upon the nose which was sufficient to break the bones would probably excite inflammatory action of any membrane of the nose?" The witness answered, "Most certainly." The objection urged in argument is that there was no evidence that any bones in the plaintiff's nose were broken. That objection, however, does not appear to have been specifically made upon the trial. The objection there made was that the question was irrelevant, immaterial, and leading, and that the witness had already testified upon the subject. There was nothing in this which would necessarily suggest the objection now urged, and we cannot say that the court erred in not sustaining the objection.

6. The defendant assigns as error the admission in evidence of an extract from a medical work on Diseases of the Throat and Nose. The extract is in these words: "Purulent inflammation of the nasal mucous membrane in exceedingly rare cases may be simply an aggravation of an ordinary catarrh. It may likewise result from injuries." The objection urged is that the statement is too indefinite; but we cannot say that it has no bearing upon the question at issue. If it has some bearing, the indefiniteness of the statement, it appears to us, goes to its value or weight as evidence, rather than its admissibility.

We see no error, and the judgment must be affirmed.

WAY v. CHICAGO, R. I. & P. RY. CO.

(*Supreme Court of Iowa.* December 15, 1887.)

1. TRIAL—VERDICT IN DISREGARD OF INSTRUCTIONS.
The court instructed the jury, in effect, that the plaintiff was not entitled to recover unless he had proved, in addition to the fact that the coming together of the cars was of unusual violence, some act of negligence on the part of the engineer or train-men in allowing the cars thus to come together. At the trial, there was no evidence tending to show any act in the slightest degree negligent in the operation

of the train beyond the fact of the collision, yet the jury found for the plaintiff. *Held*, that the instructions, right or wrong, should have been respected, and the verdict, being in disregard of them, must be set aside.

2. CARRIERS — OF PASSENGERS — INJURY TO PERSON WRONGFULLY ON TRAIN — GROSS NEGLIGENCE.
Plaintiff's intestate, wrongfully, and without the knowledge of the defendant's employes, using a pass belonging to another person, was in a caboose attached to defendant's train. Other cars were backed onto the train with such force as to throw deceased against the corner of a platform, thereby causing him injury. In a suit for damages wherein gross negligence on the part of defendant's servants was charged, the court instructed the jury that, if the train-men knew, or had reason to know, that the caboose was occupied, and yet moved it recklessly or negligently, and in such a manner as that injury to persons who might be in the caboose might reasonably be expected as the direct consequence thereof, and deceased was injured thereby, defendant was liable. *Held*, that the instruction was correct. ADAMS, C. J., dissenting.[1]

3. SAME—PLEADING—REDUNDANT MATTER—PROOF.
Plaintiff in his petition alleged that the intestate, while a passenger on defendant's railway, was injured by the negligence of defendant's servants; but, it having been established that, although he was in one of defendant's cars, he was wrongfully traveling on another person's pass, he amended his petition by averring gross negligence on the part of defendant's servants, leaving the other allegations as they stood. *Held*, that the allegation that plaintiff was a passenger was redundant, if plaintiff relied upon the averment of gross negligence, and need not be proved.

Appeal from circuit court, Mahaska county.

Action by Richard F. Way, administrator, for the recovery of damages for injuries sustained by plaintiff's intestate while traveling on one of defendant's trains. It is alleged in the petition that the injuries complained of were caused by the gross negligence of defendant's employes who were in charge of the train, and that they caused the death of the intestate. There was a verdict and judgment for plaintiff, and defendant appealed.

T. S. Wright and *Lafferty & Morgan*, for appellant. *John F. Lacy* and *Wm. R. Lacy*, for appellee.

REED, J. 1. The suit was instituted by the intestate in his life-time. It was alleged in the petition that he was a passenger on the train at the time of the injury, and that the employes of defendant in charge of the train, while switching, caused the cars to collide violently, whereby he was thrown with great violence against the cupola platform in the caboose in which he was at the time, inflicting the injuries complained of. On the trial of the issue joined on these allegations, it was proven that the intestate was riding on a commutation ticket which had been issued to another person, and which contained a condition against the assignment thereof, and that the conductor of the train, when he took up the coupons for the fare of the intestate, had no knowledge that he was not the person named in the ticket. On appeal it was held by this court that, upon that state of facts, the relation of the carrier and passenger was not created between the parties, and consequently that defendant could not be held liable on proof of that slight degree of negligence upon which it would have been chargeable if that relation had existed. See *Way* v. *Railway Co.*, 64 Iowa, 51, 19 N. W Rep. 828. When the cause was remanded, plaintiff filed an amendment to his petition, retaining the allegations of the original petition, and alleging, in addition thereto, that the injury was caused by the gross negligence of the employes in charge of the train. On the second trial the proof as to the circumstances under which the intestate was on the train was the same, and counsel for the defendant, by motion to direct a verdict and instructions as requested, asked the circuit court to rule that the petition was

[1] A person who attempts to ride on a train, on a pass to which he has no right, cannot maintain an action for injuries caused by the carrier's negligence. Railway Co. v. Thompson, (Ind.) 8 N. E. Rep. 18.

unproved in its general meaning. The position of counsel is that, as it was distinctly averrred in the petition that the intestate was a passenger on the train at the time of the injury, there could be no recovery without proof of that fact, and consequently, as there could be no pretense under the facts proven, and the former holding of this court, that the relation of carrier and passenger existed between the parties at the time of the injury, the court erred in refusing to direct the jury to find for defendant. But we think this position is not maintainable; for, while the defendant would have been liable if intestate had been a passenger, and the injury had been occasioned by but slight negligence on its part, it would also, under the statute, (Code, § 1307,) be liable, even though that relation did not exist, if the injury was caused by the gross negligence or mismanagement of the employes in charge of the train; so that the allegation that he was a passenger was redundant if plaintiff relied upon the averment of gross negligence, as, also, was that averment if he relied upon the allegation that intestate was a passenger. The petition, then, alleges two states of fact, upon either of which defendant would be liable, and some of its averments, while material to one of these, are redundant as to the other. And plaintiff was entitled to recover if he had established either of them, even though he had failed to prove the allegations which as to it were redundant. Possibly he could have been required, upon proper motion, to strike out one of the averments, or to plead the two states of facts in separate counts; but no such motion was made. Very clearly, we think, his right of recovery was not defeated alone by the failure to prove the allegation that the intestate was a passenger at the time of the injury.

2. The train was at Otley when intestate received the injury. The engineer and a brakeman were engaged in switching at the time. The caboose and 11 freight cars were left standing on the main track, while a number of cars were being cut out of the train and thrown upon a side track. When this work was done, and the engine and remaining cars were backed up to be coupled to those standing, they struck with such force that the intestate, who was standing in the caboose, was thrown against the corner of the platform of the cupola by the concussion, and sustained the injury complained of. Neither the engineer nor the brakeman knew that he was in the caboose. The defendant asked the circuit court to instruct the jury that, before they could find for plaintiff, they must find from the evidence that the employes in charge of the train were guilty of negligence so gross as to amount to willfulness, and that a mere failure to exercise ordinary care in handling the train would not be sufficient; but that there must have been such conduct as indicated an intention to handle the train as they did, knowing when they did so that it would result in injury to the deceased. The circuit court refused to give the instructions asked. It told the jury, in effect, however, that, while willfulness or an actual intent by defendant's employes to injure the deceased, was not an element of plaintiff's cause of action, yet he would not be entitled to recover unless he had shown that the act which caused the injury was grossly negligent. It also told them that, if the employes who were engaged in moving the train knew or had reason to believe that the caboose was occupied, and yet moved it recklessly or negligently, without regard to the safety of those who might be in the caboose, and in such a manner as that injury to them might reasonably be expected as the direct consequence thereof, and deceased was injured thereby, defendant was liable. In so far as the instructions hold that there could not be a recovery, unless it was shown that the act complained of was grossly negligent, they are favorable to defendant, and we need not inquire as to their correctness; and we are of the opinion that the circuit court rightly refused to instruct, that an actual intent to inflict an injury must be shown, to entitle the plaintiff to recover. Such intent is not necessarily an element of gross negligence. An act may be committed without any specific intent to injure an-

other, and yet be done with such disregard of the safety of others as to render it grossly negligent.

It may be conceded that, as the intestate was in the caboose without right, defendant owed him no special duty, and that its employes were not bound to ascertain whether he was there before commencing the work in which they were about to engage. Neither were they required to govern their conduct with reference to the possibility of his being there. But the caboose was liable at any time to be occupied by passengers, and the employes were required to take that fact into account in the performance of their duty, and govern their conduct with reference to it. If they performed the duty in a manner so unusual or reckless as to endanger the lives or safety of persons who might be rightfully in the caboose, they were guilty of negligence; and if, as the direct consequence of such negligence, the deceased was injured, the company is liable, notwithstanding the fact that he was in the caboose without right; for, by the statute referred to above, (Code, § 1307,) it is made liable for "all damages sustained by any person * * * in consequence of the neglect of agents, or by any mismanagement of engineers or other employes."

3. The circuit court gave the following instruction to the jury: "The mere fact, if it be a fact, that the cars were thrown together with more than usual force, is not of itself sufficient to establish the defendant's negligence; and while it is proper for you, in determining the question of negligence, to take into consideration the force of the collision, yet, though it may have been of unusual force, you are not to presume from this alone that it was the result of carelessness or gross negligence; but the acts of carlessness or negligence must be established by a preponderance of the testimony. If the shock to the caboose was caused by the failure of the engineer or brakeman to properly calculate the weight of the train, the distance to be traveled, or the amount of slack in the train while honestly endeavoring to make a safe and proper coupling, the plaintiff cannot recover; and it is for you, as reasonable men, to determine from all the evidence whether or not the defendant's employes were guilty of such negligence as, under these instructions, entitles the plaintiff to recover." The clear meaning of this instruction is that plaintiff was not entitled to recover unless he had proven some circumstance in addition to the fact that the collision was of unusual violence, which tended to show that the engineer or fireman acted negligently in making the coupling. We are clearly of the opinion that the jury disregarded this instruction. We have found in the record no evidence which tended in the slightest degree to show negligence in the operation of the train, except the fact of the violence of the collision; nor have counsel pointed out any such evidence. Indeed, the evidence, aside from that which tended to show that the cars went together with unusual violence, was to the effect that the coupling was made in the usual manner, and that the shock was occasioned by causes which could not be guarded against. We will not inquire whether the instruction is correct or not. It was given as the law of the case, and should have been respected by the jury. A verdict which has been found against the instruction of the court should be set aside, even though the disregarded instructions should be erroneous. Upon the theory adopted by the circuit court on this question, the cause should have been taken from the jury; for, upon that theory, there was nothing for them to pass upon. But having submitted the question to them, their verdict should have been set aside as contrary to the instruction. The judgment must be reversed.

ADAMS, C. J., dissents from the holding in the second paragraph of the opinion.

SEEVERS, J., took no part in the determination of the case.

GREEN BAY & M. CANAL CO. v. KAUKAUNA WATER-POWER CO. *et al.*

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. WATERS AND WATER-COURSES—DAM ACROSS FOX RIVER—OWNERSHIP OF STATE.
The Wisconsin act of August 8, 1848, for the improvement of the Fox and Wisconsin rivers, provided (section 16) that, "where any lands, waters, or materials, appropriated by the board [of public works] shall belong to the state, such lands, waters, or materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the state, and whenever a water-power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water-power shall belong to the state," etc. *Held*, that the state took the absolute ownership of the whole water-power created by reason of a dam across the Fox river, including the water-power existing on adjoining lands not owned by the state.

2. SAME—CONSTITUTIONAL LAW—TAKING OF PRIVATE PROPERTY.
Section 16 of the Wisconsin act of August 8, 1848, for the improvement of navigation of the Fox and Wisconsin rivers, contained a provision reserving to the state the absolute right to such water-power created by the erection of any dam or other improvement, upon lands owned by the state or others, as might be valuable for hydraulic or commercial purposes. *Held*, not such a taking of private property for private purposes as would render the provision invalid; the creation of the water-power being merely incidental to the public improvement contemplated by the act.

3. SAME—COMPENSATION—ASSUMPTION OF PAYMENT BY UNITED STATES.
After the completion of certain improvements to the Fox river, under the act of 1848, the United States became the owner, by purchase, of the title to such improvements, under the provisions of the act of congress of March 3, 1875, and assumed the payment of compensation to any land-owners entitled thereto by reason of such improvements. The latter act also gave the right to such owners to institute proceedings for ascertaining their rights. *Held* that, while the act of 1848 was defective in not making adequate provision for the compensation of land-owners, such defects have now ceased to be of importance, by reason of the action of the United States in assuming responsibility for the claims.

4. SAME—RIGHT TO COMPENSATION—ADVERSE USER.
Work on a dam across the Fox river, erected under authority of an act of the legislature, was begun subsequent to March 3, 1855. One end of the same rested on a lot, the owner of which never gave authority for such use of the land, nor were condemnation proceedings ever instituted to ascertain the damages to the same. By act of congress, approved March 3, 1875, the United States became the owner of the dam, assuming the payment of damages in cases in which "compensation is now, or shall become, legally owing." *Held* that, as on March 3, 1875, there had not been 20 years adverse user of the lot, compensation for damages was owing to the owner thereof, and that the same is still a valid claim against the United States.

5. SAME—CONVEYANCE OF RIPARIAN RIGHTS—INJUNCTION.
The owner of certain lands on the Fox river executed a deed granting an improvement company, authorized by law to erect a dam at that point, the right to erect and forever maintain on such lands an embankment of certain dimensions, reserving to himself the right to use said embankment, but not so that the same should be injured; also the right to excavate a ditch along the side of the embankment. The improvement company had by law the exclusive right to the surplus water-power created by the dam and embankment. *Held*, that the deed operated as a surrender of all riparian rights appurtenant to such land, and that an injunction would lie to restrain the grantee of such original owner from cutting through the embankment for the purpose of utilizing the water-power.

6. SAME—INTEREST OF GRANTEE.
Plaintiff, the owner by purchase of a dam, and the water-power appurtenant thereto, erected across the Fox river, under authority of the Wisconsin act of August 8, 1848, sold the dam to the United States, reserving to itself "the water-power created by the dam, and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto and the [land] necessary to the enjoyment of the same, * * * all subject to the right to use the water for all purposes of navigation," etc. Defendant, the owner of certain lots on which was built a portion of the embankment connected with the dam, cut a canal through such embankment for the purpose of taking water from the pond. Plaintiff asked for a mandatory injunction requiring defendant to restore the embankment which it had removed, or to permit plaintiff

to do so. *Held*, that the injunction would not lie, plaintiff having no legal interest in the dam or embankment, but only in the surplus water-power created by the same.

Appeal from circuit court, Outagamie county.

The plaintiff corporation controls and uses a portion of a water-power at Kaukauna, in this state, created by a dam across the Fox river at that place, which was erected for the purpose of improving the navigation of that river, and claims to own all the surplus water-power created by such dam. The water is drawn by the plaintiff from the pond above the dam, into a canal on the north side of the river, and is there used by lessees of the plaintiff to propel machinery. The canal is a part of the improvement, and is navigated by boats and vessels. The defendant Kaukauna Water-Power Company is the owner of the land on the south side of the river, abutting such dam, and of land above and below the same, on the river, and has constructed a canal for the purpose of taking water through it from said pond to operate mills and machinery on its land below the dam. The other defendants are in the use of portions of the water so taken from the pond by the defendant corporation, under and by virtue of leases thereof, to them executed by the defendant the Kaukauna Water-Power Company. This action was brought to restrain the defendants from drawing water from said pond through the canal on the south side of the river, and also to compel the defendant the Kaukauna Water-Power Company to restore an embankment on lot 6, which it had removed, or to permit the plaintiff to do so.

By an act approved August 8, 1846, congress granted to the state of Wisconsin, when it should be admitted into the Union, a quantity of land to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal. This act contains certain restrictions not material to this case. By an act of the legislature, approved June 29, 1848, the state of Wisconsin gave its assent to the act of congress of August 8, 1846, which operated as an acceptance by the state of the grant therein contained, upon the terms and conditions specified in the latter act. By an act entitled "An act to provide for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal," approved August 8, 1848, the legislature created a board of public works to supervise and carry on such improvement. Sections 15, 16, and 17 (which are most material in this case) are as follows:

"Sec. 15. In the construction of such improvements, the said board shall have power to enter on, to take possession of, and use all lands, waters, and materials, the appropriation of which for the use of such works of improvement shall in their judgment be necessary.

"Sec. 16. When any lands, waters, or materials appropriated by the board to the use of said improvements shall belong to the state, such lands, waters, or materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the state, and whenever a water-power shall be created by reason of any dam erected, or other improvements made, on any of said rivers, such water-power shall belong to the state, subject to the future action of the legislature.

"Sec. 17. When any lands, waters, or materials appropriated by the board to the use of the public in the construction of said improvements, shall not be freely given or granted to the state, or the said board cannot agree with the owner as to the terms on which the same shall be granted, the superintendent, under the directions of the board, shall select an appraiser, and the owner shall select another appraiser, who together, if they are unable to agree, shall select a third, neither of whom shall have any interest, directly or indirectly, in the subject-matter, nor be of kin to such owner, and said appraisers, or a majority of them, shall proceed to hear testimony and assess the benefits or damages, as the case may be, to the said owner from the appropriation of such land, water, or materials, and their award thall be conclu-

sive, unless modified as herein provided. If the owner shall neglect or refuse to appoint an appraiser as herein directed, after ten days' notice of such appointment by the superintendent, then such superintendent shall make such appointment for him."

From the award of the appraisers, made pursuant to section 17, an appeal to the circuit court is given to either party by section 18 of the act, and the procedure therein is prescribed in the following sections.

The plan of making the improvements, under the supervision of the board of public works, proved a failure, and was abandoned in 1853, by the enactment of chapter 98, Gen. Laws of that year, entitled "An act to incorporate an association for the completion of the improvement of the Fox and Wisconsin rivers," approved July 6, 1853. This act incorporated the "Fox & Wisconsin Improvement Co.," and granted to it all the lands then unsold which had theretofore been granted by congress to the state in aid of such improvement, subject to certain conditions specified in the act. It also granted such company "the works of improvement contemplated by the act of August 8, 1848, and by several acts supplemental thereto and amendatory thereof, and known as the 'Fox & Wisconsin Rivers Improvement,' together with all and singular the rights of way, dams, locks, canals, water-power, and other appurtenances of said works, also all the rights possessed by the state of demanding and receiving tolls and rents for the same, so far as the state possesses or is authorized to grant the same, and all privileges of constructing said works and repairing the same, and all other rights and privileges belonging to the improvement, to the same extent and in the same manner that the state now holds or may exercise such rights by virtue of the acts above referredto in this section, [section 2.]"

Chapter 112, Laws 1856, renewed and confirmed the grant to the improvement company; but upon the condition, among others, that such company should, within 90 days after the passage of the act, make a deed of trust to three trustees to be appointed by the governor, with the assent of the company, conveying to such trustees the lands thus granted to the company by the act, and all the other property, rights, and franchises belonging to the company, in trust for certain uses and purposes therein expressed. Such conveyance was duly made by the company, as required by the act, to the trustees duly selected for that purpose. By chapter 179, Laws of 1851, the legislature authorized the governor to enter into a contract with Morgan L. Martin for the completion of the improvement of Fox river between Green bay and Lake Winnebago, and a contract to that effect was duly entered into, pursuant to that act, May 14, 1851. This was while the improvement was under the supervision of the board of public works. Under this contract Martin built the dam in question at Kaukauna in 1854 and 1855.

The Fox river, at the point where such dam is erected, runs nearly east. At its north end the dam abutted upon land of the improvement company, and at its south end on a lot designated as lot 5. West of lot 5, abutting on the river, are lots 6 and 7. A canal on the north side of the river is supplied with water from the pond. It is constructed with locks, and is used for purposes of navigation. The south bank of the river was but little higher than the waters of the river in its natural state, and required an embankment to keep the same within the channel of the river. The company thereupon procured from one John Hunt, who was then the owner of lots 6 and 7, an instrument in writing, dated October 6, 1854, executed and recorded as a deed, in and by which Hunt released to the Fox & Wisconsin Improvement Company, and its legal representatives, "the right to erect and forever maintain an embankment of the dimensions as surveyed by the engineer of said company, reserving to myself the right to use said embankment when completed, but not so that the same shall be injured, through lots 6 and 7. Section 22. * * * Also the privilege of excavating a ditch along the south or east side

of said embankment, not exceeding three feet in width, and upon the south or east side of said survey and stakes set by said engineer." The company erected such embankment, and extended the same upon lot 5 to the dam. No authority from the owner of lot 5 to erect or abut the dam upon that lot, or to build such embankment in front of it, and no condemnation proceedings under the act of 1848 to obtain an appraisal of damages to such lot, were proved on the trial.

The Fox & Wisconsin Improvement Company, having made default in the performance of the conditions of the act of 1853, and of the trust deed above mentioned, and of a certain mortgage in trust executed by said company upon all the property, rights, and franchises granted to it by the state as aforesaid, such trust deed and trust mortgage were duly foreclosed in the circuit court, and judgment for the sale of said property, rights, and franchises was entered February 4, 1864. Pursuant to that judgment, such property, franchises, etc., were sold to the plaintiff, which was a duly organized corporation, authorized by law to make such purchase. Out of the proceeds of such sale a debt of over $200,000 against the improvement, sometimes called (but erroneously) a state debt, was paid, and the improvement completed, at an expense of over $43,000. Thus the trust conferred upon the state by the act of congress of 1846 was fully performed. Such sale was confirmed by the court, and the trustees in the trust deed before mentioned, who had previously been appointed by the court as referees to sell the mortgaged and trust property, duly conveyed the same to the plaintiff the Green Bay & Mississippi Canal Company. The only surviving mortgagee in trust joined as a grantor in such conveyance. By the terms of the deed the trustees, mortgagee, and referees, as aforesaid, granted, etc., to the plaintiff, its successors, etc., "the works of improvement known as the 'Fox & Wisconsin River Improvement,' together with all and singular the rights of way, dams, locks, canals, and other appurtenances of said works; the right of receiving tolls and rents for the same, and the privileges of said works; and all other rights, powers, and privileges by the state of Wisconsin granted to and vested in the Fox & Wisconsin Improvement Company, and its trustees, or either, under and by virtue of the several acts of the legislature of the state of Wisconsin in relation thereto, approved July 6, A. D. 1853, March 31, A. D. 1855, and October 3, 1856, and the acts amendatory thereof and proceedings thereunder; to which said several acts of the legislature, and the trust deed and the mortgage referred to in the judgment under which the aforesaid sale was made, reference is hereby made for a fuller and more particular description of the said works of improvement, rights, powers, privileges, etc. * * * Also all other corporate rights, privileges, franchises, powers, and property, real and personal, vested in and belonging to said company, its trustees, or both, forming a part of, or in anyway connected with, said improvement, of whatever name or nature, and from whatever source derived, and all appurtenances thereunto appertaining, including and together with all strips or parcels of land adjacent to said improvement, or the water-powers created thereby, with such exceptions therefrom as are hereinafter stated." The exceptions referred to do not affect this case.

By an act of congress, entitled "An act for the improvement of a water communication between the Mississippi river and Lake Michigan by the Wisconsin and Fox rivers," approved July 7, 1870, the secretary of war was authorized, on certain terms and conditions, to purchase the rights, franchises, and property of the plaintiff in such improvement. By chapter 416, Laws 1871, the legislature authorized the plaintiff to make such sale. Arbitrators were duly appointed under the act of congress to appraise the property, etc., of the plaintiff which the United States proposed to purchase. Such proceedings were thereupon had that on February 26, 1876, the arbitrators reported the total value of such property, etc., to be $1,048,070, and that the amount

realized from the sale of lands granted to the state as aforesaid was $723,070, which last sum being deducted from the total value, (as required by the act of 1870,) left a balance of $325,000 to be paid for all the property and franchises of the company. This appraisal included all water-power and personal property owned by the plaintiff. The board separately appraised the value of the water-power belonging to the company at $140,000, and of certain personal property at $40,000. Under the authority of the act of 1870, the secretary of war elected not to purchase such water-power as personal property, and the same was thereupon reserved to the plaintiff in its conveyance to the United States of the property purchased by it. The specific description of the reserved water-power is as follows: "The water-powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces, or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same; all subject to the right to use the water for all purposes of navigation as the same is reserved in leases heretofore made by said company, a blank form of which, attached to the said report of said arbitrators, is now on file in the office of the secretary of war, and to which reference is here made, and subject, also, to all leases, grants, and assignments, made by said company, the said lease, etc., being also reserved herefrom." The plaintiff owns the lots on the north side of the river along the canal on which the surplus water is used by its lessees.

The principal defendant, the Kaukauna Water-Power Company, is the owner of lots 5, 6, and 7, on the south side of the river, (or at least of the water-fronts thereof,) and of contiguous lands fronting upon the river east and below lot 5. These lots were purchased of the United States by one Denniston, September 1, 1835, and the same were patented to him or his assigns, without reservation, by the United States in 1837. Said company derives its title to such lots through mesne conveyances from Denniston.

In 1876 the United States erected a new dam at Kaukauna, across Fox river, 40 feet east of and below the old dam at its south end, and 110 feet at its north end. The old dam still remains, but is flooded and rendered useless by the new structure. The embankment on lot 5 was thereupon extended down the river by the United States to the new dam.

In January, 1881, the Kaukauna Water-Power Company commenced to build a canal on its land, with intent to cut the bank of the river on lots 5 and 6, and to draw water for hydraulic purposes from the pond raised by the dam in question. The plaintiff thereupon gave notice to that company, in writing, that it would resist the cutting of the embankment. The defendant company, however, proceeded with the cause, cut through the embankment on lots 5 and 6, but mostly on lot 6, and has since drawn, and still draws, water from such pond for the purpose of driving machinery located upon such canal. At the head of its canal the defendant company has erected and maintains a gate, which, when closed, stops the water as effectually as did the embankment which was cut through. By an act of congress, approved March 3, 1875, the United States assumed the payment of compensation for flowage or injury to lands caused by the improvement, for which compensation was legally owing when the act was passed, and authorized proceedings in the courts of this state to ascertain the same.

The foregoing facts appear from the pleadings of the court. The circuit court dismissed the complaint, upon the merits, with costs. From the judgment in that behalf the plaintiff company appeals to this court.

Moses Hooper and *B. J. Stevens*, for plaintiff. *A. L. Cary* and *D. S. Ordway*, for defendants.

LYON, J., (*after stating the facts.*) The controlling question in this case is, has the defendant the Kaukauna Water-Power Company the right to cut

the embankment on lots 5 and 6, on the south side of the river, and draw water from the pond made by the Kaukauna dam, for the purpose of propelling machinery located on its canal below the dam? The solution of this question requires the determination of several other questions which will be stated and considered in their order.

1. The claim of the plaintiff corporation to all the surplus water-power created by the dam is based upon the proposition that section 16 of the act of the legislature, approved August 8, 1848, appropriates all such water-power to the state. This proposition is disputed on behalf of the defendants. Their counsel maintain that section 16 only gives the state such surplus water-power created by the improvement as may exist upon lands owned by the state, and that inasmuch as the state was not the owner of the lands upon which the Kaukauna dam was erected, the section does not apply to the surplus water-power thereby created. Their argument is, in substance, that, inasmuch as the first clause of the section only reserves to the state such land, waters, or materials appropriated by the board for the use of such improvements as belonged to the state, the last clause, which provides that water-power created by the improvement shall belong to the state must be held to apply only to such water-power as is made by dams erected on state lands. In other words, they seek to apply to this section the maxim *noscitur a sociis*. We cannot adopt this construction. The statute absolutely reserves to the state the property belonging to it mentioned in the first clause, and at the same time confers upon the state the water-power therein mentioned; that is to say, such water-power as should thereafter be created "by reason of any dam erected or other improvements made on any of said rivers," (including the Fox river) which otherwise did not belong to the state. This was necessary in order to give the state the absolute control of the improvement, and such is the plain reading of the statute. Section 16 will be found copied in the foregoing statement of the case.

It requires no argument to demonstrate that the water-power reserved to the state by section 16 of the act of 1848 was granted to the Fox & Wisconsin Improvement Company, by chapter 98, Laws 1853; that the same passed to the plaintiff by the purchase on the foreclosure of the trust deed and mortgage, and the conveyance thereof to it by the trustees and mortgagee therein; and that, in its conveyance to the United States, the plaintiff reserved to itself all of the surplus water-power created by the improvement. We conclude, therefore, that whatever rights the state took to the Kaukauna water-power by the act of 1848, (which is the absolute ownership of the whole thereof, if that is a valid act,) is vested in the plaintiff.

2. It is further maintained on behalf of the defendants that, conceding the Kaukauna water-power is within the provision of section 16 of the act of 1848, such act is invalid as to the surplus of the water-power over and above that required for the navigation of the river, for the reason that it is taking private property for private use, which is beyond the power of the legislature. Here, also, we are compelled to differ with the learned counsel for the defendants. It was necessary to erect the Kaukauna dam for the purpose of making the river at that point available for navigation. Without it slack-water navigation would have been impossible. It was of vital interest, therefore, to the state that it, or the corporation to which it intrusted the preservation and maintenance of the improvement, should have the entire and absolute control of the dam, embankments, canals, and all appliances necessary for the purposes of navigation, as well as of the waters in the pond created by the dam. It would be a serious detriment to the public interests were each riparian owner entitled to cut the dam, or the embankment which is a part thereof, and draw water from the pond. The exercise of such a right might, and probably would, seriously interfere with the proper management of the improvement, greatly to the detriment of the free and unrestricted navigation of the river.

It was impossible to make the improvement in a proper manner, and to meet the requirements of navigation, without creating some surplus water-power. But for the reasons above suggested such surplus was merely incidental to the improvement.

In *Attorney General* v. *City of Eau Claire*, 37 Wis. 400, and again in *State* v. *Eau Claire*, 40 Wis. 533, it was held that a statute which authorized the city of Eau Claire to erect a dam, and raise the waters of the Chippewa river for the purpose of creating public water-works in said city, and which granted to the city the right to lease the surplus water-power created by such improvement, was a valid law. In the opinion of the court, prepared by RYAN, C. J., in each case, speaking of the power granted to the city to construct water-works, it is said: "That is so essentially a public and municipal purpose, it is obvious that the city can take any legitimate power in aid of it. For that purpose the legislature could unquestionably grant, and the city take, power to construct and maintain a dam not obstructing the navigation of a public river, or violating other right, public or private, and the dam so authorized might well produce an excess of power. *Superflua non nocent.* In such a case, as was frankly admitted on the argument, the surplus water need not run to waste. The legislature might well grant, and the city take, power to lease it. The power to construct and maintain the dam would still rest on the public municipal use, not on the disposition of the accidental excess. *Spaulding* v. *Lowell*, 23 Pick. 71." Manifestly, the principle of that case is applicable here.

3. It is further claimed on behalf of the defendants that, by locating the south end of the dam upon lot 5, building an embankment thereon and on lots 6 and 7, and appropriating the whole water-power created by the dam, the state took the property of the owners of those lots, and that the laws of the state made no adequate provision for compensating them therefor. A riparian owner upon a navigable stream has no right, without legislative consent, to build a dam across such stream for any purpose. *Improvement Co.* v. *Lyons*, 30 Wis. 61. He has the right, however, to pass from his land to the river, and from the river to his land, and to utilize the waters of the river upon his land for any purpose not interfering with navigation of the stream or the rights of other riparian owners. That the construction of the Kaukauna dam and improvement by the state, and its appropriation of the water-power thereby created, take the property of the owner of lot 5, and deprive him of his riparian rights just mentioned, (which are also property,) does not seem to admit of doubt or controversy. Such owner has never been compensated for his property so taken; neither has he released his right thereto.

As to lots 6 and 7 we incline to the opinion that the instrument denominated a release, executed by Hunt to the Fox & Wisconsin Improvement Company in 1854, (Hunt being then the owner of those lots,) in and by which he granted to that company and to its legal representatives "the right to erect, and forever maintain, an embankment of the dimensions as surveyed by the engineer of said company," operates as a surrender of all riparian rights appurtenant to such lots, not reserved in the instrument. The instrument recites a consideration of $100, and Hunt reserved therein "the right to use said embankment, when completed, but not so that the same shall be injured." He also reserved the right to excavate a ditch of certain dimensions on the land on the south side of the embankment. The embankment was surveyed and located along the margin of the river, and was so granted and erected for the purpose of confining the waters of the river within its natural banks, after it should be raised by the erection of the dam.

The act of 1848 is certainly liable to the criticism that it makes no adequate provision for compensating the owners of property taken for the improvement. True, it contains provisions in section 17, (which section is copied in the statement of the case,) and in subsequent sections, for the condemnation of pri-

vate property to the use of the improvement. Because of these provisions, DIXON, C. J., in delivering the opinion of the court in *Arimond* v. *Canal Co.*, (this plaintiff,) 31 Wis. 316, controverted a supposed statement of the supreme court of the United States in *Pumpelly* v. *Same Co.*, 13 Wall. 166, to the effect that the laws of this state failed to provide for making such compensation. We all overlooked the fact that the court in that case was determining the sufficiency of certain pleas, and only stated the case made by such pleas. It did not assume to say what were the laws of this state on the subject.

But the act of 1848, failed to give the land-owner the right to institute condemnation proceedings under it to have his compensation determined; and if the state should institute such proceedings, the compensation, when determined, was, by section 21 of the act, made payable out of the fund appropriated to such improvement. By section 20 the recording in the office of the register of deeds of a transcript of the award signed by the appraisers, and acknowledged or proved as a conveyance of land, operated to vest in the state the fee-simple of the premises condemned to the use of the improvement. This, without requiring the sum so awarded as compensation to be first paid. The history of the improvement, during the time it was in the hands of the board of public works and of the Fox & Wisconsin Improvement Company, shows that the improvement fund was a very uncertain source to rely upon for the payment of a debt charged upon it. No other provision was made in the act of 1848, or in any other act of the legislature, for the condemnation of property to the use of the improvement, or for payment therefor. In view of these serious defects in the law, and especially because the owner of the property taken for the purposes of the improvement was powerless to institute proceedings to have the compensation ascertained to which he was entitled, Mr. Justice ORTON said in *Sweany* v. *U. S.*, 62 Wis. 396, 22 N. W. Rep. 609, that, until the passage of the act of congress of 1875, there was no provision of law for the ascertainment and payment of the damages and compensation for the taking of lands by flowage or otherwise for the use of the improvement. Looking to the practical operation of the statute, the statement thus made is substantially correct, although, perhaps, inaccurate in theory and form. But whatever defects inhered in the act of 1848, they ceased long since to be of any importance. That act was fully executed, the improvement which it authorized has been made and ever since maintained, and the title thereto, except to the incidental surplus water-power reserved by the plaintiff, has passed to the United States. The failure of the state legislature to provide adequate compensation for private property taken for, or injured by, the improvement, has been supplied by the act of congress of 1875, in and by which an easy method is provided to ascertain the compensation to which the owner of such property is entitled, and the United States has assumed the payment thereof. *Jones* v. *U. S.*, 48 Wis. 385, 4 N. W. Rep. 519, affirmed in 109 U. S. 513; *Sweany* v. *U. S.*, 62 Wis. 396, 22 N. W. Rep. 609.

4. A prescriptive right to maintain the south half of the dam on lot 5, founded upon 20 years' uninterrupted adverse user, is claimed on behalf of the plaintiff. Inasmuch as we are of the opinion that the United States has the legal right to maintain the dam on lot 5, without regard to any prescription, it is quite immaterial whether such claim is well founded or otherwise. It probably is not well founded as to the additional embankment constructed from the old to the new dam; perhaps not as to the portion of the new dam on lot 5, which includes all of the structure south of the center of the stream. But however the question of prescription should be decided, were it material, it seems quite clear that no statute of limitations has run against the right of the present owner of lot 5, to recover of the United States compensation for the portion of that lot taken for the improvement, and for the injury to the lot caused thereby. The act of congress giving such compensation was ap-

proved March 3, 1875, and it provided for the payment of such claims legally owing at that date. The act, by its terms, provides for cases in which "compensation is now or shall become legally owing." Of course, it speaks from the date of its approval. The original Kaukauna dam was not erected on lot 5 until after March 3, 1855. This satisfactorily appears by the testimony of Hon. Morgan L. Martin, who erected the dam. He testified, in substance, that he entered upon the bed of the stream for the construction of the dam after warm weather commenced in the Spring of 1855. Of course, in the latitude of Kaukauna, that must have been later than March 3d. We suppose the right to compensation was not cut off until a prescriptive right to maintain the dam had matured by 20 years adverse user. Hence, when the act of March 3, 1875, was passed, compensation was owing to the owner of lot 5 for the taking of and injury to his property, which is still a valid claim against the United States. And this, we think, includes any deprivation or interruption of any legal riparian right. On this subject, generally, see the cases of *Jones* v. *U. S.*, and *Sweany* v. *U. S.*, above cited.

5. It follows, we think, from the views above expressed that neither of the defendants had any right whatever to draw water from the pond in question, and that the plaintiff is the legal owner of the water-power created by such dam, over and above what is required for navigation. The plaintiff was therefore entitled to an injunction restraining the defendants from drawing the water from the pond for the purposes aforesaid.

6. A mandatory injunction, requiring the water-power company to restore the embankment, or at least to allow it to be done, is also prayed. The dam and embankment belong to the United States. The plaintiff has no legal interest therein, no duty in respect to it, and no right to interfere with it unless by permission of the government. It is only interested in the surplus water-power created by the government works, and maintained at such height as the government chooses to maintain it. The government may lower the dam and embankment, or may remove the same and destroy the water-power entirely, and the plaintiff cannot prevent it. The government may also use such appliances as it chooses to keep up a head of water. It may retain the embankment on lots 5, 6, and 7, or use some other means of holding the water, and the plaintiff is in no position to object. Hence it is entirely a question between the United States and the Kaukauna Water-Power Company whether such embankment shall be restored where the company cut through it, or whether the head gates of the canal which, when closed, stop the water as effectually as did the embankment, shall be allowed to remain in place of the embankment. The plaintiff has no voice in the determination of that question. Hence the prayer for a mandatory injunction compelling the water-power company to restore the embankment, or to allow the plaintiff to do so, must be denied.

We do not here determine the relative rights of the plaintiff and other riparian owners below the dam, in respect to the use of the water, which would run over the dam if not taken from the pond into the canal; nor do we consider whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam. We only hold that the plaintiff owns the surplus water-power created by the dam, and that the defendants have no legal right, without the consent of the plaintiff, to draw water from the pond with which to propel machinery.

We have been greatly aided in our investigation of the case by the very able arguments of the respective counsel, which furnish evidence of great learning and research. The case is a very important one, and any judgment finally entered in it may, probably will, be far-reaching in its effect upon water-rights on the Fox river. The writer ventures to express the opinion that there are federal questions involved in it which will support an appeal to the supreme court of the United States, and the desire that such an appeal may be

taken, to the end that the relative rights of the plaintiff and other claimants to water-power created by the improvement of the Fox river, now owned by the United States, may be finally determined by that tribunal.

The judgment of the circuit court is reversed, and the cause will be remanded, with directions to that court to give judgment for the plaintiff, as indicated in this opinion.

KELLY *v.* CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. APPEAL—AMENDMENT OF ORDER PENDING—RIGHTS OF APPELLANT.
The court, on its own motion, set aside a special verdict, and ordered a retrial. From this order defendant appealed. Afterwards, during the same term, the court, on motion of plaintiff, amended the original order by adding a recital in correction thereof, and defendant took another appeal from such corrected order. *Held*, that while the court had power to amend the original order, after the appeal therefrom and the return to this court, the defendant had the right to have its first appeal determined as the order then was, without regard to the subsequent correction.

2. TRIAL—SPECIAL VERDICT—INCONSISTENT FINDINGS—SETTING ASIDE—RETRIAL.
In an action to recover damages for injuries caused by the negligence of defendant in suddenly starting a train while plaintiff was on the platform of a car in the act of alighting, the jury, by special verdict, found that plaintiff "could, by the use of ordinary care and a reasonable effort on her part, have turned back or retained her place on the steps with safety to herself;" also that plaintiff "was not guilty of any want of ordinary care in leaving the train which contributed to produce the injury complained of;" also that she was damaged in the sum of $2,000. The court set aside the verdict, on the ground that it was inconsistent, and ordered a retrial. *Held*, that defendant had no cause to complain of the action of the court. The findings of the jury were evidently inconsistent, or, if not so, they clearly acquitted plaintiff of negligence, in which case judgment should have gone for plaintiff. In any case, the findings could not be construed as holding plaintiff guilty of contributory negligence.

Appeal from circuit court, Fond du Lac county.

Action by Anna J. Kelly to recover damages for personal injuries received by the plaintiff, alleged to have been caused by the negligence of the employes of the defendant company.

In August, 1882, the plaintiff went upon a train of the defendant company at Fond du Lac, as a passenger, intending to leave the train at Van Dyne station, north of that city, on defendant's railway. The testimony tends to prove that, as the train approached Van Dyne, she left her seat and went on the platform of the car in which she had been riding, preparatory to leaving the train. She had with her a little boy four years old, and an infant fourteen months old. The train stopped just as she stepped on the platform. She had her infant on one arm, and a large market basket full of merchandise on the other, and at the same time held the little boy, who was behind her, by the hand. She stepped on the first step of the car, and just as she was in the act of stepping to the second step the train suddenly started. She let go the hand of her little boy, and sprang to the platform of the depot with her infant. She did not fall upon the platform, but was seriously jarred by the suddenness of her motion. A passenger seized the little boy and jumped to the platform with him in safety. This occurred in the afternoon. The same evening the plaintiff was taken sick, and her sickness resulted a few hours later in a miscarriage, she being then five or six months advanced in pregnancy. This is the injury of which she complains.

The jury found, specially, (1) that the train on which the plaintiff was being carried did not stop at Van Dyne station a reasonable length of time to enable passengers, using due diligence, to alight therefrom; (2) that the plaintiff used due and ordinary diligence in leaving the train; (3) that when the train stopped, the plaintiff was standing on the platform of the car directly in front of the door; (4) that when the train started the plaintiff was on the

first step downward of the car platform; (5) that the plaintiff was not compelled to jump from the steps of the car because of the starting of the train; (6) that she could, by the use of ordinary care and a reasonable effort on her part, have turned back or retained her place on the steps with safety to herself; (7) that she was not guilty of any want of ordinary care in leaving the train which contributed to produce the injury complained of; (8) that she sustained a shock by reason of jumping from the train which produced a miscarriage; and (9) that by reason of such injury she has sustained damages in the sum of $2,000.

Each party moved for a judgment on the special verdict. The court overruled both motions, and of its own motion ordered "that the said special verdict be and the same is hereby set aside as inconsistent, and a retrial ordered." Such order was made November 30, 1885. On December 18, 1885, the defendant appealed from so much of said order as denied its motion for judgment, and awarded a new trial, and the return to such appeal was duly filed in this court three days later. Afterwards, during the same term at which such order was entered, the court, on motion of the plaintiff, amended the order so appealed from by inserting therein, immediately after the word "inconsistent," the words "and contrary to the evidence." It is recited in this order that it is made to correct the former order, so as to conform the same to the order actually made, and the correction was made *nunc pro tunc* as of November 30, 1885. The defendant thereupon took another appeal from such corrected order. Both the above appeals are determined in the following opinion.

Jenkins, Wieckler, Fish & Smith, and *H. C. Sloan*, for appellant. *E. S. Bragg*, for respondent.

LYON, J., (*after stating the facts as above.*) 1. It was competent for the defendant to appeal from the order of November 30, 1885, before the same was corrected. It did so appeal, and it has the right to have its appeal determined, as the order then was, without regard to the subsequent correction thereof. It was so held under very similar circumstances in *State* v. *Supervisors Delafield*, 34 N. W. Rep. 123. The question to be determined on the appeal from that order is, therefore, are the sixth and seventh findings of fact inconsistent with each other? That they are inconsistent, or, if not so, that they acquit the plaintiff of negligence, seems to us too clear to be denied or doubted. The sixth finding is that the plaintiff could, by the use of ordinary care and reasonable effort, have remained where she was, or retraced her steps, with safety to herself. She failed to do so, but jumped upon the platform of the depot, and was injured. Yet, notwithstanding her failure to save herself from injury by the exercise of ordinary care, the jury find she was not guilty of any want of ordinary care in leaving the train as she did. The jury may have predicated the seventh finding upon the fact that the plaintiff was suddenly called upon to decide what course she should pursue in the presence of imminent peril, and that it was not negligence on her part that she erred in judgment in deciding upon her course of action. The following remarks of this court in *Schultz* v. *Railway Co.*, 44 Wis. 638, are peculiarly applicable to this case: "It is probably true that had the plaintiff gone upon the east side of the track, or into the open space in the side of the coal-house, he would have escaped injury. But it cannot be held that he was absolutely guilty of negligence because he failed to take one of these methods of escape. He was acting on short notice in the presence of imminent danger. He had no time to calculate chances, or to deliberate upon the means of escape. He was compelled to act at once, and it would be absurd and unjust to hold him negligent because the instinct of self-preservation did not suggest the most effectual method of escape from the peril. The jury might well find (as they did) that he was not negligent merely because there was a better way of es-

cape than that which he chose." If such is the significance of these apparently conflicting findings, it does not aid the defendant, for in such case, instead of a new trial being ordered, judgment should have gone for the plaintiff. But however that may be, it is impossible to construe the special verdict as finding that the plaintiff was guilty of contributory negligence. It follows that the order of November 30th, as originally entered, was most favorable to the defendant, and hence that the defendant has no good reason to complain of it. It must, therefore, be affirmed.

2. Having determined that the order of November 30, 1885, was properly made, it necessarily follows that the defendant was not injured by the subsequent correction of that order. It is claimed on behalf of the defendant that the court had no power to amend the order, after the appeal therefrom and the return to this court. We think this position cannot be maintained. The appeal from an order does not necessarily take from the circuit court jurisdiction over the subject-matter thereof. Proceedings upon an appealed order may be stayed on certain conditions prescribed by statute, (Rev. St. § 3060,) but no procedure was had upon the appeal from the original order of November 30, 1885, and the case comes within the provision of the same section to the effect that the appeal shall not delay the execution of the order. It is quite immaterial that the original order was returned to this court, for it still remains of record in the circuit court. Rev. St. 259, § 742. We conclude that the court had jurisdiction to correct the order to make it correspond with the order which the court actually announced.

For the above reasons the amendatory order must also be affirmed.

RAYMOND *v.* CITY OF SHEBOYGAN.

(Supreme Court of Wisconsin. December 13, 1887.)

1. MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—ACTION AGAINST CITY, WHEN MAINTAINABLE.
   In an action against the city of Sheboygan, Wisconsin, for injuries caused by an obstruction in the street, defendant answered, by way of abatement, that the obstruction was placed in the street by the owner of the abutting property. *Held* that, under the provisions of the city charter, (Laws Wis. 1874, c. 236, § 24,) before plaintiff can recover damages of the city, he must exhaust his legal remedies against the person who placed the obstruction in the street.
2. SAME—PLEA IN ABATEMENT.
   In such a case it is no objection to the portion of the answer setting up the matter in abatement that it does not show the wrong-doer is living, and within the jurisdiction of the court.

Appeal from circuit court, Outagamie county.

This was an action brought by Henry Raymond against the city of Sheboygan for injuries received from the overturning of his buggy, caused by an obstruction in the streets of the city. On the special verdict rendered by the jury, judgment was given for defendant, and plaintiff appealed.

Foster, Dean & Foster, for appellant. *A. C. Prescott*, for respondent.

COLE, C. J. The appellant brought this action to recover damages for injuries sustained while driving along one of the streets of the defendant city. The allegation in the complaint, which was sustained by the proof, was that his buggy was upset by coming in contact with a mound or pile of dirt in the street, which was dangerous to travelers. The city answered the general denial, and further, in substance, that the mound or pile of dirt which caused the injury was placed in the street, without its knowledge or consent, by one Joseph Keseberg, a resident of the city, and the owner of lots fronting and abutting the street where the pile of dirt was placed; that there was no contract relation between Keseberg and the city; and that the plaintiff had not exhausted his legal remedies against, nor taken any legal proceedings what-

ever to collect his damages from, Keseberg. The case went to trial on the merits, but the court finally gave judgment for the city on the matter pleaded in abatement. The question is, was that judgment correct under the circumstances?

By an amendment to the city charter, it is provided, whenever any injury shall happen to persons or property in the defendant city by reason of any defect or incumbrance of any street for which the city would be liable, and such defect or incumbrance was caused or procured by the wrong or negligence of any person, such person so guilty of the wrong or negligence shall be primarily liable for all damages for such injury, and the city shall not be liable therefor until after all legal remedies shall have been exhausted to collect such damages from such person. Section 24, *c.* 236, Laws 1874. The very obvious intent and meaning of this provision is to require the injured party first to exhaust all his legal remedies to collect his damages from the wrong-doer, or person causing the defect or placing the obstruction in the street, before the liability of the city shall be enforced. A similar provision is found in a number of the city charters of the state, and this court has had occasion to consider its effect in cases which have come before it. Its validity has been affirmed, and it has been held that it was intended to relieve "the city, as far as possible with justice to the injured party, from liability for injuries occasioned by obstructions unlawfully placed in its streets by persons for whose acts it was not directly responsible, and that whenever the person injured can, by the use of the remedies furnished him by the law, recover his damages of the party primarily in fault, therefore primarily liable," he must do so before resorting to his remedy against the city. *McFarland* v. *City of Milwaukee*, 51 Wis. 691, 8 N. W. Rep. 728. The same doctrine as to the responsibility of the city in such a case is recognized in *Hincks* v. *Milwaukee*, 46 Wis. 559, 1 N. W. Rep. 230; *Amos* v. *City of Fond du Lac*, 46 Wis. 695, 1 N W. Rep. 346; *Papworth* v. *City of Milwaukee*, 64 Wis. 390, 25 N. W. Rep. 431. Therefore the point as to when the liability of the city can be enforced, where such a provision in the charter exists, must be deemed settled in this state.

The jury found that the owner of the abutting lot placed the pile of dirt in the street while excavating a cellar on his lot. The owner might thus use the street, providing he did not improperly obstruct it, and had taken due care to guard the mound so as to prevent accidents to travelers. This principle is sanctioned in *Hundhausen* v. *Bond*, 36 Wis. 30, as being entirely consistent with the rights of the public in the street. It is there said: "When, in a city, an owner of an abutting lot has occasion to build, and for that purpose to dig cellars, he may rightfully lay his building materials and earth within the limits of the street, provided he takes care not improperly to obstruct the same, and to remove them within a reasonable time." In this case, it would appear, *prima facie*, that the owner was guilty of actionable negligence, at least, in not putting up some light or guard at the pile of earth to prevent accidents to those traveling the streets by night. For the purpose of this case, we assume that he was, and that the plaintiff could have maintained his action against him for his injuries, as he was primarily liable for them. Under the charter, then, the plaintiff was required to exhaust all his legal remedies to collect his damages from the owner before proceeding against the city. This is the plain meaning of the provision referred to, and the court below was perfectly right in abating the present action.

Some objection was taken to the answer, which set up this matter in abatement, because it was not sufficiently clear and precise, and did not show that the wrong-doer was living and within the jurisdiction of the court. We do not think the objection well taken. Under the Code, the defendant may unite in the same answer a defense which was formerly a plea in abatement, and one which was a plea in bar. *Freeman* v. *Carpenter*, 17 Wis. 126; *Dutcher* v. *Dutcher*, 39 Wis. 651; *Hooker* v. *Green*, 50 Wis. 271, 6 N. W. Rep. 816. And

we suppose a plea in abatement, or an answer in the nature of such a plea, must be liberally construed, with a view to substantial justice, like any other pleading. The answer states that Keseberg, who placed the pile of earth in the street, was a resident of the city. Presumably he was living. The answer informed the plaintiff who was liable for the injury, and against whom he should have brought his action. Whether the city was guilty of negligence in not removing the dirt from the street before the accident happened, is not a question before us. Concede that it was, that its officers were guilty of actual neglect, as counsel claims, still its liability cannot be enforced until the plaintiff has exhausted all his legal remedies to collect his damages from the owner of the lot, who placed the obstruction in the street.

The judgment of the circuit court is affirmed.

FOX RIVER FLOUR & PAPER CO. *v.* KELLY *et al.*

(*Supreme Court of Wisconsin.* December 13, 1887.)

COSTS—TAXATION—WAIVER OF RIGHT TO.

Sixty-one days after findings were filed, plaintiff served notice of taxation of costs. Upon the hearing before the clerk, defendant objected to the taxation of costs, because plaintiff neglected to have them taxed within 60 days after the findings were filed, as required by Laws Wis. 1882, c. 202. *Held*, that plaintiff waived its right to costs by neglecting to have them taxed within the time prescribed by law.

Appeal from circuit court, Outagamie county.

Appeal from an order sustaining an objection to the taxation of costs on judgment in favor of plaintiff. Plaintiff appealed. The facts appear in the opinion.

Moses Hooper and *F. W. Houghton*, for appellant. *H. D. Ryan* and *Nash & Nash*, for respondents.

COLE, C. J. The findings in this case were filed September 4, 1886. Sixty-one days afterwards, the plaintiff served its notice of taxation of costs, with an itemized bill and an affidavit of disbursements. Pursuant to notice, the matter came up before the clerk on November 13th. The defendants objected to any taxation in favor of the plaintiff, because it had neglected to have the costs taxed within 60 days after the filing of the findings, as required by chapter 202, Laws 1882. The clerk sustained the objection, and refused to tax costs in favor of the plaintiff. This act of the clerk was affirmed by the circuit court on review. There can be no doubt but the plaintiff waived its right to costs by neglecting to have them taxed within the time, and perfecting the judgment. The law is perfectly clear on the point, and this court has placed that construction upon it in several cases which have come before us where this precise question was involved. The last case where the matter is considered is *McDonough* v. *Railway Co.*, 34 N. W. Rep. 120, where the cases are cited by Mr. Justice CASSODAY in the opinion.

That part of the judgment appealed from by the plaintiff is affirmed.

BATTEN *v.* SMITH *et al.*

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—GARNISHING CREDITOR—ISSUES FOR JURY.

Plaintiff, a judgment creditor, garnished the general assignee of the debtors. *Held*, that the jury could only consider matters which went to the validity of the assignment, and not the fraudulent transfers made by the debtors, if any, prior to it.

2. SAME—INVENTORY AND LIST—CORRECTNESS—BURDEN OF PROOF.

The court instructed the jury that when, in an assignment, the inventory and list were filed in time and properly certified, the burden of proof showing their in-

correctness was on the party alleging it, and, when it was shown that assets were omitted, then the burden was on the party seeking to sustain it to show that such omissions were made by mistake. *Held*, that the instructions were correct.

3. GARNISHMENT—VALIDITY OF ASSIGNMENT—ISSUES FOR JURY.
At a trial of garnishee proceedings against an assignee under a general assignment, the court submitted certain questions to the jury, but they were not asked to find whether, upon the whole evidence, the assignment was void. *Held*, that as the issues in a garnishee action were not necessarily triable by the jury, and the court had the right to determine matters not presented to them, it will be presumed that the court found the assignment valid when it dismissed the action.

Appeal from circuit court, Dane county.

Thomas Batten, plaintiff, garnished R. T. Richards, general assignee of R. S. Smith and George J. Smith, judgment debtors. The action was dismissed, and plaintiff appealed.

J. P. Smelker, for appellant. *J. M. Smith*, for respondents.

TAYLOR, J. This is a garnishee action commenced by the appellant against the said R. T. Richards. The garnishment is upon a judgment in favor of the appellant against the said Richard S. Smith and George J. Smith, and the garnishee summons was issued after judgment in favor of Batten against said Smiths, and execution issued upon said judgment against the said Smiths. The Smiths were merchants. They had failed in business, and made a voluntary assignment in favor of their creditors; and the said R. T. Richards was the assignee named in such voluntary assignment. The object of the garnishment proceeding was to subject the property and money in the hands of such assignee to the payment of the judgment in favor of the appellant, Batten. The garnishee denied that he had any property or money in his possession belonging to the said Smiths, or either of them, and he also denied that he was indebted to them, or either of them. The appellant took issue upon this denial, and the case was tried by the court and a jury. At the close of the evidence, the learned circuit judge submitted to the jury the following questions as to their findings in the case: "(1) Had the assignors, or either of them, any property at the time of the assignment not afterwards included in the inventory?" (2) "If, in answer to the foregoing question, you say 'yes,' were the omissions, or any of them, intentionally made, or were they made by mistake?" (3) "Did the list of creditors embrace all the creditors of the assignors?" (4) "If you say 'no' to the foregoing question, were any of the omissions that you find intentionally made, or were they a mistake?" (5) "What amount in money do you find in the hands of the defendant, received under the assignment?" (6) "What amount do you find due the plaintiff on the judgment upon which the garnishee proceedings are instituted?" The jury answered the first question, "Yes;" the second question, "By mistake;" the third question, "Yes;" the fourth question, "No answer;" the fifth question, "$2,380;" and to the sixth question, "$1,348." There is no claim but that the answers to the fifth and sixth questions were correct. The appellant moved to set aside the verdict, and for a new trial, assigning various reasons therefor. This motion was denied, and exception duly taken, and afterwards the court ordered judgment dismissing the action, with costs; and judgment was entered accordingly, from which the plaintiff appealed so this court.

Most, if not all, the material questions discussed by the appellant on this appeal, and which he insists were wrongly decided by the trial court, were discussed by the appellant, and decided against him, on a former appeal from the judgment of the circuit court upon a traverse of the affidavit for attachment, which was issued in the original action of the appellant against the said Smiths, and upon which attachment the property in the hands of the present garnishee, as assignee of said Smiths, was attached. The affidavit upon which the attachment was issued, alleged that the defendants the Smiths had assigned, conveyed, disposed of, or concealed, or were about to assign, convey, dispose

of, or conceal, their property, or some part thereof, with intent to defraud their creditors, and that the defendants fraudulently contracted one of the debts for which this action is brought. This affidavit was traversed by the defendants, and the issues formed by such traverse were tried; and the circuit court found in favor of the defendants the Smiths, and set aside the attachment. From the order setting aside the attachment, an appeal was taken to this court, and the order was affirmed. See *Batten* v. *Smith*, 62 Wis. 92, 22 N. W. Rep. 342. By an examination of the record in that case, it will be found that the same evidence was relied upon by the appellant, Batten, to reverse the order in that case, which is relied upon on this appeal to reverse the judgment appealed from in this case. The assignment which is attacked as fraudulent in law or in fact in that case is the same assignment attacked in this case, and, as stated, upon substantially the same evidence. In that case, it was held by this court that any fraudulent transfer of property by the Smiths before the assignment was made could not affect the validity of such assignment, or render it void as to their creditors; and we see no reason for questioning the reasons of Justice CASSODAY, in the opinion in that case, sustaining that position. See pages 98, 99, of 62 Wis. We think the circuit judge rightly excluded from the consideration of the jury in the case at bar all questions as to what, if any, fraudulent transfers had been made by the Smiths previous to the execution of the assignment, and that he properly confined them to matters which went to the validity of the assignment, *et seq.* The only questions which were raised by the evidence which affected the validity of the assignment itself were those submitted to the jury, viz.: Did the assignors, within the time prescribed by law, file a correct inventory of their assets, and a correct list of their creditors? and, second, if they did not, was the incorrectness of the inventory and list intentional on the part of the assignors, or did it result from mistake? These questions were also raised in the traverse of the affidavit in the case against the Smiths, and the evidence on that traverse upon these questions was in substance the same as in the present case. The issues were found against the appellant in that case, as they were in the present case. In the opinion of the court on the former appeal, it is said: "Without going into details, it is enough to say that we find no evidence of intentional omission of any property from the inventory, nor any evidence that, in making the assignment, the defendants intended to defraud any of their creditors." We do not cite the former case, for the reason that we consider the matter in this case as *res adjudicata*, but simply as an adjudication against the appellant upon the issues raised in this case, supported by substantially the same evidence as in the former case. It seems to us that, unless we are prepared to say that we were wrong in the former case, we cannot disturb the verdict of the jury upon the issues decided by them in the case at bar.

If the omissions in the inventory of assets or in the list of creditors were omissions caused by mistakes of law or fact, then the assignment was not avoided by such omissions. See *Farwell* v. *Gundry*, 52 Wis. 268, 9 N. W. Rep. 11; *Smith* v. *Brown*, 61 Wis. 258, 20 N W. Rep. 917; *Mather* v. *McMillan*, 60 Wis. 546, 19 N. W. Rep. 440; *Steinlein* v. *Halstead*, 52 Wis. 291, 8 N. W. Rep. 881; and *Batten* v. *Smith*, *supra*. The material questions of fact on the trial of this case were submitted to the jury, and they have found in favor of the respondent. After a careful consideration of the evidence, we think their verdict is not so clearly against the evidence in the case as would justify us in reversing the order of the circuit judge in refusing to grant a new trial upon these questions of fact.

It is insisted by the learned counsel for the appellant that the circuit judge erred in his instructions to the jury. We do not deem it necessary to consider in detail the 22 separate exceptions to such instructions. After a careful reading of the instructions, we can find nothing which seems to us to be erroneous, in view of the fact that the only questions which were submitted

to the jury for their decision were the ones above stated. There certainly is nothing in the instructions which could have misled the jury in determining the questions submitted to them. The learned counsel for the appellant insist that the learned judge erred in stating the law as to the burden of proof. We think otherwise. The learned judge stated that when the inventory and list were made and filed in time, properly certified, the presumption was that they were correct, and the burden of proof showing their incorrectness was on the party alleging such incorrectness. This is certainly correct. He also stated that when the attacking party shows that they are not correct, and that assets are omitted from the inventory, then the burden of proof is on the party seeking to sustain the assignment to show that such omissions were made by mistake, and were not intentional. This is also clearly correct. These instructions gave the jury the correct rules of law for the determination of the questions submitted to them. The court did not err in refusing to give the general instructions requested by the appellant upon this point. The other instructions requested and refused were properly refused because the jury were not asked to find whether, upon the whole evidence, the assignment was void. If it be insisted that there was the general question in the case, whether, upon the whole evidence, the assignment was not shown to have been void, because made with an intention to defraud the creditors of the assignors, that question was not submitted to the jury, nor did the appellant ask to have it submitted to them, and we must conclude that the court decided that question against the appellant.

This being a garnishee action, the issues in the case, of the nature of those raised by the evidence in this case, were not necessarily triable by a jury, and any material issue which was not submitted to the jury the court had the right to determine. If, therefore, upon all the evidence, there was anything appearing which tended to show that the assignment was fraudulent in fact, notwithstanding that it was valid in form, and the inventory of assets and list of creditors were not intentionally incorrect, that issue, we must conclude, was found against the appellant by the court, in refusing to grant a new trial, and in directing that the action be dismissed. There is certainly nothing in the evidence which establishes the invalidity of the assignment as a matter of law; and the court and jury having found the issues of fact against the appellant, upon, as we think, sufficient evidence, the learned circuit judge was right in refusing to set aside the verdict, and grant a new trial.

The judgment of the circuit court is affirmed.

BRYANT *et al.* *v.* ROBBINS *et al.*

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. DRAINAGE—POWER TO CONSTRUCT—ON WHOM CONFERRED.
   The power to construct drains is no part of the usual powers belonging to town and county governments, but is a special authority given for a particular purpose, and may be conferred by legislative power on any person or body.
2. SAME—CONSTITUTIONALITY OF DRAINAGE ACT—COUNTY GOVERNMENT.
   Laws Wis. 1885, *c.* 442, providing for lowering the ordinary level of the water in certain lakes in Dane county, and for the drainage of wet and overflowed land in any part of said county, different from the system of drainage for the remainder of the state, as provided in Rev. St. 1878, *c.* 54, is not in conflict with section 23, art. 4, of the constitution of the state, which provides that the legislature shall establish but one system of town or county government, which shall be as nearly uniform as practicable.

Appeal from circuit court, Dane county.

Proceedings for appointment of drainage commissioners. The opinion states the facts.

Rogers, Luce & Hall, for appellants. *Pinney & Sanborn*, for respondents.

COLE, C. J. This is a proceeding instituted under chapter 442, Laws 1885, which provides a system for the drainage and reclamation of lands in Dane county. A petition was presented to the circuit court of the county, signed on behalf of the common council of the city of Madison, George E. Bryant, and more than 40 other persons, who represent that they are owners of wet and overflowed lands in the county, and setting forth the matters required by the law to be stated in the petition, and asking that a board of commissioners be appointed for the purposes prescribed. A demurrer was interposed to this petition by the owners of the mill-dam and water-power at the outlet of Lake Monona, on the ground that the law in question was unconstitutional and void; which demurrer was sustained, and the petition dismissed.

The only question which we have to consider on this appeal is whether the law is in conflict with the provisions of our constitution. It is said the learned circuit court held that the law violated section 23, art. 4, which declares that the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable. Chapter 54, Rev. St. 1878, provides for a system of drainage which is to be carried out or executed by town and county officers, and it is insisted that chapter 442 vests the powers as to drainage in a different body, over which neither the town nor county authorities have any control. This, it is said, is a plain departure from the system of town and county government which prevails elsewhere in the state. It may admit of doubt, as argued by the counsel of the appellants, whether the power to construct drains, etc., given to town and county officers under the general law, is, strictly speaking, a part of the system of government belonging to those political corporations within the meaning of the constitution. It is rather a special authority conferred for a special purpose, calculated to promote the public health and welfare. The powers and duties of county and town officers are those which they ordinarily and usually exercise as a part of the regular and permanent administration of the town and county governments. It is a significant fact in this discussion that no drainage law was enacted for several years after th adoption of the constitution, nor was any such power as is now conferred given to town and county officers to execute such work. There is therefore strong reason for saying that the power to construct drains is in no proper sense a part of the usual powers belonging to town and county governments, but is a special authority given for a particular purpose, and which may be conferred upon any persons or body upon which the legislature may see fit to confer it. In *Sheboygan Co.* v. *Parker*, 3 Wall. 93, a kindred objection was considered in regard to the authority of commissioners appointed by the legislature to subscribe to the stock of a railroad, and bind the county by their acts. It was contended that no persons but county officers could exercise such a corporate duty, and create a debt against the county. But the objection was overruled; the court holding that a county officer was understood to be one by whom the county performs its usual political functions or offices of government, and that it did not include persons appointed to perform the special duty in question. We do not think chapter 442 comes within the decisions in *State* v. *Riordan*, 24 Wis. 484; *State* v. *Supervisors*, 25 Wis. 339; *State* v. *Dousman*, 28 Wis. 541; *McRae* v. *Hogan*, 39 Wis. 529; *State* v. *Supervisors*, 62 Wis. 376, 22 N. W. Rep. 572. In the last case, the act considered relieved all towns in the state outside of Grant county from the expense of erecting and maintaining the bridges therein specified, and cast the burden of doing so upon the respective counties, while each town in Grant county was compelled to erect and maintain any such bridge within its limits at its own expense. Imposing taxes for the erection of bridges is one of the usual powers and duties of the constituted authorities of towns or counties, and ever has been; and it was essential that there should be no discrimination on that subject, but that the act should be uniform in its application. If we are right in sup-

posing that the drainage of swamps and marshes is not the ordinary duty or function of a town or county officer, then the last decision obviously does not apply to the case.

The law under consideration confers enlarged powers for drainage, and brings the whole subject under the control and supervision of a different tribunal than the one provided in the general law. It certainly seems to furnish all necessary restrictions to guard against abuse and oppression in its administration, as an examination of its provisions will show. The petition must be signed by 25 or more owners of wet or overflowed lands in the county, who are of the opinion that such lands will be benefited by the proposed system of drainage, subject to the assessment provided; and who shall also be of the opinion that the public health and welfare will be promoted thereby; and who desire to institute the proceeding for the drainage and reclamation of their land, "either by constructing, extending, opening, enlarging, widening, straightening, or deepening water-courses, or removing natural or artificial obstructions therefrom, or by permanently lowering the ordinary level of the water in any or all of the six lakes" mentioned. The petition must "specify, in general terms, the nature of the improvement desired to be made;" give a "description of the lands to be benefited thereby; state the benefits to the public health or convenience, and to private property, which it is believed will result from such system of drainage, and that such system is practicable." The petition must further specify "the stream, lakes, or water-courses proposed to be dredged, widened, deepened, straightened, or altered in course, and the lakes to be lowered, and to what extent, and the principal obstruction to be removed;" "and that, in the belief of the petitioners, the costs, damages, and expenses will be less than the benefits which will result to the owners of the lands likely to be benefited thereby. If any town or city as a whole will be benefited by such system of drainage, the petition may so state, setting forth the nature of such benefits." The common council of the city of Madison is authorized to join in said petition in behalf of said city, and any town board may join which has thereto first been duly authorized so to do by a vote of the town. The petition may also inform the court of any other matters relevant or pertinent to the matter. It is to be verified and filed with the clerk for the action of the circuit court, or presiding judge thereof, asking for the appointment of five commissioners, "to be known as the 'Dane County Drainage Commissioners.'" The filing of the petition shall be deemed the commencement of an action in said court, affecting all lands or other property that may be benefited, or damaged, or interfered with, or taken for public use by virtue of the act. Upon such filing, the court or judge makes an order prescribing the notice to be given to all parties interested in the hearing of the petition; and, upon proof being made of the giving of the required notice, any persons whose estates or interests are to be affected by the proceeding may show cause against the prayer of the petition. The court or judge hears the parties interested, and "determines and adjudicates whether the system of drainage proposed by said petition is one of public utility beyond any damage to individuals to result therefrom, and whether the public health is likely to be improved thereby, whether any highways or public streets of a town or city will be benefited, and whether such proposed system is of such paramount public benefit as to warrant the proceeding authorized in such case by the act, and whether the costs, damages, and expenses will be less than the benefits which will result to the owners of the lands likely to be benefited."

If no sufficient cause is shown against granting the prayer of the petition, and if it shall be made to appear that such proposed system of drainage will not permanently reduce the main level of the waters of Lake Monona below a point therein named, the court or judge, if he deem proper, may make an order appointing five disinterested and competent freeholders as commissioners to

act in the premises as directed by the act. The commissioners take and subscribe an oath of office; thereupon the court orders them to take into consideration the petition; and it is their duty then "to make personal inspection of all lands, streams, drains, lakes, or ponds affected by such petition, and, if the expenses of a survey be first guarantied to them, to cause a survey to be made to determine the feasibility of the proposed work, and the best manner of doing it, the lands to be benefited or damaged thereby; and the commissioners shall report whether, in their judgment, any and what drainage, opening, deepening, widening, straightening, altering, or extending of drains, streams, lakes, or water-courses is necessary, practicable, and of public utility and benefit, in excess of any damage to the public or individuals which may thereby be caused, and fully report in what such benefit consists. If they report in favor of such work, they shall determine and further report the best and cheapest method of accomplishing it, its character, accurately describing the same, and what dams or other obstructions, natural or artificial, it may be necessary to remove or destroy, whether the same are lawfully maintained or otherwise, and whether the course of any natural stream should be altered, and how much such proposed work will reduce the height of the water in Lake Monona below a level which is named, if any. They shall also determine and report what lands will be benefited by the whole or any and what part of the proposed system of drainage, and what lands or property will be damaged thereby, and shall assess the benefits or damages upon each tract or easement or interest, by whomsoever held. If any particular part of the work to be done should be assessed upon any particular tracts, or upon any town or municipality, the commissioners shall so report; and whether, in their judgment, such town or municipality should bear a part of such expense, or would as such derive a public benefit from the whole or any part of such proposed work, and shall assess the amount of such benefits. Upon the filing of this report, the court causes notices to be given to persons mentioned in the report as owners of land or other property affected or charged by assessments in such report with the amount thereof, and, after a specified time, the court hears any remonstrances or objections which may be made to the report, or that any lands are assessed too high or too low, or improperly, or that lands are assessed which ought not to be, or that lands should be assessed which are not, or, by any person to whom damages are assessed, that they are inadequate, or, by any person or municipality, that the public will not be benefited by the work proposed, or that the surface of the water of Lake Monona will be reduced by such drainage to a point below the level fixed by the act.

At the time fixed for the hearing of the objections, the court, on the demand of any person assessed for benefits or awarded damages, may frame an issue, and submit the matter to a jury for trial, whether the amount of damages will be a just compensation therefor, and whether the assessment of benefits as made by the report to any remonstrant demanding the review by a jury is too high, and the jury may assess the same. If the court or presiding judge find, upon the hearing, that the report requires modification, the same may be referred to the commissioners to be modified in any respect. If the finding of the court or presiding judge is in favor of the validity of the proceedings, the court, after the report shall have been modified to conform to the findings, or if there be no remonstrances, shall confirm the same, and the order of confirmation shall be final and conclusive, and the proposed work be established and authorized, and the proposed assessment approved, subject to the right of appeal to the supreme court as in ordinary actions. If lands not described in the original petition are included in the report, or assessments or awards of damages made thereon, the court or judge shall order the owners to be notified thereof, and allow the owner to be heard as a remonstrant, as therein provided. If, however, a majority of the owners of the land to be charged with the expense of the proposed improvement

shall join in a remonstrance in opposition to the system of drainage described in the report of the commissioners, the court shall thereupon dismiss said proceeding, and the original petitioners shall pay the costs of the clerk of court. The court directs the manner of doing the work, the commissioners having power to divide it into parts, and to receive proposals for the performance of the whole or any part of the work. Plans and specifications for the work are to be prepared under the direction of the commissioners, and are to be kept, subject to inspection by all persons interested, at some place in the city of Madison to be designated by the court. After the confirmation of the report and the assessment for benefits, any party interested may pay his assessment to the commissioners; and all assessments so made which shall not be paid shall be certified to the town or city clerk as properly due and payable for such improvements, either in whole or in part; and such clerk shall thereupon enter upon the tax-lists which shall next thereafter be made such assessment so certified, to be collected as state and county or town taxes are collected, excepting the personal property of individuals shall not be liable for such assessment for improvement on lands. The commissioners are authorized to bring a suit in the name of the county for their use as such commissioners in any court having jurisdiction to collect such assessment from any corporation refusing to pay the same, and the judgment in such action may be enforced as in other actions. By the seventh section it is provided, if the commissioners, in their preliminary examination therein provided for, shall find it necessary to condemn, remove, or reduce any dam lawfully maintained, or impair any easement, or right of flowage, or other right, they may negotiate with the owner for the amount to be paid for such purpose, and report such agreement with their report. If they cannot so agree, they shall make their award of damages therefor as therein provided. Upon the confirmation of the report, and in the prosecution of the work, it is provided that no dam shall be removed or reduced, or private property invaded or taken, until the damages agreed upon, awarded, or finally adjudged for such taking, removal, or destruction shall have been deposited with the clerk of the court for the benefit of the owner or persons entitled thereto.

These are the main provisions of the act which it is necessary to notice. It will be seen that the law vests large discretion and powers in the circuit court, or presiding judge thereof, over the proposed system of drainage. The court determines whether it will be one of public utility, beyond any damage which will result from its execution, to individuals; whether the public health is likely to be improved, or streets or highways benefited; and whether the system is of such paramount public benefit as to justify the work. While the public health and general welfare are prominent objects to be promoted by the drainage, still the law goes upon the principle that the property benefited shall mainly bear the expense of the improvement. In other words, charges are apportioned on the lands according to the benefits received. The law evidently contemplates that no system of drainage shall be authorized unless it is feasible, and where the costs, damages, and expenses shall not be less than the benefits which shall result to the owners of the lands reclaimed. In that respect the law goes upon a principle similar to one which imposes special and local burdens upon property for local improvements. In *Donnelly* v. *Decker*, 58 Wis. 461, 17 N. W. Rep. 889, the validity of the general drainage law received careful consideration, and was very fully discussed, by Mr. Justice ORTON. The majority of the court rested the authority to enact such a law upon the police power to protect the public health and welfare.

Courts have generally sustained such laws upon some ground, and the law in question may well stand upon the police power. An owner upon whose land an assessment is made has the right and opportunity to contest its fairness and justice in a court where a jury trial can be had before the assessment is confirmed; and when it is confirmed by the circuit court he has the

right to appeal the case to this court as in ordinary actions. Further, to guard against all oppression, the law provides, if a majority of the owners of the land to be charged with the expense of the proposed work join in a remonstrance in opposition to the system of drainage described in the petition and report of commissioners, the court shall dismiss the proceeding. This feature was commented on by the learned counsel for the respondent as affording proof that it was not the public health and general welfare which were intended to be promoted by the enactment, but some "swamp-land speculation to be advanced and carried out at the expense of the city of Madison." We can make no such inference from the law, nor do we feel justified in imputing to the legislature an object not indicated by it. The legislature might well hesitate to authorize the execution of such a system of drainage against the wishes and at the expense of the owners of the overflowed lands, though satisfied it would promote the public good. Another feature of the law not found in the general drainage act is the one requiring compensation to be made for any dam reduced or removed, or for private property invaded, before the removal or taking of such property.

A number of objections were taken to the law by the learned counsel for the respondents. He insists that the act attempts to confer upon the court the power of making assessments, which, he says, is not a judicial power. The court does determine whether the proposed work should be undertaken, which, in view of the matters pertaining to that question, would seem to call for the exercise of a judicial function. Such judicial determination is the foundation of the assessment collected by the taxing officers when not paid. But we cannot see wherein the power exercised differs from that exercised by the court when it stays proceedings in an action to avoid a tax until there is a reassessment of such tax. In the latter case, there has been no question as to the right of the court to act. It cannot fairly be claimed in this case that the court directly exercises the power of taxation. It is true, it may initiate a proceeding which will result in local charges or assessments upon land; but this it does in many cases, as where it sustains street improvements, or works for the improvement of harbors and public waters. See *Soens* v. *Racine*, 10 Wis. 271; *Bond* v. *Kenosha*, 17 Wis. 292; and cases cited by the chief justice in *Johnson* v. *City of Milwaukee*, 40 Wis. 315. In the *Soens Case*, the assessment upon lots for the improvement of the harbor was made by commissioners appointed by the common council under the charter, and the assessment was sustained. It may be conceded that the laying of taxes is properly the exercise of a legislative, as distinguished from a judicial, function. Still it is obvious that whenever the court sustains a law authorizing a work, the expense of which is charged against property specially benefited, it exercises the same power or function which the court does in authorizing the drainage proceeding under the law in question. "Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised,—whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. This is a matter purely of legislative discretion." FIELD, J., in *Hagar* v. *Reclamation Dist. No.* 108, 111 U. S. 701, 4 Sup. Ct. Rep. 663. In the present case, the commissioners make the assessment upon the land specially benefited by the drainage, and to the extent of such benefits. We can perceive no valid objection to the agency by which the assessments are made, or to the principle upon which they are laid. *Wurts* v. *Hoagland*, 114 U. S. 606, 5 Sup. Ct. Rep. 1086.

The same counsel further objects to the law because the city of Madison, as a municipality, is liable to be charged with a debt for the work when it may not in any way receive any benefit from it. We do not so understand the law. The law authorizes charging a city or town with a part of the expense when such city or town derives a public benefit from the whole or any part

of the work. Where the streets or highways of a city or town are particularly benefited by the improvement, there is surely no injustice in charging such city or town with an amount equal to such benefit. The city or town can appear and contest the justness and fairness of the assessment or charge made against it, and have a jury trial of that issue. There is no reason to suppose that a city or town will be oppressed by the execution of the law, or that it will be charged in any instance with a greater share of the expense than it ought to bear. In this case, the common council have joined in the petition, so, if the proceedings should ultimately result in imposing a debt upon the city, the debt will be one voluntarily incurred. But we do not think there is any ground for saying that the law authorizes the imposition of a general charge upon any city or town for an improvement from which it in no manner derives any benefit. As we have said, the law plainly makes the land which is benefited by the drainage the principal source from which the means to do the work are derived; and wherever a city or town, as a corporation, is likewise benefited, there is no injustice in charging it to the extent of the benefits received.

These remarks dispose of the material objections taken to the law. We are of the opinion that it is a valid act, and that the demurrer to the petition should have been overruled. The order sustaining the demurrer is therefore reversed, and the cause remanded for further proceedings.

BLAKE v. BLAKE.

(*Supreme Court of Wisconsin.* December 13, 1887.)

DIVORCE—ALIMONY—COURT CANNOT REQUIRE SECURITY FOR PAYMENT OF.

After decree for divorce and alimony to plaintiff, she filed a petition to revise and alter the original judgment as to alimony, on account of the change in the circumstances of defendant. The court ordered defendant to pay plaintiff's attorney's fee, and a fixed sum each month for her support, during the pendency of the proceeding, and required defendant to give bond with approved security for payment of the same. *Held* that, under Rev. St. Wis. § 2369, relating to such proceedings, the court had the power to require payment of such fees and alimony, but had no power to require security.

Appeal from circuit court, Milwaukee county.

Divorce proceedings by Christine Blake against Barnum Blake. For opinion on former appeal, see 32 N. W. Rep. 48.

E. Mariner and *E. E. Chapin*, for appellant. *J. A. Eggen*, for respondent.

COLE, C. J. After the decision on the former appeal herein, (32 N. W. Rep. 48,) the plaintiff filed a petition in the circuit court praying for an order requiring the defendant to pay her temporary alimony and suit money during the continuance of this proceeding. The petition states that the plaintiff has no money with which to meet the expenses of the litigation; that she is largely in debt, and unable to pay the same. The court thereupon ordered the defendant to pay the plaintiff or her attorney within 30 days the sum of $250 as counsel fees; and that as suit money he pay $50 on the first of August, 1887, and the same amount on the first day of each succeeding month during the pendency of this proceeding for the modification of the original judgment; and that defendant give a written undertaking with one or more sureties, to be approved by the court, conditioned, if the defendant did not pay such moneys in the manner and amount as required, then such surety or sureties would pay the same. The appeal is from this order, and it is claimed by defendant's counsel that the court had no power to make it.

It is insisted that temporary alimony and suit money can only be given during the pendency of the action for divorce under section 2367; but after

judgment of divorce is entered, and the term passed, the power of the court as to such temporary alimony and suit money is gone. We cannot adopt that view of the statute. The proceeding is to revise and alter the original judgment as to alimony on account of the change in the circumstances of the defendant, under section 2369, which gives the court plenary power in respect to that matter, as this court has often decided. See the cases referred to by Mr. Justice TAYLOR on the former appeal. But the precise question presented here has been decided adversely to the position of defendant's counsel in *Helden* v. *Helden*, 11 Wis. 554. In that case, as here, it was objected that, as the parties had already been divorced, the court had no authority to make the allowance. The objection was overruled; this court holding that the power still remained, because the statute expressly gave the court authority to "make any judgment respecting any of said matters which such court might have made in the original action." As was said in that case, there can be no doubt about the power of the court in the original action to compel the husband to pay the wife a reasonable sum to meet the expenses of the litigation and for temporary support. The statute is the same as when the *Helden Case* was decided, and we are fully satisfied with the construction that was there placed upon it. Indeed, the language seems too plain upon this point to admit of discussion, and we shall attempt none.

The sums to be paid by the defendant during the pendency of this proceeding rested largely in the discretion of the court below, and there is no ground for claiming that such discretion was not wisely exercised. There is to be an investigation as to the financial ability, wealth, and income of the defendant. This will necessarily involve expense, and demand the aid of counsel. The amount which the defendant is required to pay to meet these expenses, and for temporary support, does not seem unreasonable. In one respect, however, we deem the order erroneous. It is the provision requiring the defendant to give security for the payment of these sums. We have not been referred to any statute which authorizes the court to make such an order. Section 2367 authorizes the court to require security for the payment of the alimony or other allowance adjudged the wife in the original judgment. But we do not think this impliedly authorizes the court to require security for the payment of an allowance given on application to modify the judgment; and, unless statutory authority for exacting such security is clearly given, the court cannot require it. The order, therefore, must be modified in that regard, and in other respects it is affirmed. The clerk's fees and plaintiff's taxable costs in this court must be paid by the defendant.

The cause is remanded to the circuit court for a modification of its order in the respect pointed out in this opinion.

SADDINGTON'S ESTATE v. HEWITT.

(*Supreme Court of Wisconsin.* December 18, 1887.)

1. EXECUTORS AND ADMINISTRATORS—EMBEZZLEMENT OF FUNDS—PROCEEDINGS FOR EXAMINATION.

   Rev. St. Wis. §§ 3825, 3826, provide that upon complaint to the county court, by any one interested in an estate, that any person has embezzled or concealed or has in his possession property belonging to the estate, he may be examined by the court. A petition to the court alleged that defendant had disposed of property belonging to an estate, *Held*, that the allegations were sufficient to justify the court in proceeding under those sections.

2. SAME—FINDINGS BY COURT.

   In a proceeding under Rev. St. Wis. § 3825, the court was unable to determine whether the money from the note in the hands of the respondent came to him as the individual property of one W., or from him as the administrator of an estate. *Held* that, after such a finding, it was error for the court to restrain respondent in the use of the money.

3. SAME.
The evidence before the county court was not returned, but the finding of the court was that it was unable to decide whether it was the property of the estate or not. *Held* that, upon such findings, the proceeding should have been dismissed.

4. SAME—WHO MAY BE EXAMINED.
Rev. St. Wis. §§ 3825, 3826, provide for an examination of one alleged to have property in his hands belonging to an estate. *Held*, that these sections only provide for the examination of the party charged; and no rule of court can extend the statute, and make the proceeding one to recover the property described from the respondent.

Appeal from circuit court, Columbia county.

This proceeding was commenced in the county court of Columbia county, by a petition filed in that court by Sarah J. Johnson. The material allegations of the petition are as follows, viz.: That the petitioner is one of the heirs at law of George W. Saddington, deceased; that said deceased died on the eleventh of June, 1866, in said county of Columbia, having property to be administered upon in said county court; that on August 6, 1866, Silas G. Winters was duly appointed administrator of the estate of said deceased by the said county court of Columbia county, and that John Hewitt and one Horace Rust were the sureties upon the said administrator's bond; that said Winters, as such administrator, has never rendered any account of his administration, or been discharged by the court; that in the year 1867, the exact date being unknown, the said Winters, as such administrator, received the money due upon a life insurance policy belonging to said estate, amounting to $975, and afterwards, and within one year, as complainant is informed and believes, loaned to some person unknown the sum of $240 of said money belonging to said estate, and took a promissory note therefor; that afterwards the said Silas G. Winters, as such administrator, gave said note into the hands of his bondsman, John Hewitt, for the purpose of collection only, and that the same might be collected, and the amount saved to said estate, and the liability of said bondsman secured to that amount by payment of the same into court; that said John Hewitt received and held such note until his death, which occurred on the sixth day of January, 1868, when the said note passed into the hands of his administrator, Henry Hewitt, Jr., now residing at Menasha, Wisconsin; that Henry Hewitt, Jr., collected the amount due on said note August, 1869. The petition then alleges that the amount so collected by said Henry Hewitt, Jr., was the property of the said deceased George W. Saddington, and of his estate, and "that said Henry Hewitt, Jr., has kept and embezzled the same, and refused to pay the same to said estate, (of Saddington,) or to the persons entitled thereto, and still holds and keeps said money, and refuses to pay the same, though often requested so to do; and also kept in his possession said promissory note, given as aforesaid, which was a claim and demand belonging to said estate, and has refused to deliver or account for the same; and complainant suspects said Henry Hewitt, Jr., has taken, kept, concealed, and embezzled, and has in his possession, said promissory note, and the proceeds thereof, so belonging to said deceased and his said estate." The complainant prays "that a citation may issue from said county court addressed to said Henry Hewitt, Jr., commanding him to appear before said court at a time and place for examination upon oath in regard to the property, matters, and things above mentioned, and especially in regard to said note, and the collection and withholding the proceeds thereof."

Hewitt appeared before the county court, and was examined, and other evidence was taken upon the matters set forth in said petition, and, after hearing the evidence, the county court made the following findings and order: "The court finds that about the year 1867 one Silas G. Winters, being then and there the administrator of the estate of said George W. Saddington, deceased, turned over as collateral security to John Hewitt, one of the bondsmen of said Winters upon his bond as administrator of the estate of said Sad-

dington, a certain promissory note amounting in value to about $240, to secure said Hewitt, in part at least, against liability upon said bond; but the court is unable to determine, from the evidence, as to whether said note was the property of said Winters individually, or as administrator of said estate of G. W. Saddington. That upon the death of said John Hewitt, January 6, 1868, said note passed into the possession of said Henry Hewitt, Jr., who was appointed administrator of the estate of said John Hewitt, deceased, and was by him collected, with interest, on or about August 30, 1869, he receiving thereon the sum of $290. That said Henry Hewitt, Jr., still holds said sum of $290, so collected as aforesaid, and is chargeable with interest thereon to this date, now amounting in all to about the sum of $640. And it appearing to the court, from the records and papers on file in the matter of the estate of said George W. Saddington, that said estate never has been settled by said administrator, Silas G. Winters, and it being represented to the court that said administrator is in default, and that it will be necessary to bring suit upon his bond as such administrator to recover the amount due from him to said estate, which amount will probably exceed the said sum of $640, it is now, on motion of Thos. Armstrong, Jr., attorney for said complainant, ordered that said Henry Hewitt, Jr., hold said sum of $640, so found to be in his hands as and from the proceeds of said note, subject to the further order of this court, and until the estate of George W. Saddington is settled in this court, and until such reasonable time thereafter as may be necessary to enable said complainant, and the heirs of said George W. Saddington, to bring an action upon the bond of said administrator, Silas G. Winters, or such other action as they may be advised is necessary."

From this order Hewitt appealed to the circuit court, where the case was heard upon the proceedings and proofs taken in the county court, and upon such hearing the circuit court made the following order in the matter: "It is ordered that the order of the county court aforesaid, so appealed from, be, and the same is hereby, modified so as to read as follows: Ordered that said Henry Hewitt, Jr., hold the said sum of $640, so found to be in his hands as and from the proceeds of said note, subject to the further order of the county court. It is further ordered that this matter be remitted to the county court, with directions to said court to modify said order accordingly. Further ordered that each party pay his own costs on this appeal." From the order of the circuit court Henry Hewitt, Jr., appeals to this court.

Thomas Armstrong, Jr., for respondent. *G. J. Cox*, for appellant.

TAYLOR, J., (*after stating the facts.*) On the part of the respondent it is claimed that this is a proceeding under sections 3825 and 3826, Rev. St. 1878. On the part of the appellant it is insisted (1) that the petition or complaint does not state facts sufficient to authorize the county court to take jurisdiction of the proceeding; (2) that, if the complaint is sufficient to give the county court jurisdiction of the appellant, that the findings of the county court are insufficient to justify any restrictive order of any kind against the appellant; and (3) that the county court, upon a proceeding under said sections, has no power to make any order restraining the appellant in any manner from using any money or property in his hands, especially when he denies that he holds it for the use of the estate to which it is claimed to belong.

We are inclined to hold that the petition is sufficient. Although the allegations of the petition fail to show the embezzlement of any money or property by the respondent belonging to the estate of Saddington, they do show, if the facts alleged are true, that the respondent has disposed of property belonging to said estate, and that is sufficient to justify the court in proceeding under said section. The second objection to the order made both by the county and circuit courts, it seems to us, is well founded. After hearing the evidence, the county court found, in regard to the note, which in the petition is

alleged to have been a part of the assets belonging to the Saddington estate, that said note was turned over by the administrator, Winters, to John Hewitt, who was one of his bondsmen, as administrator of the estate of Saddington, to secure said Hewitt, in part at least, against liability on said bond; "but the court is unable to determine, from the evidence, as to whether said note was the property of said Winters individually, or as the administrator of said estate of G. W. Saddington."

If, in any case upon a proceeding under said sections 3825 and 3826, the county court has any power to make any order restraining the respondent in the use of any money or property alleged to be in his hands, it is very clear that, after the court had determined as a fact that the evidence did not show that the respondent had any money in his hands or possession belonging to the estate of Saddington, there was no ground for making an order restraining the respondent in the use of money in his possession which it did not appear belonged to the estate of Saddington. The statute is very clear in limiting the inquiry under it to the question whether the person called upon to answer "has concealed, embezzled, conveyed away, or disposed of any money, *goods, or chattels of the deceased.*" When the county judge found that he was unable to determine, from the evidence, whether the said note was the property of Winters, or of the estate of said Saddington, that should have been an end of the inquiry. It is urged that as the court has found that Winters turned over the note in question to Hewitt, his bondsman, as collateral security, to be held by him as indemnity against any liability he might be eventually subjected to as the bondsman of Winters, it is immaterial whether the note belonged to the estate of Saddington or not. This fact cannot make a case under the statute, which declares that the proceeding can only be taken when the person charged has in his possession property belonging to the deceased. Again, if the administrator, Winters, secured his bondsmen upon his administrator's bond by a transfer of the note in question, or any other of his personal estate, the person to whom such transfer is made may hold the same against the claim of persons interested in the estate of Saddington. If those interested in the Saddington estate are apprehensive that Winters will not account for the estate in his hands, they can compel him to render his account; and if he fails to render such account, and pay over the money which ought to be in his hands, they may sue his bond; and if they obtain judgment upon such bond, and cannot make their money of the sureties upon execution, they might, in a further action, subject to the satisfaction of such judgment any pledges or securities which the administrator had given to his bondsmen to indemnify them against their liabilities on such bond. But we find no authority in the statutes to make such securities the basis of the proceedings authorized in section 3825, Rev. St.

It is urged that, the evidence not being returned in the record, we must suppose that it was sufficient to charge the appellant with having converted the money or note belonging to the deceased. In answer to that, we have the finding of the facts by the county court upon which he based his order, and the circuit court has not in any way altered or changed such findings of fact; and, if anything may be inferred from his modification of the order of the county court, we think he passed upon such findings in making such modification. Upon the findings of the county court, the proceeding should have been dismissed, and, upon the appeal to the circuit court, that court should have reversed the order of the county court, instead of modifying the same.

We are also of the opinion that under sections 3825 and 3826, Rev. St., no order can properly be made in regard to the property, if any, in the hands of the respondent, and concerning which his examination may be taken under said sections. These sections are probably taken from the General Statutes of Massachusetts. The law in Massachusetts was first enacted in 1783. See section 11, c. 321, Laws Mass. p. 104, re-enacted in Rev. St. 1836 as sec-

tion 7, c. 65, p. 429; again, in Gen. St. Mass. as section 6. c. 96; and again as section 1, c. 133, Pub. St. Mass. 1882. There has been no material alteration in the act from its first enactment. This law was enacted in Michigan. How. St. §§ 5876, 5877. The statutes of Massachusetts and Michigan are substantially like sections 3825 and 3826, Rev. St. In Massachusetts and Michigan, the law has always been construed as simply giving the probate court the power to examine the party charged on oath, and as giving no power to make any adversary order in such matters; the object being to aid the parties interested in the estate of a deceased person in discovering property belonging to said estate, and as preliminary to the bringing of some proper action for the recovery thereof, and not as furnishing a method of recovering such property from the party accused for the benefit of the estate. See *Boston* v. *Boylston*, 4 Mass. 322; *Arnold* v. *Sabin*, 4 Cush. 46; *Martin* v. *Clapp*, 99 Mass. 470; *Wales* v. *Newbould*, 9 Mich. 87; *Perrin* v. *Probate Judge*, 49 Mich. 342, 13 N. W. Rep. 767; *Perrin* v. *Leppers*, 49 Mich. 347, 13 N. W. Rep. 768. Judge GARY, in his work on Probate Law, construes the act the same as it is construed by the courts above cited. See Gary, Prob. Law, p. 134, § 351. See, also, *O'Dee* v. *McCarte*, 7 Me. 467.

It seems very plain, on the reading of sections 3825 and 3826, that there was no intention that the proceeding should be in the nature of an action to recover the property embezzled or disposed of. Had such been the intention of the legislature, it is certain some provision would have been made authorizing the court to make some order in regard to it. The only thing provided for by the statute is the examination of the party charged, and power given to compel him to submit to such examination, and there the power granted ends. We think it is clear that rule 12 of the county court rules cannot convert the statute, which simply provides for the examination of the party charged, into a statute making the proceeding in the nature of an action to recover of the party charged the property described in the petition. Under the rule, it would perhaps be competent for the county judge to make an order in regard to the property in a case where the party proceeded against admitted that he had property in his possession belonging to the estate which he was willing should be held for the benefit of the estate, but it cannot change the law as to a party who contests the right of the estate to the property alleged to be in his possession. That question must be decided in some proper action at law or in equity.

The order of the circuit court is reversed, and the cause is remanded, with directions to that court to reverse the order of the county court.

COOK v. MCDONNELL.

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. APPEAL—FROM JUSTICE COURT—TRANSFER BY CIRCUIT COURT—LOSS OF RECORD.

Defendant duly appealed January 4, 1884, to the circuit court of Brown county from a judgment in a justice's court, and noticed the appeal for trial at the first term after the record was filed. When the case was called, the circuit judge, having formerly been of counsel, declined to try the case, and transferred it to Outagamie county. The record was taken from the office of the clerk by an attorney for plaintiff at the time the order of removal was made, but it was never returned to that office, nor to the office of the clerk of Outagamie county, and no steps were taken by plaintiff's attorneys to supply it until October, 1886, a few days before moving in the Outagamie circuit court to dismiss the appeal under Rev. St. Wis. § 3766, providing that in appeals from justices' courts, "if neither party shall bring the appeal to a hearing in the appellate court before the end of the second term after the filing of the return of the justice therein, such court shall dismiss the appeal, unless it shall continue the same by special order for cause shown." *Held* to be within the exception, the appeal not being triable in Brown county because of the disqualification of the judge, and because plaintiff had lost the record.

2. VENUE IN CIVIL CASES — CHANGE OF VENUE — EXCUSE FOR NOT TRANSMITTING RECORD.
Rev. St. Wis. § 2627, provides that an order changing the place of trial becomes vacated unless the party obtaining the same, within 20 days thereafter, shall cause the papers in the case to be transmitted to the clerk of the county to which the case is removed, and "no change for the same cause shall thereafter be made." *Held*, that the appellant was excused from taking any steps to transmit the record until the respondent either returned it or supplied its place in the manner prescribed by law.

Appeal from circuit court, Outagamie county; GEORGE H. MYERS, Judge.

This action was commenced in justice court, in December, 1883. On the return-day of the summons, the parties appeared, and the case was adjourned without any issue having been joined in the case. On the adjourned day, the plaintiff, William Cook, appeared; the defendant, James McDonnell, did not appear; and the plaintiff obtained judgment against the defendant, for the sum of $114.12 damages, and costs. The defendant duly appealed to the circuit court of Brown county, January 4, 1884, and at the first term of said court thereafter, to-wit, at the April term, 1884, the case was placed on the calendar, having been noticed for trial by both parties. At that term the following order was made in the action:

"*William Cook, Respondent*, v. *James McDonald, Appellant.*

"It appearing to the satisfaction of the court, from an inspection of the pleadings in this action, that the judge thereof has been of counsel for the defendant in the above-entitled cause, and on motion of John J. Tracy, attorney for said plaintiff, and after hearing Ellis, Green & Merrill, attorneys for the defendant in opposition thereto, ordered that the place of trial of this action be and hereby is changed from the circuit court of Brown county, to the circuit court of Outagamie county, Wisconsin.

"*Dated May* 24, 1884. SAMUEL D. HASTINGS, Jr., Judge."

After the making of this order in May, 1884, neither party took any action in the case until August 2, 1886, when the respondent obtained an order to show cause, from the circuit court of Brown county, why the appeal should not be dismissed. This order to show cause was brought before the court on the twenty-second day of August, 1886, when it appeared that the record in the case could not be found. On the twentieth day of October, 1886, the respondent again obtained an order on the appellant to show cause why the appeal should not be dismissed, upon an affidavit of one of the attorneys for the respondent, showing that the record in the case could not be found, and, upon procuring a copy of the justice's docket, the pleadings and judgment in said justice's court to be filed in place of the lost records. When this order to show cause came on to be heard in the circuit court of Brown county, the circuit judge refused to hear the same, and again made an order changing the place of trial to Outagamie county. This order was made October 23, 1886. Under this order it appears that the record was transferred to said Outagamie circuit court, and on the thirtieth day of December, 1886, an order to show cause why the appeal should not be dismissed was brought to a hearing before that court. In opposition to this motion the appellant read his own affidavit, the affidavit of Mr. Boland, the clerk of the circuit court of Brown county, and the affidavit of Mr. Huntington, one of his attorneys. The affidavit of the appellant states that, upon advice of counsel, he has a good defense to the plaintiff's action; that he made no endeavor to bring the action to a trial because he was informed by his attorneys that the records of the case could not be found in either the courts of Brown or Outagamie; that he has always been ready to try the case, and desires to try the same. The affidavit of Mr. Boland, the clerk of the circuit court of Brown county, states that the record was taken from his office by Mr. Wheeler, one of the attorneys for the plaintiff, at the time the first order to change the place of trial was

made, and has never been returned to said office; that no effort was ever made by the plaintiff or his attorneys to procure the transmission of the record or papers to Outagamie county until after the second order to change the place of trial was made. The affidavit of Mr. Huntington, the present attorney of the appellant, shows that he was employed by the appellant in the summer of 1886, and has ever since been anxious and willing to have the case tried, and has offered to consent that copies might be filed to supply the loss of the original record, and that he offered to try the case either in Brown or Outagamie county as the plaintiff might wish; but the attorney for the plaintiff would consent to nothing except to insist upon his motion to dismiss the appeal. After hearing the motion, the circuit court of Outagamie county dismissed the appeal on the ground that the appellant had not prosecuted his appeal with proper diligence. From the judgment entered upon this order the defendant appealed to this court.

Huntington & Cady, for appellant. *J. J. Tracy*, for respondent.

TAYLOR, J., (*after stating the facts.*) We think the circuit court erred in dismissing the appeal under the circumstances. It is undisputed that the appellant caused the appeal to be noticed for trial on the first term after the record was filed in Brown county circuit, and that, when the case was called at that term, the circuit judge made an order removing the case to Outagamie county, for the reason that the circuit judge of Brown county had been the counsel for the appellant in the action. The record says the order was made on the application of the respondent; but by whomsoever it was made, it is apparent from the subsequent action of the learned circuit judge that he of his own motion declined to try the case for the reason above stated. Neither party caused the record to be transferred to Outagamie county until in October, 1886, and a few days before the motion to dismiss the action was made in that court. It also appears that the record in the case was taken from the office of the clerk of the circuit court of Brown county at the time the first order for the removal of the same to Outagamie county was made, and the evidence tends very strongly to show that such record was taken from said clerk's office by one of the attorneys for the respondent. Such record has never been returned to said office or to the office of the clerk of Outagamie county, and no steps had been taken by the respondent's attorney, to supply such missing record, until in October, 1886, at the time a motion to dismiss the appeal was made. If there has been unusual delay in bringing the appeal to a hearing, it seems to us that the fault has been with the respondent, and not on the part of the appellant. From the time it was first noticed for trial in the Brown county circuit court, until the motion was made to dismiss the appeal in the Outagamie circuit, there has been no term when a trial of the case could be had in either court. It is evident it could not have been tried in the Brown county circuit for two reasons: *First*, because the circuit judge had refused to try it on account of his connection with the case; and, *second*, because the respondent had lost the record of the case. The action could not have been tried in Outagamie county because the record had not been transferred to that county. The case is not within the rule prescribed by section 3766, Rev. St. It is evident that this section cannot be applied to a case when there is no term of the court at which the appeal could have been brought to a hearing; and the learned circuit judge, in giving his reasons for dismissing the appeal, does not invoke the provisions of this section as the basis of his order.

We do not think this case comes within the rule of the statute as laid down in section 2627, Rev. St., viz., that the order of removal becomes vacated on the failure of the party obtaining the order of removal to have the papers transmitted to the clerk of the county to which the case is removed, within 20 days from the making of the order. The learned circuit judge of Brown county did

not understand that the statute referred to applied to the case, and so made a second order of removal, when the case was again called up for action thereon. We think he was right in so holding. If the section does apply to the case, then the case was improperly removed to Outagamie county on the second order; and that court never obtained jurisdiction of the case. The section provides that when the order for a change of the place of trial becomes vacated under said section, "no change for the same cause shall thereafter be made." If it be said that the appellant might have caused the record to have been transmitted to Outagamie county, this, we think, is answered by the evidence in the case showing that such record had been removed from the office of the clerk, and lost by the respondent. Under these circumstances, we think the appellant was excused from taking any steps in the matter until the respondent either returned the record or, if he could not return it, supplied its place in the manner prescribed by law.

The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

STATE v. GUST.

(*Supreme Court of Wisconsin.* December 13, 1887.)

JUSTICE OF THE PEACE—ADJOURNMENTS.

Rev. St. Wis. § 3631, provides that in justices' courts, no adjournment, after the first, shall be allowed unless the party applying shall show by oath that he cannot safely proceed to trial. In an action in justice's court, where there had already been two adjournments for cause shown, the case was again adjourned, on motion of plaintiff, and cause shown, against the objections of defendant, after the jury was sworn. On the adjourned day plaintiff appeared; but defendant, though in court, refused to appear. On motion of plaintiff, but without any affidavit or cause shown, the case was again adjourned. On the day to which the case was adjourned, the defendant did not appear, and judgment was rendered against him. *Held*, that the adjournment was unauthorized by law, and the judgment rendered by the justice should have been reversed.

Appeal from circuit court, Sauk county; ALVA STEWART, Judge.

It appears from the record that September 20, 1886, this action was commenced before E. A. HULL, justice of the peace, to recover a forfeiture incurred by August Gust in violating section 1418, Rev. St., by maintaining a slaughter-house within one-eighth of a mile of a dwelling-house; that on the return-day, September 27, 1886, the venue was changed to the nearest justice, E. L. POWELL, whereupon, on demand of the defendant, the plaintiff was ordered to give security for costs, and the defendant answered, denying each and every allegation of the complaint, and gave notice that he would prove that he had no slaughter-house, and that there was no nuisance on the ground and premises designated; that thereupon, and on motion of the plaintiff and the consent of the defendant, the cause was adjourned until October 4, 1886, at 10 A. M., at which time the defendant moved to dismiss the case for want of security for costs, which was denied; that thereupon the defendant moved to adjourn the case for cause shown, which was granted, and the cause adjourned to October 25, 1886, at 10 A. M., when the parties appeared in court, and the defendant called for a jury, and the same was ordered, selected, and summoned as such; that upon the jury being sworn, and cause shown by the plaintiff, and against the objection of the defendant, the case was adjourned to November 1, 1886, at 10 A. M., when the plaintiff appeared, and the defendant refused to appear, though in court; that thereupon one of said jurors was excused for the purpose of attending his brother's funeral, and on motion of the plaintiff, and without any affidavit or cause shown, the case was adjourned to November 3, 1886, at 10 A. M., and the several jurymen notified to be present accordingly; that at the day and hour last named, the plaintiff and all of said jurymen being present, and the defendant not appearing, and after wait-

ing for him one hour, the court proceeded to take the evidence of the plaintiff's witnesses, and at the close of the testimony the jury returned a verdict in favor of the plaintiff and against the defendant for $50, and thereupon the court found a judgment against the defendant and in favor of the plaintiff for $50 damages, and $51.81 costs, making in all $101.81; that each and all of said adjournments were to and at the office of said last-named justice; that November 5, 1886, said record was removed to the circuit court by writ of *certiorari;* that upon the hearing thereof in said last-named court, it was ordered that said judgment in said justice's court "be wholly affirmed;" and it was, in effect, further "ordered and adjudged that the state * * * do have and recover, of and from August Gust" aforesaid, the sum of $101.81, with interest thereon from the date thereof, together with the clerk's fees, amounting to $5.05. From that judgment the defendant brings this appeal.

William Brown, for appellant. *C. E. Estabrook*, Atty. Gen., and *R. D. Evans*, for the State.

CASSODAY, J., (*after stating the facts.*) This action is to recover the forfeiture prescribed in section 1418, Rev. St. It is a civil action. Sections 3294, 3295, Rev. St.; *State* v. *Smith*, 52 Wis. 134, 8 N. W. Rep. 870; *City of Oshkosh* v. *Schwartz*, 55 Wis. 487–489, 13 N. W. Rep. 552; *Chafin* v. *Waukesha Co.*, 62 Wis. 467, 468, 22 N. W. Rep. 732. Most of the objections raised are untenable, especially as the trial court on the *certiorari* was confined to such questions as went to the jurisdiction of the justice. The adjournment was procured by the state, October 25, 1886, on the ground that its principal witness, duly subpœnaed, had been arrested on the procurement of the defendant, and taken before another justice, in another part of the county, and there held for the purpose and object of keeping him from the trial of this action, Upon such a showing, and no denial on the part of the defendant, it is very questionable whether he was in a position to challenge the regularity of that adjournment on the ground that the application for it had not been made until after the jury had been sworn, since it was made as soon as the fact upon which it was based was ascertained. The adjournment of November 1, 1886, without the appearance or consent of the defendant, on the application of the plaintiff, and without any affidavit or cause shown, seems to have been unauthorized. The matter of adjournment in justice's court is regulated by the statutes. On the return-day, the justice may, "without the consent of either party, adjourn the cause, not exceeding three days, and shall, upon the application of either party, without requiring cause to be shown, for such time as may be required, not exceeding one week." Section 3630, Rev. St. But "no adjournment after the first shall be allowed upon the application of a party, unless such party shall satisfy the justice by his oath, or the oath of some other person, that he cannot safely proceed to trial for want of some material witness or testimony," etc. Section 3631, Rev. St. Here the application was accompanied by no such oath, and the adjournment was granted upon no such ground. It is true, as urged, the statute authorizes every justice of the peace "to hold a court for the trial of all actions of which justices of the peace have *jurisdiction by law*, and to hear, try, and determine the same *according to law;* and for that purpose, where no special provision is otherwise made by law, such court shall be vested with all the necessary powers which are possessed by courts of record; and all laws of a general nature are to apply to such justice's court so far as the same may be applicable." Section 3571, Rev. St. Whether a justice would lose jurisdiction by an adjournment in consequence of an imperative necessity, as, for instance, the sudden sickness of the justice or one or more jurymen, it is not necessary here to decide, since no such case was here presented. "The necessary powers," thus vested by this section in a justice's court, must be confined to matters within the jurisdiction of such court and in its proceedings "according

to law." Such courts have no jurisdiction except such as given to them by the constitution and laws of the state. The section does not authorize the continuance of a jurisdiction by an adjournment contrary to law. It is claimed, however, that it authorized the adjournment in question; and a decision in New York under a similar statute is relied upon. *Board of Excise* v. *Sackridger*, 85 N. Y. 159. That case presented the question of the validity of an adjournment in consequence of an attachment issued *pursuant to the statute*, "to compel the appearance of a defaulting witness," when the *statute was silent* as to allowing such adjournment. The case, however, was determined upon other grounds. Our statute expressly authorizes an adjournment in such a case for a reasonable time, or until such witness shall testify. Section 3583, Rev. St. We do not think the case is authority for the adjournment in question. The same may be said respecting the other cases cited on the part of the state.

The judgment of the circuit court is reversed, and the cause is remanded, with direction to reverse the judgment of the justice.

LAWE *v.* CITY OF KAUKAUNA.

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. EJECTMENT—PLEADING—INSTRUCTIONS—DEDICATION—MUST BE BY OWNER.
   In an action of ejectment, brought to recover certain lots used by defendant city as a highway and landing for a swing-bridge, defendant claimed dedication and adverse user. Plaintiff replied that for many years when the dedication and adverse user were alleged to have taken place, he was not the owner of the premises. *Held*, that this raised an issue as to ownership, under which it was proper to charge the jury that no one but the owner or his duly-authorized agent could dedicate the property to public use.
2. SAME—EVIDENCE.
   In an action of ejectment to recover lots used by a city, the issues were whether the premises in question had been in the adverse user of the public for over 20 years, and whether the plaintiff had dedicated them to the public. *Held*, that testimony from witnesses, and from the plaintiff himself, to the effect that he had objected to the use of the lots in controversy as a public highway, was perfectly proper and admissible.
3. SAME.
   In an action of ejectment, to recover lots used by the city as a landing place for a swinging bridge and a highway to and from the bridge, it appeared that some years before there had been two old bridges across the canal below the present site, and that the lots had been used then as a highway to the bridges. *Held*, that instructions of the court relating to the acts of dedication by plaintiff, which did not restrict the time of the acts to the present swinging bridge, were not prejudicial to defendant.
4. SAME—WHEN EJECTMENT LIES—PROPERTY USED AS LANDING PLACE FOR BRIDGE.
   Defendant was in possession of certain lots for use as a landing place for a swinging bridge, and claimed the permanent and continued right of possession for such purpose in hostility to plaintiff's title thereto. *Held*, that ejectment was the only adequate and proper remedy in the case.

Appeal from circuit court, Outagamie county; GEORGE H. MYERS, Judge.

George W. Lawe brought this action of ejectment against the city of Kaukauna to recover possession of certain city lots. Judgment was rendered for the plaintiff in the circuit court, and the defendant city appealed.

D. S. Ordway, for appellant. *Pierce & Moeskes*, for respondent.

ORTON, J. This is an action of ejectment against the city of Kaukauna to recover lots 7, 8, and 9, in block 13, in said city, which the city occupied and used for the landing of a swing-bridge across the government canal, and in connection with the street or highway leading to the same, and on which said bridge turned. The defense, besides the general issue, is that the plaintiff as the owner of said lots, dedicated them to the public use for such purpose, and

that they had been used as a highway for over 20 years in connection with other former bridges across said canal. To these last defenses the evidence was addressed, and, to say the least, it was very uncertain and contradictory, and the jury, having found for the plaintiff, must have found these issues in his favor, and we think that the evidence warranted the verdict. We have examined the evidence with great care, and we do not think we would be justified in disturbing the verdict on the merits. The evidence is very voluminous, and much of it quite immaterial, and so mixed up, in view of both of these issues, that it is extremely difficult to make application of it. The jury and the learned judge before whom the case was tried were vastly more competent than this court can be to pass upon its general effect. We shall, therefore, consider only the alleged errors in the evidence and instructions, and even they, in the general confusion, are very difficult to clearly understand, or what of these the learned counsel of the appellant are disposed to urge before this court.

1. The first error presented in the brief of the learned counsel is that the court charged the jury, in effect, that no one but the owner, or his duly-authorized agent, could dedicate property to the public use. It is claimed that, although this proposition is abstractly correct, there was no evidence to which it was applicable; the fact that the plaintiff owned the premises being unquestionable. This fact was made an issue by the replication of the plaintiff that he did not own the premises for many years when the public user and dedication thereof were alleged to have taken place, and it was not unquestionable. The title of record was in fact out of the plaintiff for many years, and whether, notwithstanding this, he owned the premises, was a question in the case, and a question of fact, for the jury to decide, although, in passing upon it, the court should instruct the jury as to the law which should govern them in deciding it. Whether the plaintiff had such an interest in the premises as to be properly and legally called the owner, against the title of record, depended upon many facts and circumstances, proper to be considered by the jury, and it is doubtful whether the court would have been justified in withdrawing this issue from them. It was clearly no error, and could have done no harm, to so state the law correctly, upon an issue proper for the jury to pass upon. It is said, in the brief of the learned counsel, that this instruction was drawn upon the plaintiff's theory of the case, that the plaintiff did not own the premises at the times stated. It was drawn as well upon the defendant's theory, that he was the owner, and this was the issue: Was he or was he not the owner? and the instruction was applicable to it. As to whether the plaintiff claimed to have an interest in these lots during such time, and whether he had an interest in them in fact, is specially left with the jury in the general charge, and no exception is taken to it. The learned counsel would seem to have been estopped from excepting to the charge given, as asked specially by the plaintiff, that no one but the owner or his agent could dedicate, on the ground that there was no such issue for the jury to try, by not excepting to the charge that there was such an issue for the jury to try.

2. It is objected that the testimony of certain witnesses, and of the plaintiff, that he objected to the use of these lots or any part of block 13 as a highway, was improper. Why improper? These were the issues,—whether the premises had been in the adverse user of the public for over 20 years, and whether the plaintiff had dedicated them to the public use for a highway. Could not the plaintiff prove that he objected to such use, and did not *intend* to dedicate? Dedication rests upon *intention*, and cannot the plaintiff testify that he had no such intention? The objection is frivolous. And so with the motion to strike out similar evidence.

3. The only other exception urged by the learned counsel of the appellant, if I understand his brief correctly, is that in certain instructions of the court, given at the request of the plaintiff, in respect to the plaintiff's acts of dedi-

cation, ought to have been confined to the time after the present draw-bridge was projected. The evidence of the acts and sayings of the plaintiff, in respect to the use of these lots in connection with the two old bridges across the canal below, and the highway leading to the same, is mixed up and mingled with his acts and sayings in respect to the new swing-bridge, and the instructions ought properly to have embraced them all. The learned counsel of the defendant did not separate so distinctly the two classes of acts as to make it error for the court to instruct the jury, generally, as to the acts and sayings of the plaintiff in respect to the highway in the past and present. This instruction would seem to be favorable to the defendant. It gave the city the benefit of the plaintiff's acts and sayings of dedication all along for many years, and they were not confined to the time of the building of the present bridge, and embraced the use of the lots with the other two bridges in connection with the highway leading to the same. It may have given the defendant the benefit of more acts and sayings of dedication than it was entitled to; but the defendant cannot complain of that, but the plaintiff might.

It is complained that the court did not give the instruction asked by the defendant, "that ejectment will not lie in this case." The defendant was in possession of parts of lots 7, 8, and 9 for the use of the swing-bridge across the canal, and clearly intended to so occupy and use the same in hostility to the plaintiff's title. Trespass would be an inadequate and vexatious remedy in such a case. The defendant claims the permanent and continued right of possession of the lots for such purpose. Ejectment is the only adequate remedy in such a case. *Lee* v. *Simpson*, 29 Wis. 333.

There may be other exceptions in the case; but they would seem to be immaterial to the merits and justice of the case, and will be disregarded. The case was very ably and fully tried, and very clearly placed before the jury in the charge of the court, and it is not perceived wherein the jury were in any respect misled, and the verdict appears to have been sustained by the evidence. We can find no error in the record. The judgment of the circuit court is affirmed.

TOMPKINS v. PAGE.

(*Supreme Court of Wisconsin.* December 13, 1887.)

APPEAL—BOND—GUARDIAN NOT REQUIRED TO GIVE.

Rev. St. Wis. § 4032, provides that, on appeal from the county court, the party appealing, "other than an executor, guardian, administrator, or trustee," shall file a bond. A guardian, having a bond for $200, was ordered, on an accounting, to pay his ward $1,827.19, and appealed to the circuit court. *Held*, that the appeal required no bond to be filed by the guardian; following *Stinson* v. *Leary*, 34 N. W. Rep. 63.

Appeal from circuit court, Marquette county.

On petition of John W. Tompkins, before the county court, Robert Page was cited to appear and account as guardian. He appealed to the circuit court from the finding, and appealed from an order of that court dismissing the appeal.

S. A. Pease and *J. C. McKenney*, for appellant. *G. J. Cox*, for respondent.

ORTON, J. On the petition of the respondent, the appellant was cited to appear before the county court, and account for certain money of the respondent in his hands, as his guardian, during his minority, and the county court adjudged and ordered that he pay to the appellant, then of age, or his attorney, the sum so found to be in his hands as such guardian. From such judgment the said appellant appealed to the circuit court. The respondent moved to dismiss said appeal on the sole ground that the appellant had not given with said appeal an undertaking or bond, usually required on appeals from the county court, and the circuit court sustained said motion on that ground alone,

and dismissed said appeal. From that order this appeal was taken, and the same ground is urged for sustaining said order. This case is closely analogous to the recent case decided by this court of *Stinson* v. *Leary*, 34 N. W. Rep. 63. In that case, as in this, the ward had become of age when the petition was filed, and the order was to pay over to the ward the sum of $446.91, when the guardian's bond was less than that amount, to-wit, the sum of $300. In this case the bond was only $200, and the amount ordered to be paid was $1,827.19, and costs, so that the disparity is much greater. The opinion in that case was filed in September, and the order of the circuit court in this case was made in February last. This court held in that case that the appellant was not required to give any undertaking or bond upon an appeal, under section 4032, Rev. St. That decision is conclusive of this case, and the circuit court, therefore, erred in dismissing the appeal on that ground. That section is general, and embraces all appeals taken by a guardian, and makes no such exception as that made by the learned judge of the circuit court in giving his reasons for the order, or any other. The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

LOVERIDGE and another *v.* OMODT.

(*Supreme Court of Minnesota.* December 16, 1887.)

SURVEYS—BOUNDARY LINE—EVIDENCE.

Verdict held to be justified by the evidence.

(*Syllabus by the Court.*)

Appeal from district court, Houston county; FARMER, Judge.

C. N. Enos, for Loveridge and another, respondents. *Lloyd Barber*, for Omodt, appellant.

MITCHELL, J. The only question presented by this appeal is whether the verdict is sustained by the evidence. Upon the trial, the whole case turned upon a pure question of fact, namely, the location of the line between the north-west quarter and the south-west quarter of a section as to which two surveyors, Goodrich and Noyes, disagreed. Goodrich located it by taking the field-notes of a survey of the section which he had made 28 years before, and from them ascertaining, as he supposed, the location of the west quarter post, and thence running east to the center of the section. Noyes located it by taking these same field-notes of Goodrich's, and ascertaining, as he supposed, the location of the south quarter post, and running thence to the center of the section, and running thence west.

Appellants' contention that Noyes' line must necessarily have been two rods too far north, because in locating the center of the section he measured to a point 162 rods north of the south quarter post, is not warranted by the evidence. This distance was called for by Goodrich's own field-notes, as shown by Exhibit B, which he admitted was correct. Any one at all familiar with the inaccuracies of government surveys can readily understand how this might be. Inasmuch as all the government stakes and bearing trees were gone, it is manifest that neither of these surveys were infallible. And, while from the evidence it would seem to us that the location of the line by Goodrich was the more likely to be correct, yet this court cannot say that there was no evidence reasonably tending to support the verdict of the jury, who evidently accepted the Noyes survey.

There is nothing in the point that the verdict is to large, because the jury must have allowed plaintiffs for at least 75 cords of wood. The argument of counsel that defendant could not have taken that amount because there was only 100 cords in the first instance, and that plaintiffs themselves shipped 55 or 60 cords, overlooks the fact that the evidence shows that the wood shipped by plaintiffs included other wood. Order affirmed.

ROLSETH *v.* SMITH and another.

(*Supreme Court of Minnesota.* December 16, 1887.)

1. NEGLIGENCE—PLEADING—CONSTRUCTION OF.
An allegation of negligence, as applied to the conduct of a party, is not a mere conclusion of law, but a statement of an ultimate pleadable fact. Hence, in an action for damages resulting from certain acts of another, alleged to have been negligent and careless, the complaint is not demurrable as not stating a cause of action, unless the particular acts alleged are such that they could not be negligent under any possible evidence admissible under the allegations of the complaint.[1]

2. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS.
Neither could a court say, as a matter of law, that it appeared from the allegations of the complaint that the defendant was guilty of contributory negligence, or had voluntarily assumed, as incident to his employment, the risks which caused the injury, unless these allegations so clearly show that fact that there could be no room for different minds reasonably arriving at any different conclusion, upon any possible evidence admissible under and consistent with the allegations of the pleading.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; LOCHREN, Judge.

Jelley & Hay, for appellant. *C. H. Benton*, for respondents.

MITCHELL, J. This action is brought to recover damages resulting from the alleged negligence of defendants, causing injuries to the plaintiff while in their employment in their saw-mill. The appeal is from an order sustaining a demurrer to the complaint, on the ground that it does not state a cause of action. The defendants' contention is that the complaint is insufficient (1) because it does not allege anything that amounts to negligence on part of defendants; and (2) that it affirmatively appears that plaintiff himself was guilty of contributory negligence, or, at least, voluntarily assumed, as incident to his employment, all the risks of which he now complains.

The complaint, although very ingeniously framed, is in some respects so conspicuous for what it omits to allege, as well as for what it does allege, as to be suggestive of possible difficulty in establishing a cause of action by the evidence; yet we are of opinion that upon its face it is good. The question of negligence is one of mingled law and fact; and hence an allegation of negligence or carelessness, as applied to the conduct of a party, is not a mere conclusion of law, but a statement of an ultimate fact allowed to be pleaded. *Clark* v. *Railway Co.*, 28 Minn. 69, 9 N. W. Rep. 75. The complaint in this case states various things which it alleges the defendants *negligently* and *carelessly* did, or omitted to do, and which caused the injury complained of. Under this allegation, the plaintiff might prove any facts or circumstances not inconsistent with the particular facts alleged in the complaint which would tend to prove this charge of negligence. Hence a court would not, as a matter of law, say that the complaint did not sufficiently allege negligence, unless the particular acts or omissions complained of are such that they could not be negligent under any possible state of facts or circumstances provable under the allegations of the complaint. When it is considered that the question whether a particular act is or is not negligent largely depends upon the surrounding circumstances, it would be impossible to say, in advance of the evidence, that the acts or omissions complained of in this case might not have been negligent. Perhaps a fair test of the sufficiency of the pleading in that regard is whether, under its allegations, evidence might be introduced sufficient to establish a cause of action. We are inclined to think that the learned court may not, in sustaining the demurrer, have given due weight to the allegation that these acts were negligent, or as to what facts or circumstances might be proven under it.

[1] See note at end of case.

As to the question of contributory negligence, it must be borne in mind that this is purely a matter of defense, which the plaintiff is not bound to negative in his complaint; also that, to constitute an assumption of risks by a servant, it is not necessarily enough that he knew, or ought to have known, the actual character and condition of the defective instrumentalities furnished for his use, but he must also have understood, or, by the exercise of ordinary observation, ought to have understood, the risks to which he is exposed by their use. *Russell* v. *Railway Co.*, 32 Minn. 230, 20 N. W. Rep. 147. This must be determined from all the facts and circumstances of the case. Hence a court could not say, as a matter of law, from the allegations of a complaint, that the plaintiff was guilty of contributory negligence, or had voluntarily assumed all the risks which concurred in causing his injury, unless these allegations so clearly show that fact that there could be no reasonable ground for different minds arriving at different conclusions upon the question, under any possible evidence admissible under the pleading.

While we think it affirmatively appears from the complaint that this was not a case of a master directing a servant, under a pressing emergency, to engage in some extra-hazardous work outside of that which he had contracted to perform, but a voluntary change of work on part of the latter, yet we think the complaint does not affirmatively show any such conclusive state of facts as that supposed. We are therefore of opinion that the demurrer should have been overruled, and the defendants allowed to answer. Order reversed.

NOTE.

NEGLIGENCE—PLEADING—GENERAL AVERMENT. When the only averment directly affecting the question of negligence is that a person did an act negligently or the opposite, and no facts are stated from which negligence, or the lack of it, can be inferred, the averment must be regarded as one of fact. Washburn v. Railway Co., (Wis.) 32 N. W. Rep. 234. And a declaration is sufficient to withstand a demurrer for want of facts which characterizes the act complained of as having been carelessly or negligently done, and does not show in what the negligence consists. Railway Co. v. Jones, (Ind.) 9 N. E. Rep. 476; Wilson v. Railroad Co., (Colo.) 2 Pac. Rep. 1; Clark v. Railway Co., (Minn.) 9 N. W. Rep. 75; Lucas v. Wattles, (Mich.) 13 N. W. Rep. 782; Keating v. Brown, (Minn.) 13 N. W. Rep. 909. See, also, Rowland v. Murphey, (Tex.) 1 S. W. Rep. 658. And the same rule applies to an averment of contributory negligence in the answer. Neier v. Railway Co., (Mo.) 1 S. W. Rep. 387. An objection to a pleading containing simply a general averment of negligence is to be reached by a motion to make more specific. Town of Rushville v. Adams, (Ind.) 8 N. E. Rep. 292; Fitts v. Waldeck, (Wis.) 8 N. W. Rep. 363. Under a general allegation of negligence, the circumstances constituting it may be given in evidence, though other circumstances specially set out in the complaint are not proved. Cunningham v. Railway Co., (Utah,) 7 Pac. Rep. 795.

COLLINS *v.* WELCH *et al.*

(*Supreme Court of Minnesota.* December 23, 1887.)

1. TAXATION—PUBLISHED LIST—AMOUNT DUE—DEFINITENESS AND CERTAINTY.
The same strictness as to definiteness and certainty is not required in the statement of the amount of tax against a tract of land in the published list (which is merely notice to the land-owner) as is required in the judgment, which is the final determination of the law as to the amount to be enforced against the land.

2. SAME—OMISSION OF DECIMAL POINT.
In the published list at the head of the column denoting the amounts of taxes due there was a dollar-mark, and throughout this and each succeeding column denoting the amounts of such taxes the two last figures of each item or amount were separated from the others by a broad space, but there was no decimal-mark or perpendicular line between them and those which preceded. *Held* as sufficiently indicating that the two last figures in each item meant cents, and those preceding them, dollars.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county; BRILL, Judge.

McMillan & Beals, for Collins, appellant. *J. F. Fitzpatrick*, for Welch and others, respondents.

MITCHELL, J. This was an action to determine an adverse claim made by defendant to certain real estate under a tax judgment rendered pursuant to Gen. Laws 1874, c. 1. The only question presented is the validity of the judgment. The only objection made to it is an alleged error as to the amount of the tax in the published list. It has been repeatedly held by this court that, under the law of 1878, such a mistake in the delinquent list, either as filed or as published, is not jurisdictional. Plaintiff, however, claims that the rule was otherwise under the statute of 1874. This depends upon the grammatical construction to be given to section 13 of that act, a question which we do not find it necessary to consider or determine in this case.

The filed list shows that the amount of tax against the land was $1.15, and the judgment against it is for $1.15. The evidence shows that in the published list, at the head of said list, immediately following the notice, there appeared at the right-hand column of figures:

Amount of Taxes
Delinquent for 1873.
$

The amounts followed thereafter in column in regular order, with the words "Delinquent for 1873," at the head of each succeeding column, and the last two figures of each amount in each column being separated from the others by a broad space. The word "Amt." appeared on every column, but the dollar-mark found at the head of the first column was not repeated in the succeeding columns; nor was there any dot or line between the figures in any of the columns in the list, but, as before stated, there was this space separating the two last figures on the right hand from the remaining figures of each amount in all the columns.

We remark at the outset that we are of opinion that the dollar-mark found at the head of the first column must be understood as applying to all the succeeding columns. In *Tidd* v. *Rines*, 26 Minn. 201, 2 N. W. Rep. 497, where the question involved was the validity of the *judgment*, and where the figures denoting the amount were the same as here, *except that there was no dollar-mark at the head of the column*, we held that the judgment was too vague and indefinite as to amount to be upheld or enforced as a valid judgment; that, in the absence of any line or decimal-mark to distinguish the dollars from the cents, by no legal intendment could any such effect be given to the greater intervening space between them; that the inference as to the purpose and object of that space was one of fact, and not of law, and that the final judgment of a court—the sentence of the law—must possess that degree of certainty as to the thing adjudged as to admit of no reasonable doubt as to its meaning, and not rest upon any inferences to be deduced from facts, either apparent or *aliunde* the record. While we are not disposed to modify that decision, or to doubt its correctness, yet it has always been considered as going to the limit of proper technical strictness, beyond which, as was said in *Gutzwiller* v. *Crowe*, 32 Minn. 70, 19 N. W. Rep. 344, we do not think it necessary or wise to go. Hence, in the case last cited, we sustained the judgment in the absence of any dollar or cent mark because the two right-hand figures were separated from the others by a short perpendicular line. In the present case we are asked, not only to go a step further than in *Tidd* v. *Rines*, but also to apply the same strictness to the published list as to the judgment itself. We say one step further, because we think that the presence of the dollar-mark (not in, in the case of *Tidd* v. *Rines*) at the head of the column, and exactly over the figures which would represent dollars if the other two figures separated by the wide space represent cents, is important, as indicating what the figures represented. But we do not think that the same strictness should be required in the published list as in the judgment. The utmost certainty and precision

is always required in a judgment, which is the final determination of the court as to the amount to be enforced. It was on this ground that the decision in *Tidd* v. *Rines* was put. But the publication of the delinquent list is simply notice to the delinquent land-owner. It possesses no such finality as to the amount of tax; for, if the amount of tax claimed either in it or the filed list is incorrect, the land-owner has a right to appear and defend. This distinction between the strictness required in the judgment and that required in the proceedings before judgment has always been recognized, even by those courts which have held most strictly in regard to the judgment. See *Eppinger* v. *Kirby*, 23 Ill. 521; *Chickering* v. *Faile*, 38 Ill. 342; *Elston* v. *Kennicott*, 46 Ill. 187.

The law is inflexible that the judgment must be *in terms* find the sum due without the aid of any inferences to be deduced from facts; while in determining the sufficiency of a notice the question is, how would people understand it? We cannot have any doubt but that every man of ordinary intelligence would not only naturally, but necessarily, understand this list as stating the amount of tax against this land to be $1.15. If so, it fully performed its office, and was sufficient. Order affirmed.

GRAVES *v.* HORTON.

(*Supreme Court of Minnesota.* December 23, 1887.)

1. PRINCIPAL AND AGENT—EVIDENCE.
   Evidence held insufficient to sustain the verdict.
2. SAME—APPOINTMENT FOR PARTICULAR SALE.
   The fact that in a particular instance a person was authorized by the owner of property to negotiate a sale of it to one person on certain terms, the actual transfer to be made by the owner personally, is not sufficient to prove authority in such person to sell and transfer the same property at a prior time and on different terms to another and different person.
3. SAME—PROOF OF AGENCY—GENERAL REPUTATION.
   Agency cannot be proved by general reputation.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; LOCHREN, Judge.

C. H. Childs, for Graves, respondent. *Smith & Reed*, for Jennie L. Horton, appellant.

MITCHELL, J. This action was brought to recover the value of certain property, which plaintiff had exchanged with defendant for a skating rink, skates, boats, etc., situated at Spirit Lake, Iowa. Plaintiff's claim is that there was an entire failure of title to this property, because defendant had previously sold it to one McCurdy. It is not claimed that defendant had personally sold it to McCurdy, whatever was done in that regard having been done by one F. M. Horton, assuming to act as her agent. Hence, unless F. M. Horton had authority as defendant's agent to sell to McCurdy, there could have been no such sale, and plaintiff has no cause of action. The burden was on plaintiff to prove such agency. It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances; that an agent cannot create in himself an authority to do a particular act by its performance, and that the authority of an agent cannot be proved by his own statement that he is such. Applying these elementary principles, and stripping the evidence of all that is immaterial or incompetent, and giving to what remains all the force that can be claimed for it, all there is that was brought home to defendant tending to prove any such agency is that, when F. M. Horton was in Spirit Lake, he transmitted and submitted to her in Minneapolis what purported to be a proposition from McCurdy to give for this property $1,090 in

goods, and assume a mortgage on it for $385, and that she agreed to accept this proposition; that McCurdy, being unable to carry this out, F. M. Horton submitted to her another proposition, as coming from McCurdy, viz., to give in place of the goods 80 acres of land in Iowa; that defendant declined to accept this last proposition, and so notified McCurdy; that about two weeks after this she authorized F. M. Horton to negotiate the sale of this property to plaintiff on the terms which were finally agreed on, she herself making the transfer by executing the bill of sale described in the complaint. We have, on the other hand, the flat denials of both plaintiff and F. M. Horton, that he ever had any authority from her to sell this property or ever was her agent for this or any other purpose.

This is really all the competent evidence there is at all bearing upon this question of agency. The acceptance of McCurdy's first proposition, which he was unable to carry out, certainly does not tend to prove authority to F. M. Horton to sell on the terms of the second which defendant expressly declined to accept; and if any sale ever was made to McCurdy, it was on the basis of this last proposition. Hence the evidence of agency is reduced down to the fact that defendant authorized F. M. Horton to negotiate the sale to plaintiff, which she herself consummated by the execution of a bill of sale. It certainly cannot be that this is sufficient. It is true that agency may be proved from the habit and course of dealing between the parties; that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do *such acts;* as, for example, the case of the manager of a plantation in buying supplies for it, or the superintendent of a saw-mill in making contracts for putting in logs for the use of the mill, which are the cases cited by respondent. It is also true, as was said in *Wilcox* v. *Railroad Co.*, 24 Minn. 269, (which involved the question of the authority of the person to whom goods were delivered to receive them,) a single act of an assumed agent, and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do *similar* acts for the principal beyond question. It is also true that the performance of subsequent as well as prior acts, authorized or ratified by the principal, may be evidence of agency, where the acts are of a similar kind, and related to a continuous series of acts embracing the time of the act in controversy, as indicating a general habit and course of dealing; as, for example, the acts of the president of a railway company in making drafts in the name of the company, which were honored by it, which was the case of *Olcott* v. *Railroad Co.*, 27 N. Y. 546, cited by counsel. But we think the books will be searched in vain for a case where it was ever held that authority to negotiate for the sale of property to one person at one time on certain terms, the transfer to be made by the principal in person, was evidence of authority to sell and transfer the same property at some former time to another person on different terms.

There are some facts about this case that would naturally incline the sympathies of a jury towards plaintiff. He has so far got nothing for the property which he gave to defendant. The conduct of F. M. Horton was not calculated to commend itself to their favor, as he admits obtaining and retaining a conveyance to his wife of the very land which McCurdy proposed to give to defendant in exchange for this property. But we do not see how, upon legal principles, the verdict can be sustained under the present state of the evidence.

A new trial would, however, have to be granted on the ground of error in the admission of evidence. The general statement of the witness McCurdy that Frank M. Horton did quite an extensive business at Spirit Lake trading in real estate, and frequently bought and sold in the name of Jennie L. Horton and Carolina W. Horton, without identifying the transactions, or describing them, or in any way bringing them home to the notice or knowledge

of defendant, was inadmissible to prove agency. The court also erred in allowing the same witness to testify that F. M. Horton was publicly and generally known at Spirit Lake as the agent of Jennie L. Horton. Agency cannot be proved by general reputation.

Judgment reversed and new trial ordered.

KING *v.* MERRIMAN and others.

(*Supreme Court of Minnesota.* December 28, 1887.)

1. CONTRACT—CONSTRUCTION—GRANT OF RIGHT TO CUT TIMBER DURING TWO SEASONS.
   A grant of the "right, privilege, and permission to enter and cut, during the logging seasons of 1883–84 and 1884–85, all the pine timber fit for saw-logs growing upon" certain land, *held* to be a contract for the sale only of so much timber as the grantees should cut during these two logging seasons.
2. SAME—"SURROUNDING CIRCUMSTANCES."
   Evidence of the "surrounding circumstances" under which a written contract was executed is not admissible to prove the unexpressed intention of the parties, or their prior verbal negotiations. Its use is limited to throw light on the real meaning of that which is written in case of ambiguity arising upon the face of the instrument.
3. TRESPASS—CUTTING AND CARRYING AWAY TIMBER—GOOD FAITH—MEASURE OF DAMAGES.
   In an action for the value of timber cut and carried away from the land of another, if the defendant was an unintentional or mistaken trespasser, or honestly and reasonably believed that his conduct was rightful, the measure of damages is the value of the timber at the time it was taken; that is, standing on the ground.
4. SAME—NOTICE OF ADVERSE CLAIM.
   Actual notice of the adverse claim of the rightful owner is not necessarily inconsistent with such honesty of intention or purpose; following *Whitney* v. *Huntington*, 33 N. W. Rep. 561

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; REA, Judge.

Hart & Brewer and *Atwater & Hill*, for King, appellant. *Benton & Roberts* and *C. H. Benton*, for Merriman and others, respondents.

MITCHELL, J. This was an action for damages for the conversion of a quantity of saw-logs. They were cut by defendants upon the land of plaintiff, in Morrison county, and transported to a boom in the Mississippi river, where they were when plaintiff demanded them from defendants. The defendants justify the cutting under a written contract executed in the autumn of 1883 between plaintiff and Leighton and Fenwick, and by the latter assigned to defendants. The two principal questions are—*First*, the right of defendants to cut and remove the timber; and, *second*, if they had no such right, the measure of plaintiff's damages.

The first question depends entirely upon the construction of the grant made in the contract, which is "*the right, privilege, and permission to enter and cut, during the logging seasons of* 1883–84 *and* 1884–85, *all the pine timber fit for saw-logs growing upon the following described land.*" That the timber in question was both cut and carried away from the land after the expiration of the logging season of 1884–85 is conceded. It would seem plain to us that this contract was a mere license to enter, and an agreement for the sale of such timber as the licensees should cut within the limit of the license. But, call it by what name we may,—a license to enter and cut; a sale; a conditional sale; or a contract to sell, coupled with a license to enter,—the object and extent of the grant was only so much timber as the grantees should cut during these two logging seasons, and no more. Contracts relating to an interest in standing timber, with an express limitation as to the time of removal, are familiar to the American courts in the timbered states. The cases arising upon them are extensively collated in the exhaustive briefs of counsel, but are too numerous to be here considered in detail. Sometimes

these contracts are in the form of conveyances of timber, sometimes of a sale, coupled with a license to enter, sometimes of a formal license to enter and cut, and again of a reservation of the timber by the grantor in the conveyance of the land. But, whatever the form, the limitation as to the time of removal has been almost invariably held to be a limitation of the grant or reservation itself. The reasons are manifest. Any other construction would be against the expressed intention of the parties. Moreover, if the right of entry be not limited to the time fixed, it would be practically unlimited, which would amount to so serious an incumbrance upon the land as to materially interfere with the owner's right to use or dispose of it. In a very few cases it has been held that, if the timber be cut within the time, the property is in the vendee, although not removed, within the limitation of the contract. This doctrine would seem to be based upon the supposed hardships of such a case, rather than upon strict logic. But no such question arises in the present case. The suggestion of counsel, supported, perhaps, by one or two cases, that this contract was an executed sale of all the timber standing on the land, but with a limited license to enter and cut, and that if the licensee should enter and cut after the expiration of the license, while he would be guilty of a trespass on the land, yet plaintiff could not recover the value of the timber, because it was the property of defendants, would seem to us to involve a legal solecism. It would be an anomaly in the law that one man should own standing timber on the land of another, with no right of entry to cut and take it away. Such a right would certainly be a barren one. If the limitation of the right of entry is of any effect at all, it must operate as a limitation upon the grant itself.

There are other provisions in this contract which in our judgment corroborate our construction of the grant, and are opposed to the idea that the parties intended it as a present unconditional sale of all the standing timber on the land. These will be obvious upon an examination of the instrument, and need not be here referred to. There are two, however, upon which defendants especially rely as being in favor of their construction, and upon which the court below laid some stress. The first is that to the effect that the grantees should enter upon the land, as soon as the logging season commenced, with sufficient men and teams to cut and haul the timber upon the land suitable for saw-logs, and to cut the same, clear acre by acre, as they went, without waste, and with as little damage as practicable to the young timber. Evidently the parties used a printed blank specially adapted to ordinary sales of stumpage by the thousand, and endeavored to alter it so as to express their agreement. The result is that some things are left in which are not particularly applicable to a transaction like the present. But taking it as it stands, and whether we construe this provision as a covenant or a condition, we can see nothing in it necessarily inconsistent with the limitation of the grant by the limitation as to time. The other provision relied on by defendants is that which provides for the payment of a gross sum in consideration of the grant. It is in these words: "*For the logs so to be cut as aforesaid,*" the parties of the second part will pay, or cause to be paid, to the party of the first part, as stumpage *on said logs*, the aggregate sum of $7,750. This expressly states for what this is to be paid, viz., "for the logs so to be cut as aforesaid." And we can see no reason why parties may not agree to pay or accept a gross sum for the timber which may be cut within a limited time; based, as it may be, upon an estimate of what could probably be cut within that time. Nor is there any controlling reason why they might not fix the amount, as defendant offered to prove in this case, upon an estimate of the value of all the timber standing upon the land. The fact that the parties anticipated, as they probably did in this case, that the time fixed in the contract might be sufficient to enable the grantees or licensees to cut all the timber, is not at all inconsistent with a limitation of the grant by the limitation of time for cutting.

2. Defendant offered to prove that before the contract was made there was an examination of the amount of timber on the land, and that the sum of $7,750 was arrived at from a computation of the value of all the timber according to this estimate. For reasons already suggested, this would have been wholly immaterial if proven; it was also incompetent. The principle upon which evidence of surrounding circumstances is admissible in the exposition of written contracts is that the court may be placed, as near as possible, in the situation of the parties whose language is to be interpreted. But such evidence is not admissible to prove an unexpressed intention of the parties, or their prior negotiations, which must be deemed to be merged in the written instrument. Its use is limited simply to develop and throw light upon the real meaning of that which is written, in case of ambiguity arising from the face of the instrument. No such ambiguity existed in this case. The evidence was properly excluded.

3. The only other question is the measure of damages. By the cases of *Whitney* v. *Huntington*, 33 N. W. Rep. 561, and *Nesbitt* v. *Lumber Co.*, 21 Minn. 491, as the latter is limited or qualified by the former, this court has adopted the following rules upon this subject as applicable to cases of this kind: *First*, where the defendant is a willful trespasser, the full value of the property at the time and place of demand; *second*, where he is an unintentional or mistaken trespasser, or, as expressed in *Whitney* v. *Huntington*, where he honestly and reasonably believed that his conduct was rightful, the value of the property at the time it was taken,—that is, the value of the timber standing; *third*, if the defendant is an innocent purchaser from a willful trespasser, the value of the property at the time of such purchase. These rules may not be logically consistent with each other, but in practice they perhaps work as equitably as any that could be adopted, and seem to be in accord with the prevailing doctrine both in this country and England. See *Wooden-Ware Co.* v. *U. S.*, 106 U. S. 432, 1 Sup. Ct. Rep. 398. It was also decided in *Whitney* v. *Huntington, supra*, that actual notice of the adverse claim of the true owner is not inconsistent with good faith on the part of the trespasser, using the term in the sense in which it is often used, of the absence of willful or intentional wrong or bad motive. Such honesty of purpose is not inconsistent with knowledge of all the facts out of which the claim of the true owner arises, but where a party acts under an honest and reasonable mistake as to the legal rights which grow out of these facts. Such was the case in *Whitney* v. *Huntington, supra;* also in *Jegon* v. *Vivian*, 6 Ch. App. 742. In the exclusion of evidence the court below proceeded upon the idea that notice of plaintiff's claim was inconsistent with good faith in the sense referred to, or, what amounts to the same thing in this case, that such notice necessarily rendered defendants willful trespassers. The evidence as to the honesty of purpose and intent on part of defendants ought to have been admitted, and the question at least submitted to the jury, under proper instructions. For this reason the order granting a new trial must be affirmed.

SKJEGGERUD v. MINNEAPOLIS & ST. L. RY. CO.

(*Supreme Court of Minnesota.* December 23, 1887.)

1. HIGHWAYS—DEDICATION—QUESTION FOR JURY.
Held that, under the evidence in this case, the question whether defendant had dedicated a highway for public use across its railroad was one of fact for the jury.

2. NEGLIGENCE—OBSTRUCTION IN HIGHWAY—ORDINARY CARE—EVIDENCE.
In determining whether defendant exercised ordinary care in attempting to travel a highway known to him to be partially obstructed, evidence that there was no other road by which he could reach his destination, *held*, under the facts of this case, to have been competent.

(*Syllabus by the Court.*)

Appeal from district court, Freeborn county; FARMER, Judge.

Lovely & Morgan, for Skjeggerud, respondent. *B. S. Lewis*, for Minneapolis & St. L. Ry. Co., appellant.

MITCHELL, J. This was an action to recover damages resulting from an obstruction by defendant of a public highway which plaintiff was traveling. The act complained of was leaving a car standing half way across a 16-foot plank crossing over defendant's road, by reason of which plaintiff was compelled to drive to one side, when his team, being frightened by reason of the proximity of the car, became unmanageable, and shied away from the car, thereby throwing the wheels of the wagon off the plank crossing onto the iron rails of the railroad, which still further frightened the horses, so that they threw plaintiff out into a ditch at the side of the crossing, causing the injuries complained of.

If the *locus in quo* was a highway, there can be no doubt under the evidence that the standing car was an unlawful obstruction, and that this was the proximate cause of the injury. Hence the main question litigated in the court below was whether this was a public highway, and the principal one here is whether the evidence on that point is sufficient to sustain the verdict. It is not claimed that any statutory road had been laid out, but that there had been a common-law dedication by defendant. The situation will be better understood by a map (Exhibit A) attached to the record. Defendant's road was built in 1877, and a station established at this point called Hartland, and a village of the same name laid out south of the railroad and a little to the south-west of the depot. This is a small country or village station. The defendant acquired the premises in question presumably for right of way and station purposes. At this point the defendant had three tracks,—the west one, called the "main track;" adjoining which the depot was built; the middle one, called the "passing track;" and, the easterly one, called the "business track" or "siding," adjoining which were a warehouse and hay barn used by parties engaged in buying grain, hay, etc., and shipping them on defendant's road.

The evidence tends to prove that, from the time that defendant's road was built, there has been a public highway (not statutory, but by common-law dedication) running east and west and at right angles to defendant's tracks, and on each side of them, and coming up on the west near the south end of the depot. This road on both sides of the railroad had, from time to time, been more or less worked and improved by the public authorities. There is also some evidence that, soon after the railroad was built, the public put some plank at the crossing, so as to enable travel to pass. This was, however, soon taken up by the defendant, which put down new plank crossings over each of these tracks, which they have ever since maintained at their own expense. These crossings are on a line with each other, and, together with the highway on each side, make one continuous line for travel. This road (including these crossings) has ever since been extensively and continuously traveled by the public, although on the west side, where the land is all uninclosed, the travel has usually diverged from the roadway prepared by the public, and turned to the south-west in the direction of the village, where the land is higher. This road has been used by all the travel between extensive districts of country east and west of the railroad in this neighborhood, and by the inhabitants of the town of Richland on the east, in coming to and going from the village of Hartland; this being the only crossing anywhere in that vicinity. The public has always thus used this crossing without objection from defendant. In common with the general public, the crossing has also been used by those having occasion to do business with the defendant at the station, or with those operating the warehouse, etc., on the business track. The evidence also shows that these, or similar crossings, are necessary to accommodate those having business with defendant at this point.

Defendant's contention is, in substance, this: (1) Where a way is kept open by the owner of lands for his own use and necessities, and as a means of access to his mill, factory, or other industry, and without which persons could not patronize him, then the presumption arises that the way was kept and maintained by him for his own use and that of his patrons, and there is no presumption that he has dedicated it to public use, simply because he has left it open, and has not captiously prevented others from traveling it, and that this presumption applies with special force to a railroad company, which is bound to furnish means of access to its depot, and from the nature of the case must leave its premises at such a place uninclosed. (2) That as these crossings were necessary for the use of the defendant and its patrons, it cannot be reasonably inferred that it dedicated its property to the public from the mere fact that it used it precisely as its own necessities require; that the use of it by strangers should, under such circumstances be regarded as permissive, and not adverse to the right of the company, and as furnishing *no* evidence that it intended to dedicate it to public use.

The first of these is doubtless, as a general proposition, good law, at least where the evidence clearly indicates that the *purpose* of the owner in opening and maintaining the way was merely for his own accommodation. But as dedication is a question of intention, and as the facts of each particular case may differ, it is dangerous to formulate a general abstract statement for universal application. As was remarked by Justice BERRY in *Morse* v. *Zeist*, 34 Minn. 35, 24 N. W. Rep. 287: "The questions of the intention of the landowners, of the significance of his conduct in the premises, and of the public acceptance, are addressed in a rather unusual degree to the plain common sense of a jury, to their knowledge of human nature, and of their observation of the way things are ordinarily done." The facts in this case are peculiar. It has special significance to us that the company placed these crossings on a direct line with the traveled highway on each side of their track, thus forming one continuous way for public travel. While crossings were doubtless necessary for its own accommodation, and that of its patrons, there is nothing to indicate that, if that was their sole purpose, they might not have been as well placed elsewhere. It is also significant that the use of these crossings by the public, so long permitted by the company without objection, was not casual or limited to those living in the immediate vicinity who might have some special occasion to pass that way, but was a common and continuous use by the general public as a thoroughfare between extensive districts on each side of the railroad. We also think it is entitled to some weight that this was the only crossing anywhere in that neighborhood. While it is true that, if no highway existed, the company was not bound to furnish one, yet, as it must have been naturally expected that a public crossing would have to be obtained somewhere in this vicinity, and this being a small country station where comparatively little switching would probably be done, such a crossing at this point would presumably not be materially more inconvenient to the company than if established elsewhere. We think the fact that there was no other in that vicinity might be legitimately considered in determining the intention of the company in establishing this one. The fact that it was used and necessary for its own accommodation is not, under the circumstances, controlling, for often the land-owner's own convenience is an important consideration in causing him to make a dedication.

The fact that the defendant made and maintained the crossing at its own expense is not at all significant, because, if it dedicated it as a public way, this would be its legal duty under the statute. Our conclusion is that the question of dedication was, under the evidence, one of fact for the jury.

It only remains to consider certain exceptions to the admission of evidence, and to the refusal of the court to give certain instructions to the jury. The defendant assigns as error the admission of evidence that there was no road

across the railroad in that vicinity except the one traveled by plaintiff. For reasons already suggested, we think that, under the peculiar circumstances of the case, this evidence was admissible upon the question of defendant's intention to dedicate. But it was clearly admissible upon the question whether plaintiff exercised ordinary prudence in attempting to cross at this place. He had crossed there in the morning of the same day on his way from home, and had seen the obstructed condition of the road. It might be argued, as it is here, that he was guilty of negligence to attempt to cross again with knowledge of that fact. A traveler is not guilty of negligence in attempting to pass over a highway that is obstructed or otherwise out of repair, provided the obstruction or other defect is such that a man of ordinary intelligence would reasonably believe that, with proper care and caution, he could pass in safety notwithstanding the defect in the road. What a man of prudence would do in view of a known defect in the highway would naturally depend somewhat on circumstances. If there was another and safer road near by, which he might use, ordinary prudence might require him to resort to it. On the other hand, if there was none, he might be justified in attempting to use the defective one. The request referred to in the third assignment of error seems to us so clearly erroneous as not to require discussion. *Young* v. *Railway Co.*, 56 Mich. 430, 23 N. W. Rep. 67. The requests referred to in the fourth and fifth assignments of error were properly refused, because wholly inapplicable to the case. The act of defendant complained of, was not one of mere neglect to perform a legal duty, or the negligent doing of an otherwise lawful act, but the commission of a positive nuisance. That this nuisance was the proximate cause of the accident can admit of no doubt under the evidence. The request referred to in the sixth assignment of error was properly refused, both because it is neither an accurate nor complete statement of the law, and also because the subject to which it refers had been fully covered by the general charge. The other assignments of error are disposed of by what has been already said. Judgment affirmed.

SCONE v. AMOS.

(*Supreme Court of Minnesota.* December 27, 1887.)

1. PLEADING—GENERAL DENIAL—WHAT MAY BE PROVED.
   Under a general denial of a complaint, alleging that defendant hired plaintiff to work, and agreed to pay him, defendant may prove that he, as agent for another, made the contract of hiring alleged, and disclosed his principal to the plaintiff.
2. PRINCIPAL AND AGENT—EVIDENCE.
   Evidence held sufficient to sustain a finding.

(*Syllabus by the Court.*)

Appeal from municipal court of Minneapolis; MAHONEY, Judge.

Thos. J. Leftwich, for Scone, appellant. *J. D. Springer*, for Amos, respondent.

GILFILLAN, C. J. The complaint alleges that defendant hired and employed plaintiff to remove a certain building, and agreed to pay him therefor, when done, the sum of $35, and that plaintiff did the work, and it demands judgment for the $35. The answer is a general denial. On the trial the defendant was allowed to give evidence, against plaintiff's objection that it was irrelevant, that he employed plaintiff for and as the agent of the Minneapolis & Pacific Railroad Company to remove the building for it, and that plaintiff knew this at the time of hiring. This was admissible under the answer, for if the fact was as defendant so endeavored to to prove, then defendant did not make the contract alleged in the complaint as a party nor become bound. The contract was not his, but that of the railroad company, and he did not agree that he would pay for the work. The evidence was a denial, in effect,

of the allegations in the complaint that defendant hired and employed plaintiff, and agreed to pay him. The evidence was such as to justify the finding that the contract of hiring was on behalf of the railroad company, and not by defendant in his own behalf. Order affirmed.

STATE *ex rel.* HENNESSY *v.* MUNICIPAL COURT OF ST. PAUL.

(*Supreme Court of Minnesota.* December 27, 1887.)

1. NUISANCE—UNSAFE BUILDING—COMPLAINT IN CRIMINAL PROCEEDING.
Under a criminal statute, relating to buildings which are unsafe "so as to endanger life," a complaint in a criminal proceeding, alleging a building to be "dangerous, having been heretofore damaged by fire," is insufficient.
2. SAME.
Neither is such a complaint sufficient under a statute relating to buildings which are "specially dangerous in case of fire."

(*Syllabus by the Court.*)

Appeal from municipal court of St. Paul; FORD, Special Municipal Judge. Writ of *certiorari*.

Wm. P. Murray, for City of St. Paul, respondent. *Young & Lightner*, for State *ex rel.* Hennessy, appellant.

DICKINSON, J. The complaint was insufficient to justify a criminal prosecution under the act upon which the prosecution was founded. Chapter 343, Sp. Laws 1887. To present a case within the terms of section 25, the building must be "unsafe so as to endanger life." In this complaint the building is only alleged to be "dangerous, having been heretofore damaged by fire." The nature of the danger is not disclosed, nor, if the peril related to persons, and not to property, is it alleged to have been such as to "endanger life." The only other sections of the act defining the crime and providing for its punishment are the twenty-sixth and twenty-seventh. The former declares that "every building which shall appear to the inspector to be specially dangerous in case of fire * * * shall be held to be unsafe." Section 27 prescribes the penalty to be imposed upon the owner or party having an interest in "the unsafe building or structure mentioned in the two preceding sections," for neglect to remove the same. The complaint is insufficient under section 26 for this reason at least: That it does not appear that the building is dangerous "in case of fire." So far as appears by the complaint, the only danger may have been that the building might be prostrated by the wind, to the injury of adjacent property. Judgment reversed.

CAVENAUGH *v.* MCLAUGHLIN.

(*Supreme Court of Minnesota.* December 27, 1887.)

VENDOR AND VENDEE—DEFECT IN TITLE—PENDENCY OF CONDEMNATION PROCEEDINGS.
The pendency of proceedings (not completed) to condemn real property for public use, is, as between vendor and purchaser, such a defect in the title that the latter, under a contract to convey to him good title, is not obliged to take the title so affected.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county; KELLY, Judge.

W. G. White, for Cavenaugh, appellant. *H. V. Rutherford*, for McLaughlin, respondent.

GILFILLAN, C. J. October 25, 1886, plaintiff paid to defendant $250, as earnest money upon, and as part payment for, the purchase of a piece of land in the city of St. Paul, which the former agreed to buy, and the latter agreed to sell to him; the purchase to be completed within 15 days after delivery of

the abstract of title. The contract of sale contained this stipulation: "It is hereby agreed by and between the parties to this contract that, if the title to said property is found to be defective, then this agreement is to be and become void, and the above 250 dollars earnest money refunded; but if the title to said premises is found good, and is not taken by said above-named purchaser, the above 250 dollars to be forfeited by said purchaser." The action is brought to recover the $250.

The allegation of defect in the title is based on these facts: In April, 1886, the common council of the city of St. Paul, by its preliminary order, instructed the board of public works to investigate and make a report concerning the widening of Lexington avenue. The board of public works made its report thereon, and May 27, 1886, the council passed its final order directing that Lexington avenue be widened as provided therein, and that 10 feet off the easterly side of the premises described in said contract of purchase be condemned and taken for the use of the public as a street. The proceedings thus stood at the time when, by the terms of the contract, the purchase was to be completed; and the question is, did the pendency of those proceedings make the title "defective," as distinguished from "good," within the meaning of those words, as used in the contract? The legal title was still in the defendant, and would not be divested until the confirmation of the assessment of damages for the taking should become absolute. But it can hardly be supposed that the parties contemplated that a transfer by defendant to plaintiff of the bare legal title, without regard to its condition, would answer the contract, or that the title, if the land were then the subject of pending proceedings that might result in defeating it, would be considered good. If such were to be the understanding of the words "defective" and "good" in the contract, then the plaintiff would be required to pay the price and take a conveyance, though the land were subject to attachments, judgments, mortgages, or any other claims that might in time defeat the title conveyed.

Taxes stand on a different footing from condemnation proceedings; for they do not affect the land until they become a lien, and every one purchasing lands must be presumed to do so expecting to pay any taxes that may become a burden on them after his purchase. But here is a proceeding, the specific purpose of which is to divest the title of the owner, and which the owner has no power to prevent. A conveyance, indeed, at any time before the condemnation proceedings had culminated in a vesting of the title in the city would have passed to the grantee the right to receive the damages allowed for the taking; but, evidently, that alone was not what the plaintiff expected to get, and the defendant expected to pass to him. The land and a good title (without defects) was what was stipulated for. It must be concluded that by good title was meant one indefeasible by reason of anything existing and affecting the land at the time. The defendant could not give such a title. Judgment reversed.

NICOLLET NAT. BANK OF MINNEAPOLIS v. CITY BANK.

(*Supreme Court of Minnesota.* December 27, 1887.)

1. STATUTES—CONSTRUCTION—ADOPTION OF STATUTE OF ANOTHER STATE.
   The legislature having borrowed from another state, and adopted into our law, a statute which had been judicially construed in such state, a presumption arises, of greater or less force according to the circumstances, that the legislature intended to adopt the statute with that settled construction.
2. BANKS AND BANKING—LOANS ON SECURITY OF SHARES OF CAPITAL STOCK—BY-LAWS PROVIDING FOR.
   The act of 1881, prohibiting banks, organized under the laws of this state, from making loans or discounts on the security of the shares of its capital stock, is effectual to prevent a bank from having a lien on the shares of a stockholder for a debt thus created subsequent to that enactment, although a by-law adopted prior to that statute had provided for such a lien.

3. SAME—ASSIGNMENTS OF STOCK WITHOUT TRANSFER ON BOOKS—EQUITABLE TITLE.
Although the shares of such stock were made transferable only on the books of the bank, an assignment of the same, without such transfer, will invest the assignee with an equitable title, which will be protected as against all parties not showing a superior right.[1]

4. SAME—ASSIGNMENT AS COLLATERAL SECURITY—LIEN OF BANK—LIABILITY FOR REFUSAL TO TRANSFER.
Such an assignment by the stockholder, for the purpose of collateral security, is effectual as against the bank, asserting a lien for a debt of the stockholder, (contrary to the statute of 1881,) and its refusal, because of such asserted lien, to make the proper transfer on its books, renders it liable to the assignee in an action for damages as for the conversion of the stock.

5. SAME—ATTACHMENT WITH NOTICE OF ASSIGNMENT.
An attachment of the shares by the bank, after notice of the assignment, is ineffectual to defeat the prior right of the assignee.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; HICKS, Judge.

Woods, Hahn & Kingman, for Nicollet Nat. Bank of Minneapolis, respondent. *Smith & Reed*, for City Bank, appellant.

DICKINSON, J. The defendant, a banking corporation created under the laws of this state, adopted a by-law in 1872, embracing the provisions that no transfer of the stock should be made, without the consent of the directors, by any stockholder, who should be liable to the bank, either as principal debtor or otherwise, and that stock should be assignable only on the books of the bank. In 1884 the defendant bank issued to one Kelley stock certificates, which bore upon their face the statement that the stock was transferable only on the books of the bank, and that it was not transferable by any stockholder liable to the bank as principal debtor or otherwise, without consent of the board of directors. In 1886 Kelley, who was then indebted to the defendant bank, without the consent of the defendant's directors, assigned and delivered to the plaintiff his stock certificates as security for a debt then contracted. This debt being still unpaid, the plaintiff notified the defendant of the indebtedness and assignment. After this the defendant, in an action against Kelley upon his indebtedness, attached the interest of Kelley in this stock; after which the plaintiff, producing to the defendant, and offering to surrender, the stock certificates, demanded that the proper transfer be made on the books of the bank, which was refused. This action was then commenced to recover the value of the stock.

The defendant asserts a lien upon the stock for the indebtedness of Kelley and claims that whatever rights the plaintiff acquired by the assignment or pledge were subject to that lien. It is asserted that the by-law, in terms charging the stock with a lien in such cases, was authorized by the statute in force at the time the by-law was adopted. This law (section 14, *c.* 33, Gen. St. 1878) was as follows: "The shares in such bank are personal property, and transferable on the books of the bank in such manner as may be agreed upon in the articles organizing such bank, or prescribed in its by-laws; and every person becoming a stockholder therein shall, in proportion to his interest, succeed to all the rights, and be subject to all the liabilities of prior stockholders." In view of the construction and effect which must be given to a later enactment,—chapter 77, Laws 1881,—which was passed before the

[1] A provision that shares of stock shall only be transferred by the proper entry on the books of the corporation, is construed to be a regulation designed for the security of the corporation, and of purchasers who take transfers of stock without notice of any prior equitable assignment; and that, as between the parties, a transfer not in conformity with such provision passes the equitable, though not the legal, title. Scott v. Bank, 15 Fed. Rep. 494. Where a transfer of stock is required to be entered upon the books of the corporation, an assignment made without such entry does not constitute the assignee a shareholder, and he cannot act as such. Becher v. Mill Co., 1 Fed. Rep. 276; People v. Robinson, (Cal.) 1 Pac. Rep. 156.

issuing of this stock to Kelley, we deem it unnecessary to determine what, independently of this later act, might have been the force of the earlier statute and of the by-law referred to.

By the act of 1881 a new section was added to the prior banking law designated section 48, which is: "No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or required shall, within six (6) months from the time of its purchase, be sold or disposed of at public or private sale." This is an exact transcript from section 35 of the national banking act of June 3, 1864, (13 St. at Large, 110; Rev. St. § 5201,) and was undoubtedly intended to be, as it is, a copy of that part of the congressional act. More than 10 years before we thus incorporated this provision in our statute, the federal statute had been authoritatively construed by the supreme court of the United States in *Bank* v. *Lanier*, 11 Wall, 369. It was there held that a pledge of stock to a bank by a stockholder, as security for obligations in the nature of a debt, was a violation of the thirty-fifth section of the act of 1864. It was also considered by the court that the claim of the bank of a lien upon the stock, apart from any special agreement, was also opposed to the law of 1864, although a by-law, authorized by the act of 1863 under which the bank had been organized, (but which was repealed by the act of 1864,) provided for such a lien. Again, in 1873, in *Bullard* v. *Bank*, 18 Wall, 589, it was decided, following *Bank* v. *Lanier*, that a national bank, organized under the act of 1864, could not acquire a valid lien upon the shares of its stockholders for money loaned, even by express provision therefor in its articles of association and its by-laws. This, as the opinion shows, was deemed to be within the prohibition of the thirty-fifth section of the act. In 1871 and 1874 the courts of New York, Maine, and Kentucky were called upon to follow these decisions of the supreme court of the United States as to the effect of section 35 of the act of 1864. *Conklin* v. *Bank*, 45 N. Y. 655; *Hagar* v. *Bank*, 63 Me. 509; *Bank* v. *Bank*, 10 Bush, 367. It is further to be noted that section 12 of the congressional act of 1864 contains, in substance, the same provisions as section 14 of our General Statutes above recited, and upon which the defendant places some reliance.

It is a well-recognized principle that where a statute, the construction of which has been judicially determined, has been adopted into the statute law of another state, a presumption arises, which, however, should be considered in connection with other principles of construction, that the legislature adopted the statute with that settled construction. *In re Railway Co.*, 33 N. W. Rep. 701, 703; Cooley, Const. Lim. 52, and cases cited. There is no reason in the circumstances of this case to oppose the applicability of this rule of construction, or to weaken its force. But even without regard to this, it seems to us impossible to place any other construction upon the act of 1881 than that which gives to it the effect of prohibiting a bank from loaning money to a stockholder upon the security of its own capital stock. To make such a loan, upon an express agreement that the stock should be held as security, would be plainly opposed to the statute. In the absence of such a special agreement, it would be equally opposed to the letter and spirit of the act, that the bank should have a lien upon the stock, as security for such a loan, by force of any by-law adopted by it, or by legal implication. It was within the power of the legislature, by general law, to declare such a prohibition which should be effectual as to future transactions, notwithstanding any regulation or by-law of the corporation to the contrary.

The matter in question is one of public concern, affecting the permanent solvency of banking corporations created, as well to subserve public interests, as for the benefit of the members, (*Bank* v. *Lanier*, *supra*,) and the manner

in which they may conduct their business is not beyond such legislative control as may be necessary for the protection of the public. The by-law alone was ineffectual to oppose proper legislative control, by general law, and as to future transactions. To justify construing a statute for the creation of corporations as authorizing the adoption of by-laws of such a nature as to place the control of matters of public concern wholly within the power of the corporation, and excluding the future exercise of ordinary legislative functions, would, at least, require language admitting of no other reasonable meaning. The provision in section 14 of the statute above recited, authorizing corporations to prescribe by by-law the manner of transferring stock, does not involve any such bargaining away or self-deprivation of legislative authority.

The assignment to the plaintiff, without a transfer on the books of the bank, did not constitute a complete transfer in merely legal contemplation, so as to effect an actual substitution of shareholders binding upon the corporation. But, as between the immediate parties to the transaction, the assignment was effectual, and would be recognized and enforced, at least in equity, as against all parties not showing a superior right. *Baldwin* v. *Canfield*, 26 Minn. 43, 1 N.W. Rep. 261; *Black* v. *Zacharie*, 3 How. 483, 513; *Bank* v. *McElrath*, 13 N.J.Eq. 24; *Dickinson* v. *Bank*, 129 Mass. 279; *Cushman* v. *Manufacturing Co.*, 76 N.Y. 365. The asserted lien of the defendant upon the stock being illegal did not oppose the acquisition by the plaintiff of the rights here asserted. The prior claim of the plaintiff must be allowed to prevail over the attachment of the defendant, the latter having actual notice of the facts. 1 Mor. Corp. (2d Ed.) §§ 196–199, and cases cited; Jones, Pledges, 179. What would be the result if there had been no such notice it is unnecessary to consider. Although the assignment to the plaintiff was for the purpose of collateral security, the plaintiff was entitled to have the same entered on the books of the bank. Cook, Stocks, § 466, and cases cited; Coleb. Coll. Secur. § 273. The refusal of the defendant to make the proper entry on its books, upon an unjustifiable assertion of a superior lien upon the stock in its own favor, subjected it to liability in an action for damages, and under such circumstances the value of the stock affords the measure of the recovery. 1 Mor. Corp. § 217; Cook, Stocks, §§ 576, 581. *Kortright* v. *Bank*, 20 Wend. 91, and 22 Wend. 348; *Blanchard* v. *Gas-Light Co.*, 12 Gray, 212; *Sargent* v. *Insurance Co.*, 8 Pick. 90; *Wyman* v. *Powder Co.*, 8 Cush. 168; *Pinkerton* v. *Railroad*, 42 N.H. 424; *Building Ass'n* v. *Sendmeyer*, 50 Pa. St. 67; *Railway Co.* v. *Sewell*, 35 Md. 238; *Bank* v. *McNeil*, 10 Bush, 54; *McMurrich* v. *Harbour Co.*, 9 U. C. Q. B. 333. See, also, *Baker* v. *Marshal*, 15 Minn. 177, (Gil. 136.)

The rights of the plaintiff in making the pledged securities available were not confined to a sale of the stock, incumbered as it was by the refusal of the bank to complete the transfer to the plaintiff. Judgment affirmed.

STATE *ex rel.* STANCHFIELD *v.* DRESSEL, Co. Auditor, etc.

(*Supreme Court of Minnesota.* December 27, 1887.)

1. TAXATION—REFUNDING AMOUNT PAID BY PURCHASER—PROCEEDING NOT JUDICIAL.
The proceeding under section 148, c. 11, Gen. St. 1878, amended by chapter 10, Laws 1881, upon the application of a holder of a tax-sale certificate to have the amount paid by him for the certificate and subsequent taxes refunded out of the county treasury, is not judicial in its nature, and the duties thereby imposed may be performed by other than judicial officers.

2. SAME—FORMER OWNER CANNOT OBJECT TO PROCEEDINGS TO REFUND, WHEN.
After the time to redeem from a tax judgment sale has expired, the former owner cannot be heard to question the regularity of the proceedings, under section 148, to refund, upon an application made on the ground that the tax judgment and sale were void for want of jurisdiction in the court, nor to object to proceedings to en-

force the taxes if they were properly levied; for if the sale was void, the taxes were not satisfied by it; if it was valid, the former owner has ceased to have any interest in the land.

(Syllabus by the Court.)

Appeal from district court, Le Sueur county; MACDONALD, Judge.

G. S. Ives, for State *ex rel.* Stanchfield, appellant. *Cadwell & Parker*, for Dressel, respondent.

GILFILLAN, C. J. One Paine was the owner of a certain tract of land in Le Sueur county, and in February, 1885, conveyed the same to the relator, Stanchfield, who presented the deed to respondent, auditor of the county, to have the proper certificate of taxes paid, etc., to admit the deed to record, to be indorsed on it. The respondent refused to make such indorsement, alleging as a reason that there were delinquent taxes upon the land.

The facts affecting the claim of delinquent taxes are these: The taxes for the years 1872 and 1873 were duly levied upon the land, and became delinquent. Proceedings, under the law of 1874, to enforce these taxes were had in that year, and resulted in a judgment and a sale of the lands under it, they being bid in for the state, and in 1876 the right of the state was assigned to one Hamilton. In May, 1881, he made petition to the board of county commissioners, alleging that the judgment under which the land had been sold was void, because, for reasons which brought the case within the principle of a decision of this court, the court had no jurisdiction to render it, and asking that the moneys paid by him upon the assignment from the state to him be refunded. The county commissioners inquired into the truth of the matters alleged in the petition, and found the facts to be as in the petition stated. The petition seems to have been forwarded to the state auditor, and he authorized the refunding of the money paid by Hamilton for the certificate and it was so done. The relator claims that the proceedings upon the petition of Hamilton were not regular under the statute, that the power, conferred in terms on the county commissioners and state auditor, by section 145, c. 11, Gen. St. 1878, added by chapter 10, Laws 1881, to determine whether a tax sale comes within the meaning of a decision of this court declaring certain tax sales void, is judicial, and cannot be conferred on such officers; and that, indeed, the judgment and sale were valid, and did not come within the meaning of any such decision.

In considering the question presented, we must, so far as this application is concerned, take the relator as standing in the shoes of Paine, his grantor. By the deed from Paine to him he could get no right which his grantor did not have. At the time when the money was refunded to Hamilton (1881) the time to redeem from the tax sale had expired, so that if the sale was valid, (as relator insists it was,) the tax title had become absolute, and Paine had no interest whatever in the premises, and it was no concern of his what became of them, nor whether, after that, taxes were rightfully or wrongfully laid on them. On the other hand, if the sale was void, it did not operate to satisfy the taxes. They were still unpaid, notwithstanding the wrongful sale. And if in such case the state choose to return to the purchaser the money paid by him, for which he got nothing, we do not see how the owner can object.

In the matter of repaying to the purchaser the money that he paid on the sale or assignment to him, no interest of the original owner is or can be affected. It is a matter solely between the state and the holder of the certificate.

Intrusting to certain officers the duty to determine that the state will return the money, the holder of the tax-sale certificate consenting, involves no judicial function, for no rights are affected except those of the parties to the transaction. If two men get together, and settle a matter between them, no

judicial function is involved, although, in arriving at terms, they may assume to determine what their respective rights are. Nor is the duty, frequently imposed on executive or ministerial officers to determine when they are to act in behalf of the state, and how, a judicial one. If the case was one in which, under the statute, the money ought to have been refunded, the owner of the land was no way concerned in the regularity of the proceedings by which it was done. No irregularity could prejudice him, and therefore he could not complain of it.

The case rests on one of two propositions: *First*, that, as claimed by the county auditor, the tax judgment and sale were void within the decisions of this court, and therefore left the taxes unpaid; *second*, that, as claimed by the relator, the judgment and sale were valid, and, at the time of the refundment, Paine's interest in the land had been cut off by them. If, after that, the only parties interested,—the state and the holder of the tax certificate,—chose to annul the proceedings and reinstate the taxes, and so give Paine another chance to save his land, he could not object. He was not obliged to avail himself of the chance thus given him. He was not personally liable for the taxes; he need not pay them if he preferred not to do so. On either of these propositions the relator is not in a position to contend that the refusal of the county auditor to indorse his deed, "Taxes paid," was wrong. Order affirmed.

CONNELLY *v.* MINNEAPOLIS E. RY. CO.

(*Supreme Court of Minnesota.* December 27, 1887.)

1. MASTER AND SERVANT—FELLOW-SERVANTS—ENGINEER AND TRACKMEN.
   A railroad company is not responsible to its section or track men for the negligence of the engineer or brakeman of a train, they being fellow-servants.[1]
2. RAILROAD COMPANIES—NEGLIGENCE—PLEADING.
   A complaint charging the company only with negligence in the movement of a particular train without warning, does not involve, as a cause of action, the neglect of the company to establish general regulations for the conduct of its servants in such cases.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; YOUNG, Judge.

Merrick & Merrick, for Connelly, appellant. *W. H. Norris*, for Minneapolis E. Ry. Co., respondent.

DICKINSON, J. We are of the opinion that the court properly dismissed the action for the insufficiency of the plaintiff's case.

The plaintiff's intestate was one of the section or track men of the defendant, and employed upon its tracks used for transfer and switching purposes at Minneapolis. From the depot two tracks of the defendant (coming together at a switch at that point) extend upon a curve in a south-easterly direction to and beyond the place of the accident. One of these may be called the "main" track and the other the "side" or "mile" track. A short time before the accident, a train of freight cars of considerable length had been run on the main track, and left standing there, extending from near the place of the accident up towards the depot. While these cars were standing there, the deceased, with his fellow-laborers, commenced the work of straightening a rail on the same track, and within less than 30 feet of the southerly or rear end of the train. While this was being done, the engine which did the business of switching and transferring cars about these premises, drew up several other cars over the side track, past the place of the accident, to the depot

[1] Upon the point as to who are fellow-servants within the meaning of the rule exempting the master from liability for injuries received by an employe through the negligence of a co-servant, see Tabler v. Railroad Co., (Mo.) 5 S. W. Rep. 810, and note.

switch, and shoved them back on the main track, bringing them forcibly in contact with the cars already standing there, for the purpose of bunting the whole train backward, so that the cars should clear the switch. Just at this time the deceased stepped from the point where he was working still nearer the rear end of the train, and, turning his back to it, stood upon the track for the purpose of taking a sight at the rail to see if it was straight. In this position he was struck in the back by the train as it was suddenly forced backward as above stated. From the injuries thus received he died. The operations of the engine at the depot switch, at the other end of the train, could not be seen from the place where these men were working. There were several other tracks of other railroads in this immediate vicinity, and so many engine bells were ringing that these workmen could not have heard or distinguished the bell of this engine if it had been ringing, nor, because of the noise made by other moving trains, would these men be likely to notice or hear the movement of these cars. The brakemen were not upon the cars, but upon the ground near by, at the time of the accident. The deceased could as well have gone in the other direction for the purpose of sighting along the track, and this would have been unattended by apparent danger.

The only ground of action assigned in the complaint was the negligent driving of these cars, without warning, upon this track and against the cars already there, thus forcing the latter backward so as to strike the deceased. This statement of the case presented on the part of the plaintiff makes obvious the correctness of the action of the trial court. If the case had turned upon the points as to whether the deceased was not legally chargeable with contributory negligence, and whether he had not knowingly accepted and assumed the risk which proved fatal, there would have been strong grounds for sustaining the ruling in question; for, apart from the obvious danger to which the deceased voluntarily exposed himself, the evidence, to all of which we have not referred, is wholly opposed to the theory that these men could have expected to receive any actual warning or notice of the movement of these cars. But the trial court seems to have based its action upon the ground that the case did not show the defendant to have been guilty of any negligence, and we prefer to rest our decision upon that ground. If the case showed any negligence in the movement of these cars, it was the negligence only of the fellow-servants of the deceased, for which the employer was not responsible. *Foster* v. *Railway Co.*, 14 Minn. 360, (Gil. 277;) *Brown* v. *Railway Co.*, 27 Minn. 162, 6 N. W. Rep. 484; *Fraker* v. *Railway Co.*, 32 Minn. 54, 19 N. W. Rep. 349.

The appellant, in his brief, relies to some extent upon the duty of the defendant to make and promulgate general rules for the conduct of its employes, so far as might be necessary for the protection of co-employes. The case does not involve any such consideration. The complaint does not allege any neglect of duty on the part of the defendant in that respect, nor otherwise than in the movement of these cars on this particular occasion, nor was such a question litigated. The general doctrine as to the duty of the master to afford a safe place for the servant to work in has obviously no applicability in this case. The doctrine adverted to is not opposed to that which holds the master, who is himself blameless, free from responsibility for the negligence of fellow-servants. If this place was unsafe only because of negligence in the management of these cars, (and no other negligence is alleged,) that is simply the case of danger and injury caused by the wrongful conduct of fellow-servants.

The order refusing a new trial is affirmed.

GANSER *v.* FIREMAN'S FUND INS. CO.

(*Supreme Court of Minnesota.* December 27, 1887.)

1. PRINCIPAL AND AGENT — APPOINTMENT AND DISMISSAL — NOMINAL APPOINTMENT OF AGENT'S SON.
   M., the agent of an insurance company, resigned his agency, and, seeking the appointment of his son in his place, wrote as an inducement that the work of the latter would be under his immediate supervision. Another agent, through whom this was communicated to the company, added that the business would run the same as before, but that he, M., "desires his son to learn the business, and have some responsibility, and takes this method." The son having been thereupon appointed, *held*, that the evidence justified the finding that M. had still authority to act for the company.
2. INSURANCE—PAROL CONTRACT—EVIDENCE.
   Evidence in the case considered as justifying a finding that a parol contract of insurance had been made.
3. SAME—EVIDENCE—ADMISSIBILITY—EXPIRED CONTRACT.
   Any fact necessary to an understanding of other material and relevant facts in a case is admissible in evidence, *e. g.*, an expired contract of insurance, in connection with a subsequent parol agreement for the reinsurance of the same property, made with reference to the former contract.
4. SAME—UNDERSTANDING OF PARTIES—SUBSEQUENT ACTS.
   A transaction being such that the parties may or may not have understood it alike as an agreement, the testimony of the parties may be received directly as to their understanding. The subsequent acts of a party may also be shown by the adverse party as showing his understanding of the agreement.
5. SAME—IMPEACHMENT OF WITNESS—FORMER DECLARATIONS.
   The former declarations of a witness offered by the adverse party were properly excluded, they not being contrary to his testimony.
6. SAME—FRAUD IN PROOF OF LOSS—PLEADING—ISSUES.
   There being no averment by the defendant that the contract provided that fraud in the proof of loss should avoid the contract, and it not appearing that the plaintiff consented to litigate that question, the defendant was not in a position to avail itself of that defense.

(*Syllabus by the Court.*)

Appeal from district court, Steele county; BUCKHAM, Judge.

A. C. Hickman, for Ganser, respondent. *Berry & Morey*, for Fireman's Fund Ins. Co., appellant.

DICKINSON, J. This action is upon a parol contract of insurance alleged to have been made July 28, 1884. The principal question is whether the case shows the making of any such contract. For several years prior to March, 1884, one E. Malony had been conducting insurance business for the defendant as its agent, at Owatonna, in this state, but at that time he formally resigned his agency, and procured his son, A. A. Malony, to be appointed as agent in his stead. There were some questions as to the authority of the elder Malony to continue to act for the defendant as he did assume to do, to which we shall hereafter refer. In 1880 the plaintiff obtained an insurance from the defendant through its agent E. Malony, for one year, for the sum of $2,000; $1,000 of this being upon the machinery, horse-power, and brewery apparatus of a brewery, and $1,000 upon the stock of barley, malt, hops, and beer therein. This policy was to run until July 1, 1881; but was renewed from year to year, through the same agent, until it finally expired, July 1, 1884. A few months before that time the plaintiff put a boiler and engine into the brewery, consent to do so being indorsed upon the policy at the office of the agent.

The evidence tended to show that at that time it was understood between the plaintiff and E. Malony, who had then resigned his agency as above stated, that when that policy should expire (July 1, 1884) a new policy should be issued instead of a mere renewal, and that $500 of the $2,000 insurance should be placed upon the engine and boiler, the terms of the insurance remaining in

other respects the same as before. Nothing further was done until a few days after that policy had expired. Then the agent, A. A. Malony, went to the plaintiff to learn how he desired the new policy to be made. The evidence tends to show that the plaintiff then named the same terms as had been before contemplated in the conversation with E. Malony, and that the agent assented to this. However, for some reason, no policy was then made. We need not particularly consider whether the parties at that time really understood the matter alike, nor the reason why a policy was not then issued, although the evidence tends to show that the parties then supposed the agreement to be complete, and did not anticipate any delay in the making of the policy. The case went to the jury upon the theory that the contract, if there was any contract, was perfected a few days after this, on the twenty-eighth of July.

On the day last named, the elder Malony, at the request of his son, A. A. Malony, went to the plaintiff to ascertain again how he wanted the insurance placed; and the terms were again stated, and arranged in accordance with what, according to the plaintiff's evidence, had been before agreed upon. Malony then retured to the office, and a policy was made out in accordance with this agreement, by one Crandall, a clerk in the office, who signed the agent's name to it. It was not, however, delivered until the next day. In the mean time, in the evening of the 28th, the property was partially destroyed by fire. It further appears that it is the custom of this defendant, and of insurance companies generally, to make the contract of insurance to run, under ordinary circumstances, from noon of the day when the agreement is made, and, as the evidence went to show, to collect premiums at the end of the month.

It was left to the jury to determine whether a complete agreement was effected at this last interview between the plaintiff and the elder Malony. We are of the opinion that this was right, and that the verdict in favor of the plaintiff was justified by the evidence. It was only necessary that the plaintiff and the defendant, through an authorized agent, should agree upon a present insurance, and upon terms which were certain. The evidence conduces to show that, in view of the facts relative to the former insurance, and the negotiations which had taken place before this twenty-eighth of July, it only remained, in order to complete an agreement, to agree upon the manner in which the $2,000 should be apportioned,—even if that had not already been once agreed upon. This was agreed upon between the elder Malony and the plaintiff at this time. Whether Malony had authority to thus act for the defendant was left to the jury to determine. The evidence justified a conclusion that he had such authority. In his letter of resignation to the defendant the elder Malony, requesting the appointment of his son, writes: "His work will be under my immediate supervision and inspection, and I shall at all times render him assistance." Another agent of the defendant, communicating with the company upon the subject, adds: "The business will run same as heretofore, but he desires his son to learn the business, and have some responsibility, and takes this method." The appointment, under such circumstances, of a person as agent, who is shown to have been without experience, may fairly be deemed to have been made with the expectation that the former agent would still act in the business for the interest of the company, and that would involve an authority so to act.

The reason just stated sufficiently answers the objections made to the evidence of conversations had with the elder Malony. Proof of the former insurance was proper, for it formed in part the basis upon which the negotiations immediately in question proceeded. Such negotiations seem to have included, without specific mention, some of the elements of the former insurance, such as the company in which the risk was to be placed, the period of time, the property insured, and probably other things. For a similar reason,

there was no error in allowing proof of an indorsement on the former policy of a consent to the placing of the engine and boiler upon the premises, although that indorsement was not made by the agent.

In the testimony of witnesses as to the "understanding," in respect to certain matters, that word seems to have been used to express the idea of an agreement, rather than that of a mere mental condition. There is one exception to this, where the plaintiff was allowed to testify that he understood from the negotiations which had been detailed that the property was insured. This was proper evidence within the rule laid down in *Berkey* v. *Judd*, 22 Minn. 287, 297, especially where the transaction upon which an asserted agreement of minds is predicated was of such a nature that it may or may not have resulted in such an agreement.

The testimony which the appellant claims to have involved the "opinions" of the witnesses is not subject to that objection. The testimony, as we understand it, was as to the fact of a custom, and as to who gave authority to one Crandall to do certain things. There was some immaterial evidence received, such as that relating to the authority of Crandall to make contracts of insurance; but we think that none of this evidence could have affected the result of the trial; for the case of the plaintiff, as presented to the jury, did not in any manner depend upon any such testimony. It was not claimed that Crandall made any contract which could affect this case.

The receiving in evidence of the policy, made out and signed by Crandall, (with the agent's name,) but not delivered until after the fire, was not error. It was made by direction of the elder Malony, after his last interview with the plaintiff, and as the question of his authority to represent the company was for the jury, this instrument might also be considered as an act done in the course of his agency, if he had the authority of an agent, and indicating his own understanding of the verbal agreement claimed to have been completed on that day, and in pursuance of which, as it might be urged, this policy was made out. The bearing of this evidence upon the issue was explained to the jury.

It was not error to exclude Exhibit R, offered by the defendant as a part of the cross-examination of the witness A. A. Malony. This was a certificate made by him to the effect that he did not write, issue, nor deliver the policy to Ganser. The testimony of this witness had not been to the contrary of this, and it had already been shown by other evidence on the part of the plaintiff that A. A. Malony did not write, sign, or deliver the policy.

The refusal of the court to charge as requested as to the effect of any fraudulent representations in the proof of loss was right; for it was not alleged in the answer that, by the terms of contract, such fraudulent representations should avoid the same, nor is it apparent that the plaintiff consented to litigate this question.

There are some other questions raised as to the rulings of the court, which we do not deem it necessary to state, and will only say that we find no error. Upon the whole case the order refusing a new trial is affirmed.

STATE *v.* DROSKY and another.

(*Supreme Court of Iowa.* December 16, 1887.)

APPEAL—PRESUMPTIONS IN FAVOR OF TRIAL COURT—EVIDENCE ON MOTION TO AMEND RECORD.

Plaintiff applied to correct an entry in the record made by the clerk, and submitted an affidavit strongly supporting the motion. *Held* that, in the absence of any showing to the contrary, it will be presumed the court heard other testimony, and that the order overruling the motion was sustained by evidence.

Appeal from district court, Johnson county.

The state of Iowa applied for an injunction to restrain J. W. Drosky and J. Slezak, defendants, from maintaining a nuisance by keeping a saloon. The clerk, from the judge's calendar, entered a decree dismissing the suit. Plaintiff alleged error in the record, and moved to have it amended, which the court refused, and plaintiff appealed.

Remley & Remley, for appellant. *Boal & Jackson*, for appellees.

REED, J. At the January term, 1887, of the district court, the plaintiff filed a motion to correct an entry made by the clerk in vacation. Prior to January 1st, the cause was pending in the circuit court, and was transferred to the district court at that date by operation of the statute abolishing the circuit court. Chapter 134, Acts 21st Gen. Assem. The entry in question purports to be a final judgment in the case, and it was made up by the clerk from the memorandum made in the case by the judge of the circuit court at the October term, 1886, of that court. The motion was upon the grounds that the cause had never been finally submitted to the court, and that the memorandum of the judge from which the clerk made up the record related to an application for a temporary injunction which had been submitted to him in vacation. The motion was overruled, and the appeal is from that order.

The motion was supported by the affidavit of the attorney who appeared for the plaintiff in the court below, and his testimony tended strongly to establish the allegations of fact in the motion. The motion and affidavit are set out in the abstract on which the case was submitted; but it is not averred therein that the affidavit is all of the evidence introduced upon the hearing. It would have been competent for the court to hear other testimony on the question, and, in the absence of any showing to the contrary, we must presume that there was other evidence, and that the finding of fact implied by the order overruling the motion is sustained by the evidence. Affirmed.

STATE v. DOW.

(*Supreme Court of Iowa.* December 16, 1887.)

CRIMINAL PRACTICE—APPEAL—TRANSCRIPT—ERROR.

Where, on appeal in a criminal case, there is no appearance by appellant, and the transcript filed shows no error, judgment will be affirmed.

Appeal from district court, Mahaska county; J. K. JOHNSON, Judge.

The defendant, John Dow, was indicted, tried, and convicted on a charge of keeping a nuisance by using a building for the purpose of unlawfully selling intoxicating liquors therein, and he appeals.

No appearance for appellant. *A. J. Baker*, Atty. Gen., for the State.

ROTHROCK, J. The trial was had and judgment rendered in the month of December, 1885, and the appeal was taken to the June term of this court, 1886. No appearance has been made for the defendant. The attorney general filed a transcript of the proceedings in the district court. An examination of the transcript discloses no grounds for a reversal of the judgment, and it is therefore affirmed.

HENNY BUGGY CO. v. PATT.

(*Supreme Court of Iowa.* December 16, 1887.)

1. GARNISHMENT — GARNISHEE CANNOT RAISE OBJECTIONS TO JUDGMENT AGAINST DEFENDANT.

Objections to a judgment rendered against a defendant, which do not go to the jurisdiction of the court, and concern the defendant alone, cannot be successfully raised by a garnishee for defendant's indebtedness.

2. SAME—PLEADING—ALLEGING RECOVERY OF JUDGMENT AGAINST DEFENDANT.
Where a garnishee answers, denying indebtedness, and the plaintiff tries the issue, it is not necessary for the complaint to allege the recovery of a judgment against the defendant, where the record in the case discloses that fact.

3. SAME—EVIDENCE—FICTITIOUS FIRM NAME.
Where the facts showed that E. S. M. & Co., purporting to be a firm, consisted in fact of but one person, E. S. M., it is not error to introduce evidence of a chattel mortgage from E. S. M. & Co. to a garnishee, to prove the latter's indebtedness to E. S. M. personally, against whom plaintiff had a judgment.

4. FRAUDULENT CONVEYANCE—EVIDENCE—INSOLVENCY OF GRANTOR.
Testimony as to the insolvency of a defendant is evidence bearing upon the question of good faith in a conveyance made by him.

5. WITNESS—BILL OF SALE—IMPEACHMENT OF, BY PARTY OFFERING.
After plaintiff had introduced a certain bill of sale, he was allowed to file an amendment charging fraud in the making thereof. Upon defendant's objection, on the ground that plaintiff could not discredit his own witness, *held*, that a bill of sale was not a *witness*, and plaintiff had a right to introduce it, and discredit it, for the purpose of showing the whole transaction connected with the pretended sale.

Appeal from district court, Union county; J. W. HARVEY, Judge.

Judgment was rendered against J. H. Patt, appellant, as a garnishee in an action brought by plaintiff against E. S. McMullen & Co. The garnishee now appeals to this court. The facts appear in the opinion.

James G. Bull, for appellant. *McDill & Sullivan*, for appellees.

BECK, J. 1. The plaintiff's action was brought by attachment to recover upon promissory notes and an account, and process of garnishment was issued against Patt, who answered, denying indebtedness to the defendant in attachment. Subsequently, at the trial, plaintiff offered certain evidence, to which objections by defendant were sustained by the court. The objections were upon the ground that the petition failed to allege that something was due from the defendant to the plaintiff, and the evidence offered did not correspond with the allegations of the petition. Thereupon the plaintiff had leave to amend the petition, and the cause was continued. Afterwards, during vacation, a confession of judgment made by defendant was filed. It is in the form upon which judgments are authorized by statute to be entered by the clerk in vacation. Such a judgment was accordingly entered before the next term. The confession does not in express language refer to the pending action, but is numbered the same. After judgment by confession, the plaintiff filed a pleading controverting the answer of the garnishee. To this pleading the garnishee demurred, upon the following grounds: "That there is a defect of parties plaintiff and defendant in said controverting answer, to-wit: The plaintiff alleges neither corporate nor partnership power or capacity to sue. Said defendant garnishee was not attached as debtor, or as the possessor of property of E. S. McMullen, nor notified nor garnished to answer as debtor of E. S. McMullen, and did not so answer; but was garnished as the debtor of E. S. McMullen & Co., defendants in said action, No. 2,583, and so answered. (2) That the facts stated do not entitle the plaintiff to the relief demanded. There is no general issue, or general denial of garnishee's answer as such; but admits the truth of his answer, and sets up insufficient and impertinent matter in avoidance. (3) Plaintiff's right of action against garnishee is founded on three written instruments,—a lease, a chattel mortgage, and a bill of sale from E. S. McMullen & Co., with J. H. Patt, garnishee, and a judgment against E. S. McMullen alone; copies of which are not set out in the answer, and no reason therein assigned for failure to do so. (4) The answer fails to allege that plaintiff has obtained judgment against the defendants E. S. McMullen & Co., and fails to allege an indebtedness from garnishee to defendants, and fails to allege money or property in possession of garnishee, or under his control of defendants."

The demurrer was overruled, but the plaintiff afterwards filed the following amendment to his pleadings, controverting the garnishee's answer: "That plaintiff is a corporation organized and doing business under the laws of the state of Illinois; that E. S. McMullen & Co. and E. S. McMullen are one and the same; that although the firm selling agricultural implements at Creston, defendants herein, went for a time under the style of E. S. McMullen & Co., it in fact, at all times at and subsequent to the incurring of the indebtedness, sued upon by Henny Buggy Co., consisted of one sole, single person, to-wit, E. S. McMullen, and no other person; that said E. S. McMullen, after the last term of district court, as such sole and only defendant in the case, confessed judgment upon the claim made by *Henny Buggy Co.* v. *E. S. McMullen & Co.*, No. 2,583, district court; that judgment was confessed upon the indebtedness of E. S. McMullen, who purchased the goods as E. S. McMullen & Co., pleaded upon in that case; that E. S. McMullen is the only person indebted thereon, and said judgment was voluntarily confessed by E. S. McMullen in the above-named case, *Henny Buggy Co.* v. *E. S. McMullen & Co.*, No. 2,583, district court, December term, 1885, to avoid further proceedings and costs in said case, for which said E. S. McMullen would be solely liable."

It will be observed that none of the objections made to the pleadings by the demurrer go to the jurisdiction of the court; they are simply upon irregularities or errors which do not render the judgment of confession void, but may be corrected by the defendant, who was alone concerned therein, by proper proceedings authorized by law. The proceedings, not being void, cannot be questioned by the garnishee. *Pierce* v. *Carleton*, 12 Ill. 358; *Roofing Co.* v. *Macy*, 3 N. E. Rep. 417. Many of the objections, however, are based upon facts, some of which are answered by the amendment filed by the plaintiff, above set out. The objection upon the ground that the pleading of plaintiff does not deny the garnishee's answer is not supported by the record. The pleading does not, in express language, "controvert" the answer of the garnishee. To controvert is to deny. It was not necessary for the plaintiff to allege that judgment had been recovered against defendant. The record of the case showed that fact, and it was not necessary to plead or prove the contents of the record in the case. The same objections, or some of them, were raised upon the trial to the admission of the judgment and proceedings against the defendant in evidence as against the garnishee. The considerations just expressed sufficiently answer them in this connection.

2. A chattel mortgage executed by E. S. McMullen & Co. to the garnishee was admitted in evidence, against the objection of the latter, based upon the ground that the judgment was against E. S. McMullen. But the real debtor was E. S. McMullen; the company was a fiction. Other objections to the admission of the instrument go to its effect as evidence, not to its competency.

3. Evidence of McMullen's insolvency was admitted, against the garnishee's objection. It was a fact which, taken in connection with other matters, would tend to show the good faith of the conveyance of the property to the garnishees.

4. The plaintiff was permitted to file an amendment alleging fraud in the bill of sale. This is complained of now, on the groud that, as the bill of sale was offered in evidence by plaintiff, it was thus permitted to discredit its own witness. It will not do to call an instrument in writing a witness. Plaintiff, to establish fraud between the defendant and garnishee, was authorized to show all the transactions in relation to the property, and the nature and character thereof.

5. It is objected that the garnishee was, upon the issue of fraud, entitled to the verdict of a jury, which was denied him. Let this be admitted, but he waived his right in this regard by consenting to try the case to the court. This consent related to all issues in the case as they existed, or might arise

upon further pleadings as authorized by law. But the garnishee suffered no prejudice by his failure to go to a jury on the issue of fraud, for the reason that the court made no findings thereon, but based the judgment on other grounds: expressly holding that the decision of the case did not require a finding on the issue of fraud.

6. Other objections are raised by the assignment of errors. Some of them are not argued, but merely referred to in the argument of counsel. We are not required to consider them. Others are disposed of by the views we have expressed, while some are so trivial, or involve such familiar principles of law, that the discussion of them is not demanded. The findings of fact by the court below cannot be interfered with on the ground that it is not sufficiently supported by the evidence.

The judgment of the district court is affirmed.

STATE *v.* SCHMIDT.

(*Supreme Court of Iowa.* December 15, 1887.)

1. HOMICIDE—DYING DECLARATION—EXPECTATION OF DEATH.
   On the trial of an indictment for murder, a declaration made by deceased a few days before her death was received in evidence. Some days before making it, deceased had said she knew she must die, and had made other statements showing she did not expect to live. *Held*, the declaration was properly admitted.[1]
2. SAME—SENSE OF IMPENDING DEATH—HOW PROVEN.
   The sense of impending death necessary to constitute a dying declaration may be proven either by the express words of the declarant, or inferred from the circumstances of the case.
3. SAME—LENGTH OF TIME BETWEEN DECLARATION AND DEATH.
   The length of time elapsing between the making of a declaration and the declarant's death does not affect the admissibility of the declaration in evidence, though, in the absence of better evidence, it may serve to show the presence or absence of a sense of impending death.
4. SAME—DECLARATION PART WRITTEN AND PART ORAL.
   On the trial of an indictment for murder, a dying declaration in writing was received in evidence, as was also a parol declaration made by the same party further identifying the perpetrator of the crime. *Held*, that part of the evidence being written and part parol was no valid objection to its admission.
5. SAME—WEIGHT OF DYING DECLARATIONS.
   Dying declarations are entitled to the same consideration as statements made upon oath.
6. SAME—RES GESTÆ—DECLARATIONS.
   On the trial of an indictment for murder, evidence was received of a declaration made within a few moments of the firing of the pistol shot which caused the injuries of which deceased died. The declaration tended to identify the defendant as the perpetrator of the crime, and was made when there was danger of the occupants of the house being burned, and in reference thereto, a fire having been started in one of the rooms. *Held*, the declaration was part of the *res gestæ*.

Appeal from district court, Fayette county; L. O. HATCH, Judge.

Indictment charging that the defendant, Henry Schmidt, unlawfully, willfully, deliberately, and with malice aforethought, did kill and murder Lucretia Peek. Trial by jury, who found the following verdict: We, the jury, find the defendant guilty of murder in the first degree, and we say that his punishment shall be death." Judgment that the defendant, "Henry Schmidt, be punished by death, and that the judgment be executed by hanging the defendant, Henry Schmidt, according to law, on the first Wednesday of January, 1888." From this judgment defendant appealed.

[1] As to the conditions requisite for the admission of dying declarations in evidence, see Whitaker v. State, (Ga.) 3 S. E. Rep. 403; State v. Newhouse, (La.) 2 South. Rep. 799, and note; Luker v. Com., (Ky.) 5 S. W. Rep. 354; People v. Ramirez, (Cal.) 15 Pac. Rep. 33; State v. Johnson, (Iowa,) 34 N. W. Rep. 177; Easley v. Com., (Pa.) 11 Atl. Rep. 220; Dorbey v. State, (Ga.) 3 S. E. Rep. 668.

Samuel Murdock, for appellant. *A. J. Baker*, Atty. Gen., for the State.

SEEVERS, J. The deceased was the wife of Abram Peek. They resided on a farm, and their homestead consisted of a sitting-room, bedroom, and kitchen. There is a door between the sitting-room and bed-room. On the night of the fourth day of September, 1886, there were two beds in the bedroom, one in the north-east, and the other in the north-west, corner of the room. Near the latter there was a window. On said night there were in the house Mr. and Mrs. Peek and Abram Leonard. They went to bed between 9 and 10 o'clock. Leonard slept in the bed in the north-west corner of the room, and Mr. and Mrs. Peek in the other. Some time in the night, and while Leonard was sleeping, there was a pistol shot, and he was struck by a "ball," and another "ball" passed probably within an inch of him. He remained still for a minute or two, then got up, but before he did so he said, "I am shot." Mr. and Mrs. Peek got up before he did. A shot then came in the west window, and Mrs. Peek said, "I am shot," and Mr. Peek said, "I am shot." A fire was started in the sitting-room. Mr. Peek rushed out and said: "Henry, you d—n son of a b—h, you are going to burn us all up." Leonard could see in the sitting-room, and he saw the defendant standing by the partition, and said, "Henry I see you plainly." When Peek rushed out he told Leonard to hold the door, and he said, "I will put out the fire." Mr. Peek did not return to the house. Leonard and Mrs. Peek remained in the house until morning, when he aroused the neighbors. The foregoing is, in substance, the evidence of Leonard, who was then 72 years old.

The evidence also tended to show that a fire had been started in the sitting-room, and that it was extinguished after Mr. Peek left the bedroom. The body of Mr. Peek was found the next morning not far from the house, and the evidence tended to show that the skull was fractured, and it was produced by a blunt instrument, and this was the cause of his death. The deceased was shot in the right cheek. There were powder marks all over her face. She died on the twentieth day of September, 1886. A *post mortem* examination was held, and a bullet was found in the right side of the brain. The gunshot wound caused her death. The foregoing facts were in no respect controverted, except that it is claimed the declarations made by Mrs. Peek were inadmissible.

The only material controverted question was as to whether the defendant was the person who fired the pistol shot which caused the death of Mrs. Peek. Evidence was introduced tending to show that the defendant was at the house on the night in question, which we have not deemed it necessary to set out. A few days prior to the death of Mr. Peek the defendant, in speaking of him, said: "God damn him! if he didn't pay him he'd kill him." A few days before her death Mrs. Peek made a statement, which was reduced to writing and signed by her. It is as follows. The portion italicized was striken out by the court, and the residue only was admitted in evidence:

"WINDSOR, September 16, 1886.

"Feeling poorly, I make this statement concerning the shooting of Mr. Leonard, Mr. Peek, and myself. *On or about the night of the fourth of September, 1886, Mr. Leonard and Mr. Peek had been in town (West Union) on business, getting home about sundown. Being late after supper, we persuaded Mr. Leonard to stop over night. Mr. Leonard slept in the same room with Mr. Peek and myself. Mr. Leonard slept in the west bed next to the window; head to the west. Mr. Peek and I slept in the east bed; head to the north. There was a curtain between the two beds.* About eleven o'clock we were startled by a shot, and Mr. Leonard said 'O, I am shot!' and then he turned and shot Mr. Peek, and then we shut the door. Mr. Peek said: 'For God's sake, woman, what will we do? We are in here without anything to defend ourselves. If we stay in here, we will be burned up; and

if we go out we will be killed.' I told Mr. Peek I would rouse the neighborhood. He said, 'My good woman, if you go out, he will kill you.' I said I will go out of the window, and go up to Mr. Swails, and tell him. When I stuck my head out of the window he shot me. I said to him: 'Henry, how could you hurt me?' He said, 'I didn't mean to hurt you, Mrs. Peek.'

"LUCRETIA PEEK."

She also said that the person who inflicted the wounds on her was "Henry Schmidt, the boy who worked for us." To the introduction of the written statement and oral declaration of Mrs. Peek, counsel for the defendant objected, on the ground that it was not shown that they were made under the belief that she soon expected to die. The objections were overruled.

1. It is insisted by counsel for the defendant that the court erred in admitting what was said by Mr. Peek when he opened the door between the sitting and bed room. What he then said tended to show that he then recognized the defendant. The attorney general insists that what Mr. Peek then said was *res gestæ*, or a part of the transaction, and therefore the evidence was admissible. What length of time had elapsed after Mrs. Peek was shot before the door was opened and the declaration made does not certainly appear; but it could not have been but a few moments. Several pistol shots had been fired, and all of the persons in the house declared they were shot. A fire had been lighted in the adjoining room, and the danger of being burned existed when the door was opened and the declaration made. It seems to us quite clear that the declaration constitutes a part of the transaction, and was clearly admissible in evidence. It is true, the pistol shots had been fired a short time before, but the fire was then burning. The danger of being burned actually existed at that time, and the declaration was made in reference to that fact. In *Com.* v. *McPike*, 3 Cush. 181, the deceased ran from a room where her husband, the defendant, was, to a room in the same house, a story above the one occupied by herself and her husband, and knocked at a door, crying "Murder!" A witness saw the deceased was wounded, and started for a physician. She met the defendant and another witness on the stairs, and the latter went for a watchman, and, upon returning, went immediately to the room where the deceased was, and there found her bleeding profusely. She said John (meaning defendant) had stabbed her. The defendant objected to such declaration. The objection was overruled, and it was held the ruling was right, on the ground that it was so recent after the receiving of the injury as to justify the admission of the evidence as a part of the *res gestæ*. See, also, *Driscoll* v. *People*, 47 Mich. 419, 11 N. W. Rep. 221; *People* v. *Vernon*, 35 Cal. 49; *Harriman* v. *Stowe*, 57 Mo. 93; *Insurance Co.* v. *Mosley*, 8 Wall. 397; *State* v. *Driscoll*, 34 N. W. Rep. 428. The declaration was admissible in evidence, and therefore the court rightly refused the following instruction asked by the defendant: "It has been testified to that Mr. Peek said in his house, at or about the time the shooting took place: 'Henry, you d—n son of a b—h, you are going to burn us all up.' You are not to consider there words as tending to show that the defendant was present at the shooting, or that he shot Mrs. Peek." As the evidence was admissible, it follows it should be considered by the jury. It is true that the declaration does not certainly indicate that Mr. Peek meant the defendant. He simply designated the person as "Henry." The defendant's Christian name is Henry. This fact, and other evidence in the case, without the semblance of a doubt, was sufficient to warrant the jury in finding that Mr. Peek meant the defendant. The fact that Mr. Leonard saw the defendant at the same time, when his opportunities for recognizing him were not as good as Mr. Peek's, renders it certain beyond a reasonable doubt that the latter also at the time knew and recognized the defendant.

2. The settled rule as to the admission of dying declarations is that evidence must be introduced showing that such declarations were made at a time when the declarant believed that he or she expected to soon die. This

must amount to a conviction. A mere transient or fleeting impression, it will be conceded, is not sufficient. It is the province of the court to determine when this has been sufficiently established. Mrs. Peek was the mother of three sons, named John, Fred, and Frank Beeker, who were with her almost constantly after she was shot until she died, and Frank testified that she said, on the sixth day of September, that "she was getting very weak, and knew she must die." "The day before she died she said: 'I am feeling very bad, Frank. Am growing weaker all the time. I know I am dying, and must go.' We encouraged her all we could. She said, 'No, it's of no use. I know I must die.'" Fred testified that she "seemed despondent and positive she was going to die. She seemed to think she had no longer to stay with us. We told her to cheer up; that perhaps she would recover. She said, 'No, children, don't think I can live.' We told her not to give up in that way; try and stay with us. She said she was growing weaker all the time, and knew she could not live much longer. John spoke to her, and said she ought to pray. She said, 'I do pray, John.'" John testified: "My brother Frank said, 'Ma, how are you feeling this morning?' She said, 'I am feeling very poorly. I know I must die.' We told her to cheer up; she might get better. She said, 'Yes, I would like to live; but I know I must die.' She said she heard beautiful music, and 'am getting weaker all the time.'" The physician that was attending the deceased informed her that such a wound was frequently serious; but he did not inform her it was necessarily fatal.

It clearly appears from the evidence that the deceased never rallied from the shock produced by the pistol shot. At no time did she express the belief or hope she would get well; but at all times when she gave expression to her belief on the subject she said she could not live, and that she would die. At times the deceased was delirious to some extent. Her condition was of a comatose character; but she knew and recognized the persons present, and expressed herself usually in a rational manner, and seemed to comprehend what she said, and her condition and the character of the wound would naturally cause any person to entertain apprehensions that it would prove fatal. We feel constrained to say that the declarations were admissible in evidence; for it is sufficient if it satisfactorily appears that they were "made under a sense of impending death," whether it be proved by the express words of the declarant, or inferred from his evident danger, or the opinion of the medical or other attendants stated to him, or from his conduct or other circumstances of the case, all of which may be resorted to in order to ascertain the state of the declarant's mind.

The length of time which elapsed between the declarations and the declarant's death furnishes no rule for the admission or rejection of the evidence, though, in the absence of any better evidence, it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending." 1 Greenl. Ev. § 158. In this case there is the express words of the deceased that she expected to die, and the character of the wound, and other circumstances which clearly indicate that such must have been the belief of the deceased. The fact that a part of the declaration was reduced to writing, signed by the deceased, and other declarations established by parol, is not a valid objection to the admission of the evidence. 1 Greenl. Ev. § 161.

8. The court instructed the jury that the "dying declarations of Mrs. Peek are in evidence in the case, entitled to the same consideration as if given under oath, and no greater," and the defendant asked the court to instruct the jury as follows: "In considering the dying declarations of Mrs. Peek, you will take into consideration the fact that they were not made under oath, and that she was not subject to cross-examination; and she states she met the defendant, and conversed with him, immediately after the wound from which she died was inflicted." This instruction was refused. The

ground on which declarations are deemed admissible in evidence is "that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." It therefore follows that the instruction given by the court is clearly correct. No authority has been cited which sustains the instruction asked. No rule or principle of law is therein enumerated. It simply states what every juror of ordinary understanding would recognize without any direction from the court. If the instruction had been given, it would not have constituted error, and we think it equally clear that it was not error to refuse it. If it had been given, it is apparent, we think, it would not have benefited the defendant. But, as we have said, it announces no rule of law, but, at most, simply stated a fact.

We have examined this case with the care its importance demands, and the evidence fully sustains the verdict. We have been unable to find any error in the record, and therefore the judgment of the district court must be affirmed.

KERN and another *v.* WILSON.

(*Supreme Court of Iowa.* December 16, 1887.)

1. TROVER AND CONVERSION—PLEADING—EVIDENCE OF OWNERSHIP.
   A petition in an action for conversion alleged that plaintiffs were the "absolute and unqualified owners of" certain property, that they acquired such ownership by purchase. Under this, plaintiffs offered in evidence a chattel mortgage in their favor as mortgagees. *Held* that, under Code Iowa, § 3225, subsec. 3, providing that "the facts constituting the plaintiff's right to the present possession, and the extent of his interest in the property, whether it be full or qualified ownership," must be set out, this evidence was not admissible to prove plaintiffs' ownership as alleged.
2. SAME—FAILURE OF PROOF.
   It was error, also, to refuse an instruction to the effect that, as the only evidence of plaintiffs' ownership under the petition was the chattel mortgage, the plaintiffs had failed to establish their ownership in the property claimed.
3. CHATTEL MORTGAGES—DESCRIPTION OF PARTIES—AMBIGUITY.
   A chattel mortgage read: "I, J. C. Dwyer, * * * in consideration of * * * to me in hand paid by J. B. Kern & Son, * * * party of the second part; * * * said mortgage covers all stock, and additions to the same that may be made from time to time by *second party*." *Held*, that it was error for the court, in attempting to ascertain the meaning of the parties, to construe "second party" as intended for "first party."
4. SAME—DESCRIPTION OF PROPERTY—PROVINCE OF JURY.
   A chattel mortgage described the property covered as "the drug stock purchased by first party of second party at Belmont, Iowa, * * * to be located at Dows. * * *" *Held*, that under this description it was a question for the jury to determine whether the parties included in the "drug stock" show-cases, bottles, funnels, etc., pertaining to the drug store.

Appeal from district court, Wright county; S. M. WEAVER, Judge.

Action by J. B. Kern & Son against H. G. Wilson, to recover specific personal property which the defendant, as sheriff, had taken possession of by virtue of a certain writ of attachment against J. C. Dwyer. Trial by jury. Verdict and judgment for the plaintiffs. The defendant appeals.

E. C. Walsh and *Nagle & Birdsall*, for appellant. *R. H. Whipple* and *Cook & Tilkins*, for appellees.

SEEVERS, J. 1. It is stated in the petition that the "plaintiffs are the absolute and unqualified owners of a stock of drugs, late in the possession of J. C. Dwyer, in a certain store building * * * in Dows, Iowa; that they acquired said ownership by purchase; that defendant wrongfully detains possession of the same." The plaintiffs offered to introduce in evidence a chattel

mortgage executed by Dwyer to them upon the goods in controversy, as they claimed. To this the defendant objected, upon several grounds, which were overruled. The defendant asked the court to instruct the jury that the "plaintiffs allege that they are the absolute and unqualified owners of the property in controversy in this case. The only evidence of such ownership introduced by them being a chattel mortgage, you are instructed that plaintiffs have failed to establish their ownership of the property in controversy, and your verdict must be for the defendant." This instruction was refused. It is provided by statute, in actions of this character, that "the facts constituting the plaintiff's right to the present possession, [of the property,] and the extent of his interest in the property, whether it be full or qualified ownership," must be stated in the petition. Code, § 3225, subsec. 3. This action was commenced in May, 1886, and the mortgage was given to secure the payment of two promissory notes; one of which became due in August, 1886, and the other in August, 1887. There are authorities which hold that, after default in the payment of the money secured by a chattel mortgage, the title to the mortgaged property becomes absolute in the mortgagee; but prior to that time, at least in this state, the mortgagee is not the unqualified and absolute owner of such property. The right of redemption certainly exists. *Hubbard* v. *Insurance Co.*, 33 Iowa, 325; *Goldsmith* v. *Willson*, 67 Iowa, 667, 25 N. W. Rep. 870; *Evans* v. *Harvester Works*, 63 Iowa, 204, 18 N. W. Rep. 881. The plaintiffs, however, under the provisions of the mortgage, were, at the time the action was commenced, entitled to the possession of the mortgaged property. Code, § 1927. This right, however, is much less than absolute ownership. The provision of the statute requiring the plaintiff to state the nature and extent of his interest means something; and it follows, when it is pleaded, that the plaintiffs' right to the possession of the property is because they were the absolute and unqualified owners thereof, and they must establish on the trial such ownership. The object of the statute was to advise the defendant of the nature of the plaintiffs' claim to the property, to the end that he could intelligently defend. The rule is that the proof must sustain the material allegations of the petition. *Woolsey* v. *Williams*, 34 Iowa, 413; *Edgerly* v. *Insurance Co.*, 43 Iowa, 587. The court therefore erred in admitting the mortgage in evidence, and also in refusing the instruction above set out.

2. As the plaintiff may see proper to amend the petition, it is deemed necessary to determine certain other questions which may arise on another trial. The mortgage states that "I, J. C. Dwyer, * * * in consideration of * * *, to me in hand paid by J. B. Kern & Son, * * * party of the second part; * * * said mortgage covers all of said stock, and additions to the same that may be made from time to time by second party." It became a material question on the trial whether this mortgage covered additions to the "drug stock" made by the mortgagor. The only provision in the mortgage in relation to such additions is the one above set out, which refers only to additions made by the second party, or mortgagees. It was the province of the court to construe the mortgage, and, looking at all its provisions, the court concluded that the additions made by the second party were intended to mean, and did mean, additions made by the first party. In other words, the court reached the conclusion that there was a mistake made in drafting the mortgage, and that this was apparent on its face. This conclusion ignores the positive language used in the mortgage to express the intention of the parties. The effect of the words used in the mortgage is that all additions to the stock made by J. B. Kern & Son are covered by and included in the mortgage; and the court held that, looking at the whole mortgage, the words must be construed to mean J. C. Dwyer. In construing the mortgage, the court was required to ascertain the actual meaning of the parties, or as nearly so as the words used would permit, without doing violence thereto, or to the rules of

law. *Moorman* v. *Collier*, 32 Iowa, 138. It was not competent for the court, in the effort made to ascertain the meaning of the parties, to strike out certain words, and insert others, so as to give a directly opposite meaning to the mortgage to that expressed on its face.

3. The property is described in the mortgage as follows: "The drug stock purchased by first party of second party at Belmont, Iowa, * * * to be located at Dows. * * *" It becomes material on the trial to determine what the words "drug stock" embraced; that is, what items or description of property was included therein. Without referring to the particular rulings of the court, we think the proper construction is that "drug stock" includes all articles ordinarily and usually kept therein at the place where the stock was situated, and it was a question for the jury to determine what such articles consisted of. Whether jars, show-cases, and other articles were included in the terms of the mortgage it was for the jury to say, under evidence which was, or at another trial may be, introduced. Any one having constructive or actual notice of the mortgage, we think, would naturally conclude that it included all property usually kept in a drug stock at the place where it was situated. A drug stock has a different meaning from the entire stock of drugs, medicines, oils, paints, and goods of every description now kept in a store-room. *Van Evera* v. *Davis*, 51 Iowa, 637, 2 N. W. Rep. 509, in which case it was considered by counsel that certain property designated as fixtures, which consisted of a number of "bottles, glass funnels, marble tell-till, mortars, globe, and other like articles," were not included in the terms of the mortgage. This concession, it may be supposed, was made because the words of the mortgage only included "drugs, medicines, oils, paints, and goods" kept for sale; and the contention in that case was whether evidence was admissible to show whether the parties intended to include anything else. It was held such evidence was inadmissible. It therefore follows that the fifth instruction given to the jury is correct; and our views as to other rulings made by the court in striking out evidence which, possibly, are more favorable to the appellant than he was entitled to, are sufficiently indicated. What we have said sufficiently indicates that the objection to the third instruction is not well taken. As at present advised, we do not think the objections made to the ninth instruction are tenable. Reversed.

BAYLISS v. DEFORD.

(*Supreme Court of Iowa.* December 16, 1887.)

JUDGMENT—RES ADJUDICATA—ISSUES—SPECIAL FINDINGS.

Defendant gave two notes for a harvesting-machine, conditioned that they were "given with the understanding that the harvester must be perfected, or this note is void." In an action brought upon the second of these notes, defendant by answer stated that he had been previously sued upon the first of the two notes, to which he set up the defense of the failure of the condition; alleged its breach, and a breach of warranty given with the machine; that the jury found specially the facts as averred, and found the difference between the value of the machine as warranted and as it was, to be the amount of the note at that time in suit. The answer in the present suit, upon the last note, also alleged a failure of the condition upon which it was to be paid. *Held*, upon demurrer, that the answer did not show a previous adjudication of the matter relied upon in defense, and did not show a judgment sufficient to compensate defendant for loss by the failure of the condition; and that the second note was subject to the defense set out.

Appeal from district court, Mitchell county.

Action by Edwin Bayliss against John Deford upon a promissory note. There was a demurrer to the defendant's answer. The court sustained the demurrer, and, the defendant electing to stand upon his answer, judgment was rendered against him for the amount of the note. The defendant appeals.

M. M. Browne and *J. M. Moody*, for appellant. *W. L. Eaton*, for appellee.

ADAMS, C. J. The answer shows, in substance, that the note in question was given for a harvester, being the third one of a series of notes; that some time prior to the harvest of 1875 the plaintiff sold the harvester to the defendant with a warranty; that upon trial the harvester proved defective and unsatisfactory; that the defendant, however, was induced to keep it, with the understanding that it should before another season be perfected, and made to comply with the warranty; that with this understanding the defendant gave the plaintiff three promissory notes of $60 each, and made payable, one December 1, 1875, one December 1, 1876, and one December 1, 1877,—the latter being the one now sued on. The answer shows that the first note was executed without any condition attached, but upon each of the other two notes there was written a condition in these words: "This note is given with the understanding that the harvester must be perfected, or this note is void." The answer shows, further, that the defendant paid the first note when it became due; that upon the second note he was sued, and as a defense set up the condition, and averred that the machine did not fulfill the warranty with which it was sold, and that the plaintiff had failed to perfect it; that upon trial the jury found specially the facts as averred, and found, also, that the difference in value of the machine as it actually was, and as it would have been if it had been as warranted, was the amount of the note then in suit; and judgment was accordingly rendered for the defendant. The answer, in addition to setting up the adjudication on the second note, sets up the condition on the note in suit, and avers the defective condition of the machine, and failure of the plaintiff to perfect it. The plaintiff demurred to the answer, upon the ground, in substance, that the answer shows that in the adjudication upon the second note the defendant was allowed all the damage to which he is entitled by reason of the defective condition of the machine, and ought, therefore, to pay the third note in full.

We have to say, however, that in our opinion the plaintiff's position cannot be sustained. In order to sustain it, we should be obliged to attach more importance to a special finding of the jury than we think it is entitled to. That finding relates to the difference in value of the machine as it actually was, and as it would have been if it had been as warranted. In our opinion, that finding was not material under the issues. The case was not one simply of a breach of warranty. The parties had expressly provided what should be the result if the machine should not be made good. The provision was contained in the condition written upon each of the last two notes. Those two notes were to be void, and that, too, regardless of the difference of the value of the machine as it was, and as it would have been if it had been as warranted. It is true that the answer in the suit upon the second note set up the warranty, and the failure, and the fact that the plaintiff neglected to perfect the machine; but it is manifest that all this was done merely to show that the condition written upon the note had not been complied with by the plaintiff, and that the note was therefore void.

If there had been no condition written upon the second note, and, in the action brought upon it, the defendant had pleaded simply a breach of warranty, and the special finding of the jury had been as above set out, there would have been some ground for contending that the defendant, having been allowed his full damages once, ought to pay the third note in full. But the contract between the parties was that, if the plaintiff failed to make the machine good, both the second and third notes should be void. It was the right, therefore, of the defendant to plead the failure as a defense to both notes. What was said about the warranty appears to have been merely a mode of pleading a failure to perform the condition expressed on the note. While that condition

was that the plaintiff should *perfect* the machine, the meaning evidently was that it should be made to comply with the warranty with which it had been sold. Probably a good answer could have been drawn in the action upon the second note without reference to the warranty, but we see no valid objection to pleading a breach of the condition written on the note in the way in which it was pleaded. We think that the real adjudication in that case was that that note was void, and, if that is so, the defendant is not precluded from claiming that this, the third, note, containing the same condition, is void also.

We think the court erred in sustaining the demurrer. Reversed.

LUCE *v.* MOOREHEAD and another.

(*Supreme Court of Iowa.* December 16, 1887.)

1. CHATTEL MORTGAGES—DESCRIPTION OF PROPERTY—CROPS TO BE GROWN.
Where a chattel mortgage describes certain property covered as "crops growing and to be grown" on certain land, it is sufficiently definite to cover the crops growing at the time of its execution, and as to them is valid, although the year when the crops are to be grown is not specified. Distinguishing *Pennington* v. *Jones*, 57 Iowa, 37, 10 N. W. Rep. 274.[1]

2. TROVER AND CONVERSION—TITLE OF PLAINTIFF—EVIDENCE.
A plaintiff in an action for conversion, has no ground of complaint because defendant introduces chattel mortgages on the property claimed to have been converted, which show that plaintiff has no interest in the property.

Appeal from district court, Harrison county.

Action by Lucy A. Luce against George P. Moorehead to recover the value of certain corn converted by defendant Moorehead. R. B. Hillis intervened. There was a judgment for defendants. Plaintiff appeals.

H. H. Roadifer and *J. W. Bernhart*, for appellant. *S. H. Cochran*, for appellees.

BECK, J. 1. The petition alleges that plaintiff held a landlord's lien upon certain corn grown upon land leased by her to one Lake, for which the rent remains due and unpaid, and that Lake sold and delivered the corn to defendant Moorehead, which he has converted to his own use. The plaintiff seeks in this action to recover the value of the corn. The defendant alleges in his answer that Lake executed to him a chattel mortgage, under which he acquired the corn in controversy, before the lease upon which plaintiff claims was executed; that Lake at that time owned the land upon which the corn was grown, and subsequently conveyed it to plaintiff, and executed the lease, and that the corn was planted before the lease was executed. Hillis intervened, claiming that the corn was covered by a chattel mortgage executed to him by Lake before the mortgage to defendant Moorehead was executed. The cause was tried to a jury, and a verdict was had for defendant as against plaintiff, and for the intervenor, as against defendant, for a small sum, upon which judgments were rendered. Plaintiff appeals, but defendant does not appeal, from the judgment in favor of the intervenor.

2. The mortgage under which defendant acquired the corn conveys, among other property, "all crops growing and to be grown" upon the land covered by plaintiff's lease. The evidence supports the allegations of defendant's answers as to the date of the execution of the mortgage being prior to the execution of the deed to the land and the lease to plaintiff, and the allegation that the corn was planted before the mortgage was executed. But plaintiff insists that the mortgage as to the corn is void for uncertainty in the description, for the reason that it fails to designate the year in which the crop was grown.

[1] Respecting mortgages on crops, and the sufficiency of the description of the subject of the mortgage, see Barr v. Cannon, (Iowa,) 28 N. W. Rep. 413; Cole v. Kerr, (Neb.) 28 N. W. Rep. 600, and note.

Plaintiff, to support this position, relies upon *Pennington* v. *Jones*, 57 Iowa, 37, 10 N. W. Rep. 274. That case holds that a mortgage covering crops "to be sown and raised" upon certain land described, was void for uncertainty, in that it failed to specify the year in which the crop was to be grown. As to the corn in question, there is no such uncertainty in the mortgage invoked in this case. It covers crops growing; that is, crops growing when the instrument was executed. It thus designates the year in which the crops are grown as the year in which the mortgage was executed. It would be void under the case just named as to the crops "to be grown;" but as such crops are not involved in this case, this uncertain description can have no effect upon defendant's rights. An instrument may be valid as to property sufficiently described, and void for uncertainty of the description of other property. The objection to defendant's mortgage on the ground of uncertainty of the description was made upon the offer to introduce it in evidence, and was renewed in requests to instruct the jury. In each case, it was correctly overruled.

3. The district court, against plaintiff's objection, permitted the mortgage under which the intervenor claims, and other mortgages to other persons, to be introduced in evidence. The objection is renewed in this court. We think it is not well taken. Plaintiff seeks to recover for the conversion of property upon which she held a lien. If these mortgages were paramount to her lien, her claim would be defeated, for she could not recover against defendant unless she showed that she was entitled to enforce her lien against the corn. In that case, the holders of these mortgages, and not plaintiff, are entitled to complain on account of the conversion of the property. She cannot recover against defendant when it is shown, as it was by these mortgages, that her lien cannot be enforced against the corn.

As the defendant does not appeal, no question arises in the case as to the judgment in favor of the intervenor.

The foregoing considerations dispose of all questions argued by plaintiff's counsel. The judgment of the district court is affirmed.

GALE v. BOHANAN.

(*Supreme Court of Iowa.* December 16, 1887.)

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—ARREST FOR MALICIOUS MISCHIEF.
There was a dispute between the parties as to the ownership of a hedge-fence, and plaintiff, claiming the fence, cut it down, and defendant procured his arrest therefor on a charge of malicious mischief, from which he was acquitted. He then brought this action for malicious prosecution. The evidence showed these facts, but did not show that the second had *reason to believe* that the first acted in malice when he cut down the hedge. *Held*, as malice was a necessary element to the crime of malicious mischief, the jury were justified in finding that the arrest was procured without probable cause.

2. SAME—EVIDENCE OF MALICE.
The evidence, in an action of malicious prosecution, tended to show that defendant had been informed by a surveyor of certain defects in the boundary line of his land, but persisted in claiming that he "had bought 160 acres, and would have it," regardless of the true boundary line. Plaintiff, the adjoining owner, cut down a hedge fence, which, according to the surveyor's statements made to defendant, was on plaintiff's land. Defendant thereupon procured his arrest on a charge of malicious mischief. *Held*, that the jury were warranted in finding that defendant acted maliciously in procuring the arrest.

3. APPEAL—ABSTRACT—EXCEPTIONS.
When the abstract does not show that the admission of questionable evidence was excepted to, it will not be passed upon in the appellate court.

Appeal from the superior court of Creston.

Action by Francis Gale against W. H. Bohanan to recover for a malicious prosecution. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Hanna & Porter, for appellant. *Maxwell & Leonard*, for appellee.

ADAMS, C. J. The defendant caused the plaintiff to be arrested and prosecuted on a charge of malicious mischief in cutting and destroying a hedge-fence, upon which charge he was acquitted.

1. The defendant assigns error in the admission of certain evidence; but the abstract does not show that the admission of the evidence was excepted to.

2. The defendant assigns as error that the verdict is in conflict with the second and third instructions given. Those instructions are as follows:" (2) If you find from a preponderance of the evidence that the defendant filed the information and caused the arrest of the defendant [present plaintiff] thereunder as alleged in plaintiff's petition, and at the time he filed said information he was actuated by malice towards the plaintiff, and as an ordinarily prudent man, had no probable cause for believing that the plaintiff was guilty of the crime charged in said information, then you should find for the plaintiff. (3) But if you find that the defendant, when he filed said information, was not actuated by malice, or that he had probable cause for believing that the plaintiff was guilty of the crime charged in said information, then you should find for the defendant."

The facts as disclosed by the evidence, are that the parties own adjoining land, and a dispute arose between the parties as to the ownership of a certain hedge-fence. The plaintiff claimed that it stood wholly upon his land, and the defendant denied that it did. The plaintiff, under his claim, cut the fence, and thereupon the defendant caused him to be prosecuted on a charge of malicious mischief. There was evidence tending to show that the defendant honestly believed that the fence did not stand wholly upon the plaintiff's land, and that plaintiff had no right to cut the same, and that he caused him to be arrested under such belief. The defendant relies upon this evidence as showing that he had probable cause. His counsel say: "If Bohanan honestly believed that he was the owner, and in good faith and to protect his own property insisted that Gale should not cut the fence, or any part of it, down, then we say that, if it is shown that Gale did actually cut down any part of said fence, then Bohanan had probable cause for believing the truthfulness of the charge made in the information filed before the justice." They seem to forget, however, that the mere cutting of the defendant's fence by the plaintiff would not constitute the crime of malicious mischief. It was not enough that the plaintiff committed an act that was wrongful. He was not to be deemed guilty of the crime charged unless his act was also malicious. To constitute probable cause, Bohanan should have had reason to think that Gale did not suppose the fence to be his. It appears to us that the jury had reason to conclude that Bohanan did not think that Gale was malicious in cutting the fence. As to whether Bohanan was malicious in causing the plaintiff to be prosecuted, it appears to us that there is evidence tending to show that he was. It consists, not only of evidence tending to show that Bohanan had reason to think that Gale's claim was honest, but of evidence tending to show that Bohanan intended to assert his claim regardless of what was right. It appears that one Worley, the county surveyor, was called upon to find the boundary line between the parties with the view of determining the ownership of the fence. He proceeded to make a survey, but was not allowed by Bohanan to finish it. The difficulty as to the boundary line appears to have grown out of the fact that the government survey did not give full measure. This was discovered by Worley, and he so informed Bohanan. Worley's testimony is in these words: "I told Mr. Bohanan that the original notes made section 8 [Bohanan's land] short. He said that he bought 160 acres, and would take no less, and he set a stone at 160 rods measure. * * * I endeavored to explain to Mr. Bohanan how it was that he could not get 160 acres; but he said that he bought it, and would have it. * * * He said

he got me to survey his land, and he would not pay for surveying other's land. * * * I was not at liberty to complete my survey. Bohanan must have 160 acres. I could not give it to him and quit." If we take the surveyor's testimony to be true, as the jury was at liberty to do, we think it tended to show downright perverisity on the part of Bohanan. It tended to show a disposition to set up a claim regardless of the true boundary line, and the jury might well have believed that it was with that disposition that he caused the plaintiff's arrest and prosecution.

Some other questions are presented; but we think that they are substantially disposed of by the views which we have expressed. We see no error, and the judgment must be affirmed.

LEWIS v. SAYLORS.

(*Supreme Court of Iowa.* December 16, 1887.)

1. MECHANICS' LIENS—CLAIMANT NEED NOT SHOW WHICH OF TWO BUILDINGS MATERIALS WERE USED IN.
   In an action to foreclose a mechanic's lien, the evidence showed that defendant was engaged in the erection of two buildings at the same time, for each of which he procured materials from plaintiff. *Held*, that it was not necessary for plaintiff to show that the particular materials in question went into the building on which the lien was sought to be established. If the question was of any materiality to defendant, the burden was on him to show how the materials were used; following *Lumber Co.* v. *Newton*, 33 N. W. Rep. 377.
2. SAME—PROOF OF DEFENDANT'S OWNERSHIP.
   In an action to foreclose a mechanic's lien, it was shown that defendant contracted for materials for the erection of the building; that he procured it to be erected; and that, since its erection, he had occupied it as a residence. *Held*, that defendant's ownership was sufficiently shown.
3. SAME—FILING SWORN STATEMENT WITH CLERK—PROOF—ADMISSIONS.
   It was admitted on the trial that the copy of the account attached to the petition as an exhibit was a copy of the statement of the account filed with the clerk, and that the same was sworn to and claimed a mechanic's lien. *Held*, that it was not necessary to introduce the sworn statement to prove that it had been filed.

Appeal from circuit court, Wayne county; DELL STUART, Judge.

Action by Henry Lewis on account for lumber and building material, and for the foreclosure of a mechanic's lien. Judgment was entered by the circuit court for plaintiff. Defendant, J. S. Saylors, appeals.

G. T. Wright and *Freeland & Miles*, for appellant. *C. W. Bolster*, for appellee.

REED, J. 1. Appellant does not question the correctness of the judgment on the money demand, but contends that the circuit court was not warranted by the evidence in establishing and foreclosing the mechanic's lien. The evidence shows that defendant was engaged in erecting two buildings at the same time, for each of which he procured materials from plaintiff, and it is contended that it was not shown that the particular materials for which a recovery was had went into the building on which the lien was sought to be established. It must be admitted that the evidence on the question is not very satisfactory; and if it was material to establish that fact, we probably would be compelled to hold that plaintiff had failed to prove that all of the materials went into the particular building in question. But we held in *Lumber Co.* v. *Newton*, 33 N. W. Rep. 377, upon precisely the same state of facts, that it was not necessary for the plaintiff to designate, either in his sworn statement of the account or in his petition, the particular lumber which went into either of the buildings. It was not meant by that holding that the plaintiff would be entitled to a lien upon one building for material which it was shown went into the other. All that was intended is that, if the question is of any materiality to the defendant, the burden would be upon him to show how the

materials were expended. The holding might well be based upon the familiar rule that the burden of proof as to any particular fact is upon that party who, from the circumstances of the case, has the exclusive knowledge of the fact.

2. It is next contended that it was not proven that defendant was the owner of the property on which the lien was sought to be established. But it was proven that he contracted for material for the erection of the building, and that he procured it to be erected, and that, since its erection, he occupied it as a place of residence. As against the alleged owner, this is *prime facie* evidence of ownership.

3. It is contended, also, that there was no evidence of the filing with the clerk of the sworn statement of the account. But it was admitted on the trial that the copy of the account, attached to the petition as an exhibit, was a copy of the statement of the account filed with the clerk, and that the same was sworn to and claimed a mechanic's lien. With this admission it is not necessary to introduce the sworn statement or to prove that it had been filed with the clerk. Affirmed.

ROBINSON *v.* CHICAGO, R. I. & P. RY. CO.

(*Supreme Court of Iowa.* December 16, 1887.)

CONTINUANCE—UNNECESSARY—COSTS IMPOSED ON APPLICANT.

Plaintiff was allowed to amend his petition, whereupon defendant asked for a continuance, which was granted; but the order for continuance also provided that defendant pay the costs thereof. It appeared that the amendment did not so change the issue as to necessitate the continuance. *Held* that, as defendant chose to accept the unnecessary continuance, accompanied by costs, the order should be affirmed. REED, J., dissenting.

Appeal from circuit court, Appanoose county.

Action by Thomas Robinson for a personal injury to his intestate. The plaintiff, at the term at which the case should have been tried, amended his petition. Thereupon the defendant applied for a continuance on the ground that, after the issue had been changed by the amendment, it was not prepared to go to trial. The court granted the continuance, but ordered that the costs be taxed to the defendant. From this order in respect to costs the defendant appeals.

T. S. Wright and *Tamehiel, Vermilion & Haynes*, for appellant. *T. M. Fee*, for appellee.

ADAMS, C. J. We do not think that the issue was so changed as to call for evidence different from that apparently called for under the original issue. It appears to us, therefore, that the continuance was unnecessary. The defendant then might have protected itself by waiving the order for a continuance, after seeing that it was accompanied by the order for the payment of costs. After accepting the unnecessary order for a continuance, accompanied by the order for the payment of costs, we do not think that it should be heard to complain of the latter order. Affirmed.

REED, J., dissenting.

DES MOINES ST. RY. CO. *v.* DES MOINES BROAD GAUGE ST. RY. CO.

(*Supreme Court of Iowa.* December 17, 1887.)

MUNICIPAL CORPORATIONS—STREET RAILWAYS—MONOPOLY PRIVILEGE.

The opinion filed in this case, as reported in 33 N. W. Rep. 610, was not intended to indicate that the court held that the city of Des Moines could not avail itself, by reason of the ordinance under which plaintiff acts, of any improved street railway, to be operated by other than animal power, if necessary for its welfare.

Petition for rehearing. See 83 N. W. Rep. 610. Supplemental opinion.

PER CURIAM. A petition for a rehearing has been filed in this case, and was fully argued at the last term. We have re-examined the case, and conclude that the petition for a rehearing must be overruled. It is proper, however, that we should say, in order to prevent any misconstruction of our opinion, that it was not our intention to hold, and it is not held, that the city is precluded by the ordinance under which the plaintiff is acting from availing itself of any improved street railway, to be operated by other than animal power, if reasonably necessary to meet the public wants. We did not regard such question as in the case, and on that we express no opinion.

DOWAGAIC MANUF'G CO. v. GIBSON.

(*Supreme Court of Iowa.* December 17, 1887.)

1. SALE—PAROL EVIDENCE—WARRANTY—INDUCEMENT.
Evidence showing representations as to the character, quality, and value of certain machinery sold on a written contract, and for which a note was given, which representations were make before the contract was executed, is not inadmissible as varying the terms of a written contract, not because it shows a parol warranty of articles sold on written contract. Such representations are admissible to show the inducement to the purchase.

2. SAME—FRAUD—WAIVER BY GIVING NOTE FOR PRICE.
Where it was claimed that a defendant had waived any question of fraud in a certain sale by giving a note for the articles purchased, after he had knowledge of the alleged fraud, *held* that, as there was some evidence, thought slight, that defendant, at the time of giving the note, reserved his right to damages for the fraud, the court properly refused to direct a verdict for plaintiff on the ground of the waiver.

Appeal from district court, Wright county.

Action against G. C. Gibson on a promissory note. There was a judgment upon a verdict for a small part of the amount claimed by plaintiff. He appeals.

R. H. Whipple, for appellant. *Williams & Baker*, for appellee.

BECK, J. 1. The defendant, in his answer, admits the execution of the note, but, as a defense, sets up a failure of consideration, alleging that the note was given to plaintiff for the purchase price of two harrows and one seeder, and that one of the harrows was never delivered to him. He further sets up a counter-claim in the following language: "That the defendant was induced to purchase said machinery through the false and fraudulent representations of the plaintiff's agent, made prior to the execution of the note, to the effect that said machinery was well adapted to the use for which it was intended; that the said articles are ready sale and well worth the price agreed to be paid, etc.; that, in fact, all the said representations were false and fraudulent, and that said machinery was not adapted to the uses represented; that it was of no value and unsalable; that the defendant is an agricultural implement dealer, but did not know whether the representations were true or false, but, relying upon said representations, he purchased the goods in question, and that, on account of the worthlessness of said goods, and the false representations of plaintiff, he has been damaged in the sum of one hundred and fifty dollars, for which he asks judgment." The plaintiff claimed to recover the amount of the face of the note, $95.55, with interest. The verdict and judgment were for plaintiff in the sum of $10.

2. The defendant was permitted, against plaintiff's objection, to introduce evidence showing representations as to the character, quality, and value of the implements for which the note was given, made by plaintiff or its agent before the written contract of sale was made, and before the note was executed. It is insisted that the evidence was erroneously admitted, for the reason that it tends to establish, by parol, a warranty, when the contract was

in writing, and could not, in that way, be varied, changed, or extended. But the evidence does not tend to establish a warranty, and was doubtless not introduced and admitted for that purpose. It was, however, competent to show fraud and misrepresentations, which defendant had set up in his counter-claim as a ground of defense and recovery on his part. The fact that the fraud and misrepresentations were made before the contract and note were executed, does not prevent defendant from showing that he was induced thereby to enter into the contract, and that he suffered loss and damages thereby. The fraud and misrepresentations were inducements to the purchase, and of necessity must have existed before the execution of the written contract.

3. Plaintiff insists that the court ought to have sustained its motion for a verdict, for the reasons that the evidence shows that defendant, when he executed the note, had knowledge of the breach of warranty and fraud, and thereby waived his right to set them up as a defense.

4. We need not determine the question as to whether such knowledge waives defendant's right for the reason that there was some evidence tending to show that, when he executed the note, he reserved his right to claim damages for the fraud and misrepresentation. To justify the court in directing a verdict for one party, there should be an absence of all proof the other way. There being some evidence, though slight, the district court rightly submitted the case to the jury. While most of the evidence on this point was rejected or stricken out, yet it does appear that defendant, in the negotiations resulting in the execution of the note, did claim damages, and there is other evidence tending to show that this claim was not settled or withdrawn when the note was given. The note was in fact a settlement of plaintiff's claim under the prior contract; but there is no evidence that other matters were settled. We think that there was some evidence tending to rebut the presumption that the settlement included defendants claim for damages.

5. Plaintiff maintains that the verdict is not supported by the evidence, in that there was no proof of a warranty or fraud. As we have seen, the defendant could recover on the counter-claim, in the absence of proof of a warranty, upon the fraud and false representations. We think that the verdict upon the counter-claim is not without the support of evidence.

6. The abstract does not contain the instructions given to the jury. We are to presume that they were correct, and must exercise every presumption in support of the rulings and judgment of the court in the absence of positive error appearing in the abstract. We reach the conclusion that no error is shown.

We have considered all questions argued by counsel. The judgment of the district court is affirmed.

WARNSTAFF *v.* LOUISA CO.

(*Supreme Court of Iowa.* December 17, 1887.)

CRIMINAL PRACTICE—WITNESS SUBPŒNAED BY JUSTICE BEFORE WARRANT ISSUED OR COMPLAINT FILED—COUNTY NOT LIABLE FOR MILEAGE.

A county is not liable for the mileage of a witness subpœnaed to attend a preliminary examination of a person accused of crime, where the subpœna was issued and served before the complaint was lodged with the magistrate, and before the accused was arrested.

Appeal from district court, Louisa county; A. H. STUTSMAN, Judge.

The plaintiff, Jane Warnstaff, claims she was a witness in a criminal case on the part of the state, and brought this action to recover of the defendant her fees as such witness. Judgment for the defendant, and the plaintiff appeals.

E. W. Tatlock, for appellant. *D. N. Sprague* and *Hurley & Hale*, for appellee.

SEEVERS, J. The facts are that on the eighth of March, 1886, a subpœna was issued in the usual form by a justice of the peace in Louisa county, directed to the plaintiff, requiring her to appear before such justice on the thirty-first day of March to testify in a certain action pending before the justice, wherein the state of Iowa was plaintiff and James D. Barr defendant, on the part of the state. This subpœna was forwarded to the plaintiff at Astoria, Oregon, and service thereon duly acknowledged by her on the seventeenth day of March, 1886. A similar subpœna in all respects was issued by the justice on the succeeding day, and sent to the sheriff of the proper county in Oregon, and the same was served on her by said sheriff on the seventeenth day of March, 1886. On the same day an information was verified by the plaintiff in the state of Oregon, charging the said Barr with having embezzled $400 of the money of the plaintiff in Louisa county in this state. The information was prepared in this state at the request of the plaintiff. We are unable to ascertain from the record when a warrant was issued for the arrest of Barr, but it must have been between the seventeenth day of March, 1886, and the twenty-fifth of said month. He was arrested, and, upon being brought before the justice, waived a preliminary examination, and gave bonds for his appearance to answer the charge at the next term of the district court. The plaintiff claims she came from Oregon to the state of Iowa in obedience to the subpœna, and was in said county ready to testify before the thirty-first day of March, and that she traveled 2,276 miles, and that her compensation as fixed by statute amounts to $227.60, which the defendant refused to pay.

It is provided by statute that a person charged with a crime may be arrested either with or without a warrant; and, when brought before the magistrate, he must be informed "of the offense with which he is charged." He must be allowed a reasonable time to send for counsel. Immediately after the appearance of counsel, the magistrate must proceed to examine into the case. The magistrate must issue subpœnas for any witnesses required by either the state or defendant. Code, §§ 4226–4233. The magistrate clearly has the power to issue subpœnas; but when or at what time is the material question. We think he cannot do so until an information has been filed by him, or until an arrest has been made, if it is made before the information has been filed, and the defendant is brought before him under arrest; for until an information has been filed or an arrest made, there is no case pending before him, and no crime has been legally charged against any one. A magistrate has no jurisdiction of a criminal offense until one has been preferred in the manner contemplated by statute. Until then his jurisdiction has not been invoked. Therefore we are of the opinion, as the subpœna was issued before the justice had obtained jurisdiction of the offense, he exceeded his power and jurisdiction, and therefore the subpœna was void, and cannot be said to amount to a request on the part of the state that the plaintiff should attend as a witness at the time mentioned. The plaintiff was bound at her peril to know whether the justice had power to issue the subpœna. As a matter of fact, she did know that no criminal action was pending when the subpœna was issued; for it was served on her the same day she verified the information. Counsel for appellant insist that *Westfall* v. *Madison Co.*, 62 Iowa, 427, 17 N. W. Rep. 614, is precisely like the case at bar. But there is a material difference between that case and this. In the former, a criminal action was pending when the subpœna was issued. The court, therefore, had the power to issue it. This probably would be true in the district court if the grand jury was simply inquiring whether a criminal offense had been committed.

The judgment of the district court is affirmed.

RAYBURN v. CENTRAL IOWA RY. CO.

(*Supreme Court of Iowa.* December 19, 1887.)

1. RAILROAD COMPANIES—NEGLIGENCE—PROVINCE OF COURT AND JURY.
Plaintiff and others, section-hands in the employ of defendant railroad company, were directed to get upon a loaded moving train by the conductor and others in charge. They requested those in charge of the train to stop it, but were told that, if stopped, it could not be started again. Plaintiff, in attempting to get on the moving car, was thrown down, and received severe personal injury. *Held*, that the facts do not warrant the conclusion, as a matter of law, that either plaintiff or defendant was guilty of negligence. The question was for the jury.[1]

2. SAME—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS.
It was not negligence for plaintiff to attempt to get on the moving car when required to do so by order of the conductor and others in charge.

3. SAME—LIABILITY OF RAILROAD COMPANY FOR INJURIES TO EMPLOYE—"USE AND OPERATION" OF TRAIN.
Code Iowa, § 1307, provides that railroad corporations shall be liable to persons or employes for damages sustained by neglect of agents, mismanagement of engineers, or willful wrong by them or other employes, when connected with the use and operation of a train. Plaintiff, a section-hand in the employ of defendant, was directed to get on a loaded moving train by the conductor and others in charge of the train, to go to another place to help unload it, and, in attempting to do so, was thrown down, and received personal injuries. *Held*, that such injuries occurred in the "use and operation" of the train, within the meaning of the statute.[2]

4. SAME—ACT MAKING RAILROAD COMPANY LIABLE NOT UNCONSTITUTIONAL.
Code Iowa, § 1307, providing that railroad corporations shall be liable to persons or employes for damages sustained by neglect of agents, mismanagement of engineers, or willful wrong by them or other employes, when connected with the use and operation of a train, is not in conflict with the fourteenth amendment to the constitution of the United States.[3]

5. APPEAL—MISCONDUCT IN ARGUMENT—AFFIDAVITS OF—BILL OF EXCEPTIONS.
Defendant's counsel filed affidavits to show misconduct of plaintiff's counsel in argument to the jury, and counter-affidavits were filed by plaintiff's counsel. *Held*, that matters of this kind ought not to be brought up, except upon bills of exceptions.

6. SAME—ASSIGNMENTS OF ERROR NOT ARGUED—ADDITIONAL ABSTRACT—COSTS.
Where defendant's counsel assign a great number of errors, but abandon all but a few in their argument, plaintiff is justified in procuring, and should not be required to pay the costs of, additional abstracts covering all the points of error assigned by defendant's counsel.

Appeal from district court, Mahaska county.

[1] As to the province of court and jury in considering questions of negligence, see Dwyer v. Railway Co., (N. J.) 7 Atl. Rep. 417; Iron Co. v. Fanning, (Pa.) 6 Atl. Rep. 578; Canal Co. v. Webster, Id. 841; Moynihan v. Whidden, (Mass.) 9 N. E. Rep. 645; Railroad Co. v. O'Connor, (Ill.) Id. 263; Burns v. Railroad Co., (Iowa,) 30 N. W. Rep. 25; Barbo v. Bassett, (Minn.) 29 N. W. Rep. 198, and note; Hoye v. Railway Co., (Wis.) Id. 646; Rush v. Railway Co., (Kan.) 12 Pac. Rep. 582; Nichols v. Railroad Co., (Ky.) 2 S. W. Rep. 181; Railroad Co. v. Howard, (Ga.) 3 S. E. Rep. 426; Walton v. Ackerman, (N. J.) 10 Atl. Rep. 709.

[2] Under Code Iowa, § 1307, making a railroad company liable to their employes for damages resulting from the negligence of other employes, the company is liable only for injuries sustained by those employed in the movement of cars and engines. See note to Hawley v. Railroad Co., (Iowa,) 29 N. W. Rep. 793. It is not necessary, however, that such employe should be engaged in the actual movement of the train, as an engineer, brakeman, or conductor. Thus a person injured in operating a ditching machine which is carried on a car, and worked by the movement of the car on the railroad track, is within the provision of the statute. Nelson v. Railway Co., (Iowa,) *post*, 611.

[3] As to the constitutionality of a statute which makes a railroad company liable to its employes for injuries incurred by them from the negligence of co-servants, see Bucklew v. Railway Co., (Iowa,) 21 N. W. Rep. 103, and note to Hawley v. Railroad Co., (Iowa,) 29 N. W. Rep. 793; Railroad Co. v. Koehlen, (Kan.) 15 Pac. Rep. 567.

Action to recover for personal injuries sustained by plaintiff, N. B. Rayburn, while attempting to go upon a car attached to a train drawn by an engine on defendant's railroad. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Anthony C. Daly, for appellant. *Sampson & Brown* and *John F. Lacy*, for appellee.

BECK, J. 1. The evidence shows that plaintiff was employed as a section-hand upon defendant's railroad, and while engaged in removing snow and ice from the track a train passed upon the road, wherein were a number of cars loaded with slack to be drawn to another place. Plaintiff and the men working with him were directed by the conductor and others upon and in charge of the train to get upon the cars and accompany them. It was the purpose to employ plaintiff and the other section-men in unloading the slack. The train was not stopped, and some of the section-hands requested those in charge of the train to stop it, but were informed that, if stopped, the train could not again be started. Thereupon plaintiff attempted to get upon one of the cars. By reason of a quick movement or "jerk" given to the train, and the snow upon the track, plaintiff was thrown down, and received a severe injury to one of his knees, which he claims is permanent.

2. Counsel for defendant insists that the conductor and others who ordered plaintiff to get upon the train were not negligent, for the reason that the train was moving so slowly that plaintiff could have gone upon the cars in entire safety. He again insists that plaintiff was not bound to get on the train until it stopped, and, if it was negligent in the conductor to order plaintiff to get upon the car, it was negligent in plaintiff to attempt it, and he urges that defendant is not chargeable with negligence, and that plaintiff is chargeable with contributory negligence. The facts of the case do not authorize the conclusion that, as a matter of law, either plaintiff or defendant is guilty of negligence. The question of the care of each was for the jury to determine, not for the court; and it cannot be truthfully said that there was a failure of evidence authorizing the jury to find negligence on the part of defendant, and due care on the part of plaintiff. The evidence is discussed at considerable length by defendant's counsel, to support his position to the contrary. It would be profitless to occupy the time required to review the evidence on this point, which could only be done in many pages.

3. If, under other circumstances, it would have been negligence in the plaintiff to attempt to get on the car while it was in motion, it was not negligence for him to do so when required by the order of the conductor and others having charge of the train. *Fransden* v. *Railway Co.*, 36 Iowa, 372; *Cooper* v. *Railway*, 44 Iowa, 184; *Pyne* v. *Railway Co.*, 54 Iowa, 223, 6 N. W. Rep. 281.

4. Counsel insists that plaintiff is not authorized to maintain this action for the negligence of his co-employes under Code, § 1307, for the reason that such negligence was in no manner connected with the use and operation of the railroad. It must be remembered that plaintiff was required to go upon the train for the purpose of aiding in unloading the cars. The employment and duties of plaintiff were identical in character with those of plaintiffs in *Schroeder* v. *Railway Co.*, 47 Iowa, 375; *McKnight* v. *Railway Const. Co.*, 43 Iowa, 46,—and unlike those of plaintiff in *Fransden* v. *Railway Co.*, 36 Iowa, 372; *Pyne* v. *Railway Co.*, 54 Iowa, 223, 6 N. W. Rep. 281; *Crowley* v. *Railway Co.*, 65 Iowa, 658, 20 N. W. Rep. 467, 22 N. W. Rep. 918; and *Farley* v. *Railway Co.*, 56 Iowa, 337, 9 N. W. Rep. 230. Following the doctrines of these cases, we hold that the plaintiff may maintain his action for injuries resulting from the negligence of an employe of the defendant engaged in operating the train upon its road.

5. Counsel insists that Code, § 1307, just cited, is in conflict with the four-

teenth amendment to the constitution of the United States. This precise question was determined adversely to counsel's position in *Buckley* v. *Railway Co.*, 64 Iowa, 603, 21 N. W. Rep. 103. We have no ground for doubting the correctness of our decision in that case, which is brought to our attention in the argument of counsel.

6. It is insisted that the verdict for $3,500 is excessive. The jury could well have found that plaintiff's injuries are permanent. We cannot say that the sum he recovered is in excess of the amount of damages which will compensate him for his injuries.

7. Counsel insists that the continuance of defendant's disability is attributable to his want of care after he was injured; but this was a matter for the consideration of the jury, and the record of the evidence discloses no ground upon which we can interfere with their findings in this regard.

8. It is urged that the court below erred in not setting aside the verdict on account of the misconduct of plaintiff's counsel in presenting, in their arguments to the jury, inflammatory appeals and considerations which should not have been urged to influence the finding of the verdict. The substance and language of that part of counsel's argument to which the objection is made are set out in affidavits of defendant's counsel at the trial, and of others. Counter-affidavits were filed by counsel on the other side. This contest of affidavits between members of the profession is unseemly, and ought not to be tolerated. The law provides for perpetuating of record such matters by bills of exceptions by which the court below can show the facts; thus avoiding the necessity of resorting to affidavits. In view of the fact that usually a short-hand writer is in attendance upon the trial courts, his aid can be secured to take down the improper words of counsel; or the court, when objection is made thereto, can at the time reduce them to writing. In either case, they may be then or afterwards embodied in a bill of exceptions. This practice will involve no inconvenience, and will secure greater accuracy in preserving the objectionable words of counsel than can be attained by resorting to affidavits and counter-affidavits. We conclude that matters of this kind ought not to be made of record, and brought here, except upon bills of exceptions. We have heretofore reviewed objections based upon like conduct of counsel which were shown by affidavits, but no objections were made on the ground that the facts and language brought in question were not preserved and embodied in the records by bills of exceptions. We doubt not that, had the objections been made, we would have refused to review the question of misbehavior of counsel; but, at all events, we are now satisfied that correct practice requires that the court below shall certify the facts and language complained of as amounting to misbehavior on the part of counsel. In support of this conclusion, see *Smith* v. *Wilson*, 31 N. W. Rep. 176, decided by the supreme court of Minnesota.

9. It is lastly insisted that plaintiff ought to be taxed with the costs of his additional abstract. We think differently. While defendant urges in argument no more than five or six of its assignments of error, they number sixty-four, and cover every point which ingenuity can suggest as being available for assault upon the judgment of the court below. Counsel of the plaintiff well prepared defenses at these numerous threatened approaches, for they knew not but attacks would be made at all. We think they were warranted in presenting the matter found in these additional abstracts in order to make their preparation complete against the threatening multiplicity of 64 assignments of error.

We have considered all questions discussed by counsel, and reach the conclusion that the judgment of the district court ought to be affirmed.

EVERETT v. CENTRAL IOWA RY. CO.

(*Supreme Court of Iowa.* December 14, 1887.)

1. ASSIGNMENT — OF CLAIM AGAINST RAILROAD COMPANY FOR KILLING STOCK—DOUBLE DAMAGES.
   A right of action against a railroad company for killing stock may be assigned, and the assignee, by serving the notice required by Code Iowa, § 1289, for the purpose of recovering double damages, will be entitled to recover such damages upon the same showing as the original owner of the stock.[1] REED, J., dissenting.
2. APPEAL—RECORD—MISCONDUCT OF ATTORNEY.
   When the misconduct of an attorney, in making statements to the jury, is alleged as error, the ruling of the trial judge, founded upon affidavits by each party, as to the statements, will not be disturbed. The record must clearly show misconduct by an attorney to justify a reversal of a decision on that ground.

Appeal from district court, Mahaska county; J. K. JOHNSON, Judge.

This is an action by J. F. Everett to recover double the value of certain live-stock, which were killed and injured by a train running on the defendant's railroad. There was a verdict and judgment for the plaintiff. Defendant appeals.

Anthony C. Daly, for appellant. *J. F. & W. B. Lacey*, for appellee.

ROTHROCK, J. 1. The claim made by the plaintiff is that two horses were killed, and a calf was injured. One of the horses was owned by one Hunt, and the other by one Shock. The calf was owned by the plaintiff. All of the damage accrued at the same time and place. A short time after the injury, Hunt and Shock assigned their claims for damages to the plaintiff. Afterwards the plaintiff served the notice and affidavit upon the defendant which are required by the statute to authorize a recovery of double the actual damages sustained by the owner of the stock killed or injured. The defendant objected to the introduction of the notice and affidavit in evidence. One ground of the objection was that a claim of this kind, if assignable at all, is only assignable so far as actual damages are involved, and that no assignment for the penalty or double damages is valid. The same question was raised in a request for instructions to the jury. The court refused to give the instructions as requested, and held that the claim was assignable. This is the first ground upon which a reversal of the judgment is asked.

The general rule in this state, under our statutes, is that any cause of action may be assigned. An action for a personal injury may be assigned. *Vimont v. Railway Co.*, 69 Iowa, 296, 22 N. W. Rep. 906, and 28 N. W. Rep. 612. There can be no doubt that the claim for damages in this case was assignable. The objection of the defendant to the assignment cannot be sustained. But it is insisted that the assignee could not acquire more by the assignment than the actual claim assigned, which, at the time of the assignment, was the right to recover actual damages, and no more. The ground of the argument is that an action for a statute penalty cannot be assigned. We think a complete answer to this is that no penalty was assigned. If the assignee had commenced his action in this case without serving the notice and affidavit, there would have been no right to recover double damages. The right accrued by the service of the notice. It is a right which arises, not from the fact of an injury resulting in damages to the owner of the stock killed or injured, but by reason of the failure of the defendant to pay the claim within 30 days after service of the notice and affidavit. It is a right that accrues during the process of collection, and to insure prompt payment without putting the claimant to the expense of litigation. Counsel for defendant contend that by the very language of the statute there can be no recovery of the double dam-

[1] See note at end of case.

ages by any one but the owner of the stock. The language is that "such *owner* shall be entitled to recover double the value of the stock killed, or damages thereto." Code, § 1289. But the word "owner" is not used in the statute in a restrictive sense. In the absence of a statute forbidding it, all demands are assignable, and it would be useless verbiage if the statute should, when it defines a right of action, always confer the right of action on the party in interest *or his assignee*. We think it is quite clear that the assignment carried with it all the rights of the assignor, as well those which had already accrued, as those which might arise in the collection of the claim.

2. It is claimed that the judgment should be reversed for misconduct of one the plaintiff's attorneys in the closing argument to the jury. It appears, by an affidavit by one of defendant's attorneys that the misconduct complained of consisted of certain alleged statements, made in the closing argument, which were unwarranted by the evidence and facts in the case. The attorney who made the argument made a counter-affidavit, in which it is claimed that all that was said by him was in reply to an argument made by one of defendant's attorneys. This is denied by an affidavit of one of defendant's attorneys. The matter was submitted to the court on these affidavits. We cannot be expected to reverse the ruling of the district court on this question. The judge no doubt determined the question upon his own knowledge of what transpired at the trial, as well as upon a consideration of the conflicting affidavits. When we are asked to reverse a judgment on the ground of misconduct of an attorney, the record should show the misconduct without question. We cannot say, in this case, that the court did not correctly decide that there was no misconduct. Moreover, see *Rayburn* v. *Railroad Co.*, *ante*, 606, (decided at the present term.) Affirmed.

REED, J., (*dissenting.*) My disagreement is as to the first point ruled in the foregoing opinion. I do not deny that a claim for damages for an injury such as is complained of is assignable. Neither do I make any question as to the power of the owner thereof to assign a claim for double damages after the right thereto has accrued. My dissent is as to what passed to plaintiff under the assignment. When the assignment was executed, the only right in existence was the right to be compensated for the injury sustained. Defendant was then liable only for the value of the property destroyed. It is true, events might occur in the future upon which it would become liable for double that amount; but no such right or liability existed at that time, and, unless it should occur in the future that defendant should neglect for 30 days after notice of the injury to pay the damages, never would exist. The assignment passed to the plaintiff the demands which the owners of the property then held; which, as I have said, were demands simply for the value of the property destroyed. It seems to me impossible that the assignment of an existing definite claim should operate to vest the assignee with rights which have no existence at the time of the assignment, and which are not necessarily or certainly incident to the thing assigned. In my judgment, therefore, the judgment ought to be modified by reducing the amount of the recovery to the actual damages.

NOTE.

TORTS—ACTION FOR—ASSIGNMENT. As a rule, only such actions are assignable as survive the death of a person, and would go to his executor or administrator. But the number of actions which survive has been greatly increased, by statute, in nearly all the states, over the number which existed at common law; and it is now the general doctrine in this country that all causes of action based upon torts to property, real or personal, which diminish the value of the estate, survive to the personal representative of the owner, and, as a consequence, are assignable. Davis v. Railway Co., 25 Fed. Rep. 786. In *Michigan*, causes of action for assault and battery, and for false imprisonment, survive, Dayton v. Fargo, 7 N. W. Rep. 758; in *Kansas*, actions for fraud, Davis v. Railroad Co., *supra*. But under the statutes of *Rhode Island*, which provide for the survival of actions for damages to the person, or real or personal estate, it is held that

an action for deceit is not assignable. The damage done must be to some specific property. Tufts v. Matthews, 10 Fed. Rep. 609. So, also, in *Michigan*, Dickinson v. Seaver, 7 N. W. Rep. 182; Dayton v. Fargo, *supra*.

NELSON v. CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Iowa.* December 20, 1887.)

1. RAILROAD COMPANIES—LIABILITY TO EMPLOYE FOR NEGLIGENCE OF CO-EMPLOYE.
Under Code Iowa, § 1307, providing for the recovery of damages suffered by reason of the negligence of a co-employe, "connected with the use and operation" of a railway, a person injured in operating a ditching-machine which is carried on a car, and worked by the movement of the car on the railroad track, comes within the provision, and evidence tending to show that the injury was caused by the negligence of co-employes should be submitted to the jury.[1]

2. NEGLIGENCE—CONTRIBUTORY—PROVINCE OF JURY.
Conflicting evidence as to whether plaintiff suffered the damage alleged by his own negligence should be submitted to the jury.

Appeal from district court, Scott county; A. J. LEFFINGWELL, Judge.

The plaintiff, Anton Nelson, brought this action to recover damages for a personal injury which he alleges he sustained by reason of the negligence of a co-employe while engaged in operating a ditching-machine upon a moving train of cars. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

Heins & Hirschl, for appellant. *Grant & Grant*, for appellee.

ROTHROCK, J. 1. At the close of the evidence, the defendant presented a motion that the jury be instructed to return a verdict for the defendant. The motion was as follows: "*First*. The undisputed evidence shows that plaintiff was at the time of his injury working on a ditching-machine constructed on a flat car, being struck by a crank which was made to revolve by the lowering of the bucket, which result was produced by the weight of the bucket alone; and that said accident or injury was not in any manner due to the neglect of any of defendant's agents, or the mismanagement of any of its employes or agents, connected in any manner with the use and operation of its railway on or about which they were employed. *Second*. The undisputed evidence shows that the injury was caused by his own neglect in not standing out of reach of the crank which struck him, when his duty did not require him to be there, and after he had been instructed and shown how to work the machine, and had actually been at work with it five or six days, and was bound to take notice of the danger of being in reach of it when not required to be there when the bucket was to be raised." The motion was sustained, and this ruling of the court is the grievance of which plaintiff complains.

The first question presented is, was the court in error in determining that there was no sufficient evidence for the consideration of the jury, and from which they might determine that the plaintiff was entitled to recover by reason of having been injured by the negligence of co-employes while engaged in an employment "connected with the use and operation" of a railway, as provided in section 1307 of the Code? To determine this question, it is necessary to understand the nature and character of the employment, and the cause of the injury. The train upon which the plaintiff was employed was what was called a "ditching train." As we understand it, the train consisted of a locomotive with its tender, a caboose, and a flat car, upon which the ditching-machine was placed, and upon which car it was operated by the plaintiff and other employes. The machinery consisted of a derrick and a scoop or shovel

[1] As to what are injuries occurring in the "use and operation" of a train, within the meaning of Code Iowa, § 1307, see Rayburn v. Railroad Co., (Iowa,) *ante*, 606, and note.

on each side of the car. The buckets were raised and lowered by means of a windlass. It was the plaintiff's duty to assist in raising one of the buckets when it was filled. At the time of the accident the bucket or scoop was being filled. It is not very clear how or by what force the buckets were filled. As we understand the facts, the buckets were lowered to the ground in the ditch, and were filled by the movement of the train, which scooped the buckets along on the ground. At the time of the accident the front end of it was too low to properly do its work, and the rear end of the bucket was let down. As it went down, it caused the windlass to revolve, and the crank struck the plaintiff, and broke his collar-bone. There is no dispute that the train was moving when the injury was received. There is no complaint that the engineer in charge of the locomotive was negligent in any respect. It is not claimed that the train was moved when it should not have been; indeed, the work in hand was accomplished by moving the train. The buckets or shovels could be raised or lowered with the train standing still, but to do the work for which the ditching-machine was intended it was absolutely necessary that the railway be "operated," within the meaning of the statute; that is, that the engine and cars be moved upon the track. Now, while thus engaged, the plaintiff was injured. It is very clear to our minds that his employment was such, at the time of the injury, as to bring him within the class of employes included in the statute above cited. The ditching-machine is altogether unlike a steam-shoveler, or a dredge worked by a stationary engine. It was propelled by a moving engine upon the track of the road. It is true, the plaintiff was not injured by contact with the wheels of a car or engine; but this was not necessary in order to entitle him to recover, because it is equally true that, if the car had not been in motion at the time, it would have been useless to raise or lower the bucket or shovel. It was the movement of the train that made it necessary to lower the rear end of the bucket. It was not necessary, to maintain the action, that the plaintiff should be an employe engaged in the actual movement of the train, as an engineer, brakeman, or conductor; it is sufficient if he was one of the crew necessary for the performance of the work intended to be done by the train, and its machinery and appliances. We think it is clear that the proof shows the case to be within the statute; and we do not regard it as necessary to discuss the cases heretofore determined by this court on this question.

2. It is claimed, however, in the second point of the motion, that the undisputed evidence shows that the plaintiff was injured by reason of his own neglect. We think there was such a conflict in the evidence on this question as that the case should have been submitted to the jury. As the cause must be reversed and remanded for a new trial, it is unnecessary, and perhaps improper, to discuss the evidence here. Reversed.

SEARL *v.* ABRAHAM and others.

(*Supreme Court of Iowa.* December 16, 1887.)

MUNICIPAL CORPORATIONS—CONTRACTS FOR LIGHTING STREETS—INJUNCTION TO RESTRAIN FROM MAKING ADDITIONAL CONTRACT.

In an action for injunction brought by a private citizen to restrain the mayor and council of a city from entering into a contract to have the streets lighted by electricity, it was alleged that a prior contract had been made with a gas-light company, which was yet in force, and that, by making the second contract, the city would increase its indebtedness; but it was not shown that the gas-light company had the ability or desire to perform its contract, nor that the city or the plaintiff would sustain any substantial injury by the contemplated act. *Held* that, without such showing, an injunction would not be granted.

Appeal from district court, Mahaska county; W. R. LEWIS, Judge.

Action by C. P. Searl for an injunction to restrain the defendant city of Oskaloosa and the other defendants, as mayor and city council of the defend-

ant city, from entering into a contract with the Edison Electric Light Company for lighting the streets of the city. A temporary injunction was granted, and afterwards the same was on motion dissolved. From the order dissolving the injunction the plaintiff appeals.

J. F. & W. R. Lacy, for appellant. *J. O. Malcolm* and *L. C. Blanchard*, for appellees.

ADAMS, C. J. The plaintiff avers that he is a citizen and tax-payer of the city of Oskaloosa; that the city has made a provision for lighting its streets by a contract with the Oskaloosa Gas Company, which is still in force, and that the city has exhausted its power for lighting its streets; that, notwithstanding such fact, the officers of the city are about to enter into a contract with the Edison Electric Light Company to light the same lamps, and that by such contract the city will increase its indebtedness beyond the constitutional limit. The defendants deny that there is any contract in force between the city and the Oskaloosa Gas-Light Company; and it contends that in any event the plaintiff, as a citizen and tax-payer, is not entitled to maintain an action for an injunction to restrain the city council from entering into another contract for lighting the streets.

We do not think that it is necessary to determine the question as to the validity of the alleged contract between the city and the Oskaloosa Gas-Light Company. For the purposes of the opinion, it may be conceded that it is valid. It is to be observed that that company is not complaining. The complaint is made by a mere citizen and tax-payer, and on the ground that his taxes will be increased. He claims, indeed, to have shown that the taxes of the city will be increased even beyond the constitutional limit. In respect to the latter position, that the contract would create an indebtedness in excess of the constitutional limit, we have to say that, as such contract could not be enforced, we do not think that the plaintiff has any ground of complaint, at least in advance of any steps taken by either party towards a performance of the contract. But we do not think that it is made to appear that the plaintiff's taxes would be increased at all. The Oskaloosa Gas-Light Company may have neither the ability nor desire to perform its contract. If this is so, the city might properly enough make other provision for lighting its streets. In no event would the city be liable to the Oskaloosa Gas-Light Company for more than the damages which it would sustain by reason of the refusal of the city to take and pay for its gas; and it may be that the damages would be such, if any, that the city could afford to pay them in consideration of a cheaper or better service by the other company.

The plaintiff does not show, with any reasonable certainty, that he would sustain any injury by the contemplated action of the council. Without such showing, we do not think that he is entitled to an injunction. *Dodge* v. *Council Bluffs*, 57 Iowa, 560, 10 N. W. Rep. 886; *Gas Co.* v. *Des Moines*, 44 Iowa, 510; *Dodge* v. *Woolsey*, 18 How. 331. In our opinion the injunction was rightly dissolved. Affirmed.

HULL v. BAIRD.

(*Supreme Court of Iowa.* December 17, 1887.)

1. DRAINAGE—ESTABLISHMENT OF DITCHES—NECESSITY—WRITTEN RECORD.
Under Code Iowa, § 1220, providing for the establishment and cutting of ditches when the board of trustees of a town deem it necessary for the public health, and providing that "all the findings and doings of the trustees shall be reduced to writing, and entered on record by the clerk," a ditch is not legally established without a written record showing the action of the trustees, and that the ditch was necessary for the public health. BECK, J., dissenting.

2. SAME—SUFFICIENCY OF RECORD.
One of the trustees testified that "his judgment" was that the record made by the trustees did not contain these recitals, and no other evidence on that question

appeared. *Held*, that this was sufficient evidence from which to draw the conclusion that the record was not properly made, and therefore the proceedings of the trustees were invalid.

Appeal from district court, Van Buren county.

Action by Charles Hull for a *mandamus* to compel the defendant, Byron P. Baird, to open a ditch alleged to have been duly established and constructed under the statute, and afterwards obstructed by him. The defendant denied the establishment of the ditch. There was a trial to a jury, and, under peremptory instruction from the court, the jury rendered a verdict for the defendant. The plaintiff appeals.

Wherry & Walker, for appellant. *Sloan, Work & Brown*, for appellee.

ADAMS, C. J. The ditch in question runs through the defendant's land, but he is not benefited by it. There is no doubt that the township trustees attempted to establish it, and supposed that they had legally done so. What precisely they did do is not shown by any existing record. Whatever record was made in the matter appears to have been destroyed by fire. The defendant insists that, to give the township jurisdiction to establish the ditch, it was necessary for them to find certain facts which, under the statute, justified taking private property for public use, and among them, that the land to be drained was a source of disease, and that the public health would be promoted by draining the same, and that the township trustees never found such facts. The statute (Code, § 1220) provides that "if the trustees are satisfied from personal examination of the premises, or from evidence of witnesses, that such swamp or marsh lands are a source of disease, that the public health will be promoted by draining the same, that such ditch is necessary for the proper cultivation of such lands, that the permanent value thereof will be increased thereby, and that it is necessary, in order to drain said lands, that such ditch should pass through the land of others, they shall determine the direction, depth, and width of such ditch as near as may be, and, if necessary, may employ the county surveyor to assist them; and after such examination, or hearing such evidence, may order or refuse the construction of said ditch. All the findings and doings of the trustees shall be reduced to writing, and entered on record by the clerk."

For the purpose of showing the contents of the lost record, the plaintiff introduced as a witness one Deford, who was one of the township trustees at the time the proceedings in relation to the ditch were had. He was asked by the court a question in these words: "Did the record that your township trustees signed recite anything about the overflow of the land being a source of disease, or that the public health would be promoted by draining the same?" To this the witness answered: "My judgment is that it did not." We do not discover any evidence that the record did contain such recital, and, while the testimony of Deford is not of a very positive character, yet, it being all there is which sheds any light upon the question, we think that the court might well have assumed that such recital was wanting.

Now, as the statute provides that all the findings of the trustees shall be reduced to writing, and entered upon the record, the presumption must be that any finding which the record did not show was not in fact made. We have a case, then, where the township trustees failed to find that the lands to be drained were a source of disease, and failed to find that the draining of the same would promote the public health. There is no presumption that the lands were of that character. This being so, it does not appear that the case was one in which private property could be taken for public use, and so the trustees had no jurisdiction to order and establish a ditch.

We have thus far proceeded upon the theory that the statute makes the fact that the land is a source of disease, and that the draining of it would promote the public health, a necessary jurisdictional fact. The defendant, however,

takes a different view of the statute. His view is that, while it may be a jurisdictional fact, it is not a necessary one, and that the ditch might be established, and land condemned for that purpose, if it was necessary for the proper cultivation of the swamp lands, or if their permanent value would be increased thereby. But it is to be observed that the expression of the different facts which may be regarded as calling for the ditch are connected by the word "and;" that is to say, the word "and" is finally used, which shows that it is to be supplied in what precedes where a conjunctive word is understood, as it is between the different clauses. In our opinion, all the different facts enumerated as calling for a ditch should exist in a given case, to justify its establishment.

In our opinion the action of the trustees was void. Affirmed.

BECK, J., (*dissenting.*) In my opinion, the omission of the record of the township trustees to show that the existence of the swamp or marsh was a source of disease, and the public health would be promoted by draining it, does not support the conclusion that the trustees acted without jurisdiction. The existence or non-existence of these facts is not a jurisdictional matter. Jurisdiction was acquired by the trustees by the service of the notice required by Code, § 1218. In my opinion the judgment of the district court ought to be reversed.

D. M. OSBORN & Co. v. SIMNERSON.

(*Supreme Court of Iowa.* December 16, 1887.)

1. SALE—ACTION FOR PRICE—ISSUES—EVIDENCE.
In an action for the purchase price of a harvester, the sole issue being whether defendant had given the machine a fair trial, a witness called as an expert for plaintiff was asked to state "how other machines made by plaintiff [in the same year] like the machine sold [defendant] worked,—whether good or bad." *Held*, that the question was properly excluded, as introducing a new issue not presented by the pleadings.

2. SAME.
The witness was also asked to state "whether or not the machine sold to defendant, the one you examined at his place, could have been made to do good work." *Held*, that the question was properly excluded, as not being confined to what the defendant contracted for.

3. SAME—CONTRACT NOT SIGNED BY DEFENDANT—INSTRUCTIONS.
Plaintiff offered in evidence a writing claimed to be the contract between the parties, but which was not signed by defendant. The court instructed that "the unsigned contract offered in evidence * * * cannot be regarded as the contract of the defendant upon which the plaintiff can recover as upon a written contract signed by him. * * * It at the most can only be considered as a part of the transaction at the time of the negotiation and agreement between the parties. If said paper was read over to the defendant accurately and fully, and fairly understood * * * by him, and he assented and agreed to the terms therein stated. * * * he is bound by said terms, and his liability will be determined accordingly." The objection being to the first sentence, *held*, that in an instruction consisting of several sentences, all bearing on the same question, all must be read together, and in this, taken as a whole, the court committed no prejudicial error.

Appeal from district court, Wright county; H. C. HENDERSON, Judge.

Action for the purchase price of a harvesting machine which plaintiff claims to have sold to defendant, Fred Simnerson. Defendant admits that he received the machine, but alleges that it was delivered to him upon the understanding that if, upon a fair trial, it worked as represented by plaintiff's agent, he would keep it, and pay the purchase price, otherwise he was not to keep it or pay for it; and that, upon a trial, it did not work as represented. The verdict and judgment were for defendant, and plaintiff appeals.

Nagle & Birdsall, for appellant. *A. R. Ladd*, for appellee.

SEEVERS, J. The verdict must be regarded as determining in defendant's favor the controversy between the parties as to the agreement or understanding on which he received the machine, which was that he was to give it a fair trial, and, if it worked as represented by the agent, he would keep it, and pay the price agreed upon. He did give it a trial by harvesting 10 acres of barley with it. He then notified the agent from whom he received it that it did not work satisfactorily, and requested him to telegraph plaintiff to send a man to put it in order, which was done; but, when the man sent by plaintiff went to his place, defendant refused to assist him to make any further trial of the machine, or to permit his team to be hitched to it that the agent might test it, but declared he would not keep it, and the agent did nothing to it. The evidence tended to show that the barley harvested by defendant with the machine was foul, and the ground upon which it grew wet and soft; and the question arose whether the trial afforded a fair test of the quality and working capacity of the machine. This was a controverted question on the trial. A witness who was familiar with the workings of the Osborn machine of 1883, like the one sold the defendant, and who was an expert in operating them, was asked the following questions by counsel for the plaintiff: "State how other machines made by the plaintiff's company in 1883, like the machine sold Simnerson, worked,—whether good or bad." "State whether or not the machine sold the defendant—the one you examined at his place—could have been made to do good work." These questions were objected to, and the objection sustained, and such ruling is assigned as error.

1. As to the first question, counsel contend that it was competent to show how other machines like the one in question work. Conceding it to be established that other machines worked well, then the deduction therefrom could be drawn that the machine in question had not been fairly tried. The material question was not whether the machine was a good one or not, and it was immaterial whether it was properly constructed, but the question was whether it had had a fair trial. Therefore, how other machines like this one worked was a collateral matter, and the evidence, if admitted, would have introduced into the case an issue not presented in the pleadings, and which the defendant could not have anticipated; and that is, whether the other machines were in fact like the one in question. If this had been conceded, then it might be said the question was whether the machine was like a model, or in principle would have been the same as where there has been a sale of goods by sample. In such case, it is clearly competent to compare and test the goods by the sample or the machine by the model. *Tilton* v. *Miller*, 66 Pa. St. 388. The question in this case is materially different. The right of the defendant to show that the other machines were not like the one in question cannot be doubted, and this is clearly a collateral matter. 1 Greenl. Ev. § 352. This question was determined, as we think, adversely to the plaintiff in *Harvesting Co.* v. *Gray*, 100 Ind. 285. The subsequent case cited by counsel for plaintiff of *Bank & Loan Co.* v. *Dunn*, 106 Ind. 110, 6 N. E. Rep. 131, is clearly distinguishable, and this fact is recognized by the supreme court of Indiana. The other cases cited by counsel for the appellant are not applicable.

2. As to the second question, we deem it sufficient to say that the ruling of the court is correct, conceding the inquiry was one in relation to which the evidence of an expert was competent, for the reason the trials of the other machines were not made under similar circumstances; that is to say, this qualification or limitation was not omitted from the question asked. It may be this machine could be made to do good work under favorable circumstances; but this was not what the defendant contracted for. The question asked, however, was so broad that the witness could well have answered that in his opinion the machine could have been made to work, and the test in his mind would have been under favorable circumstances.

3. The plaintiff offered in evidence a writing which it claimed was the contract actually entered into between the parties. It, however, was not signed by the defendant, and in relation thereto the court instructed the jury as follows: "The unsigned contract offered in evidence * * * cannot be regarded as the contract of the defendant, upon which the plaintiff can recover as upon a written contract signed by him. * * * It at the most can only be considered as a part of the transaction at the time of the negotiation and agreement between the parties. If said paper was read over to the defendant accurately and fully, and fairly understood * * * by him, and he assented and agreed to the terms therein stated, * * * he is bound by said terms, and his liability will be determined accordingly." The first sentence of this instruction is objected to, but prejudicial error cannot ordinarily be based on a single sentence in an instruction consisting of several sentences, all bearing on the same question. The whole instruction must be read, in order to determine its meaning. Doing this, it seems to us the instruction is correct and just to both parties.

The fourth, fifth, sixth, and seventh instructions are objected to by counsel. To set them out would require considerable space, and we deem it sufficient to say that they, and all the instructions given, are correct, and fairly state the several propositions of law pertinent to the case. The instructions given cover the whole ground, and therefore the instructions asked were correctly refused.

We cannot interfere with the verdict on the ground that it is not sustained by the evidence. Affirmed.

STATE v. WARD.

(*Supreme Court of Iowa.* December 17, 1887.)

1. RAPE—WHAT CONSTITUTES—FEAR AND COERCION—RESISTANCE.
An allegation of force in an indictment for rape is proved by evidence of a violation by physical force, or by evidence of a violation after frightening and coercing into subjection the woman ravished, and by evidence that the woman did not consent to intercourse, but used all resistance in her power, "under the circumstances, up to the time of intercourse."

2. SAME—WITNESS' NAME NOT INDORSED ON INDICTMENT—WAIVER OF OBJECTION.
A witness called by the state in a prosecution for rape, whose name was not indorsed on the indictment, and of whose testimony no notice was given, was, upon objection of defendant, excused, when defendant's counsel withdrew the objection, "but waived no rights," and thereupon the witness was recalled and examined without objection. *Held*, that such examination was not error, after the withdrawal of objections.

3. SAME—CHASTITY OF PROSECUTRIX—FORM OF QUESTION.
A question submitted to a witness for defendant in a prosecution for rape was: "Are you acquainted with the general reputation of the prosecuting witness * * * in that community for chastity?" *Held*, that it was properly excluded as incompetent and immaterial, as it did not confine the question of reputation to the time previous to the alleged rape.

4. SAME—CROSS-EXAMINATION OF PROSECUTRIX.
Where it appeared that defendant in a prosecution for rape was given the fullest chance to cross-examine the prosecuting witness, it is not error to refuse the admission of questions covering ground already covered by the testimony, nor to refuse the admission of questions clearly improper.

5. SAME—REPUTATION OF DEFENDANT AS PEACEABLE AND LAW-ABIDING.
A question put to a witness for defendant, who was testifying as to the latter's reputation, in these words: "Are you acquainted with his reputation as a peaceable, law-abiding citizen?"—was excluded as incompetent and immaterial. *Held*, that the ruling might well be sustained, on the ground that the question was not explicit by reason of the omission to include defendant's reputation in the community where he dwelt at and before the commission of the offense.

Appeal from district court, Woodbury county; C. H. LEWIS, Judge.

The defendant, Fred Ward, was indicted, tried, and convicted of the crime of rape, alleged to have been committed upon the person of one Mrs. McGlashen, and he appeals.

Murphy & Brost, for appellant. *A. J. Baker*, Atty. Gen., for the State.

ROTHROCK, J. 1. The complainant is a married woman and the mother of three small children; the youngest of which, at the time the alleged crime was committed, was about nine months old. They resided with her husband at a country place in Woodbury county, where the husband was engaged in operating a saw-mill. The defendant is an unmarried man, and at present goes by the name of Fred Ward. He had been living in Woodbury county some two or three years, and for about eight months before the alleged crime was committed he had been working in the neighborhood of McGlashen's saw-mill. Up to the time when he went into that neighborhood his name was Redman. It does not appear for what purpose he changed his name, and it is probably not a material inquiry in the case. On Sunday afternoon, August 25, 1885, the complaining witness was at home with two of her children. Her husband was away at a neighbor's house with the oldest child. The defendant came to the house on horseback, tied his horse, and went in the house, and had sexual intercourse with the complainant. It was claimed on the part of the state that the defendant assaulted the woman, and that she resisted him, and that the intercourse was effected by force, and against her will. The defendant claimed, and so testified on the trial, that the act was done with the consent of the woman, and for a consideration in money paid to her. Two witnesses testified that they met the defendant as he was going away from the house, and some distance therefrom, and that defendant told them that he had been to McGlashen's and had sexual intercourse with Mrs. McGlashen. He did not describe the means used to effect it.

The complaining witness, among other things, testified as follows: "I was afraid of him, but I didn't dare to run, on account of my children. Well, he took right hold of me, and of course I did all I could to get away from him, and I got out to the front door at once. I almost got away from him, and he grabbed my dress, and catched hold of my arm, and I did get away from him, and almost out of the front door. He caught me by one of my arms. Well, I don't just remember, but anyhow he just lifted me, and threw me right onto the floor, and threw his weight right onto me. I made all the struggle that laid in my power. I lugged his weight and mine all over the floor as long as I had any strength. I hollered, and he put his hand over my mouth, so I couldn't holler; and then I tried to hiss the dog, and I hissed the dog twice, and he said, if I did that again, he would kill me. He had both of my hands in one of his. I have told all I did in reference to resisting him. I did all in my power. He threatened to kill me a number of times. Just once he raised his hand to strike me. He accomplished his purpose; he had sexual intercourse with me at that time. I should judge it is about a hundred yards to my nearest neighbor's, Mr. Beals. I thought they were not at home. It was about as far again to my next nearest neighbor. After he accomplished his purpose, he told me, if I ever told, he would kill me; and then he left. He did not stay there any length of time. I did not see him when he went away. When he went away I hadn't got up yet off the floor. He hurt my arm, and one of my limbs. My dress was torn. There was bruises on my arm and one of my limbs. He held my hands clasped by one of his; he held me by this process, and hurt me, and I never will be as strong as I was before. When down on the floor he had his knees right on me for a time. When he was on me I crawled on the floor, or dragged on the floor, and dragged his weight. At this time my little baby was in the cradle, and my little girl was there, but when I got up I found her down to the mill-dam, to a shanty

we had down there. The child was scared almost to death. She wouldn't hardly come to me. I found her hid in a corner. Just as soon as I could get up, and get my baby, and hunt up my other child, I went away. I went to Mr. Crawford's. I did not go to my nearest neighbor, for the reason I thought they weren't at home; the doors were all shut."

It has appeared to us to be proper to set out this testimony, for the reason that complaint is made that the defendant was denied the right to fully cross-examine the witness. The witness was cross-examined at great length. The evident purpose of the examination was to show that she consented to the intercourse. There was not one word of her cross-examination inconsistent with her testimony as above set out. Objection was made by the state to certain questions in the cross-examination, and complaint is made because the objections were sustained. There is no merit in the objections. The questions were either repetitions of others previously answered, or they were clearly improper. We will give two or three of these questions as examples of others. One was as follows: "You may state any specific act the defendant did in effecting an entrance to your person;" another: "What, if anything, did the defendant use to effect an entrance to your person?" It is perfectly manifest that these and other kindred questions were improper, in view of the particularity with which the witness had again and again described the alleged assault upon her. We need not further allude to these objections. It appears to us that the defendant was allowed the fullest latitude in the cross-examination of the witness.

2. The defendant introduced in his defense a witness who testified that he lived in Floyd township, Woodbury county, and that he was acquainted with the defendant, and had known him about three years. He was then asked the question: "Are you acquainted with his [defendant's] reputation as a peaceable, law-abiding citizen?" The question was objected to by the state as being incompetent and immaterial, and the manner in which it was asked. The abstract recites that the "objection was sustained, with leave to call for the fact as to whether he knows his general character in the respect named." The defendant insists that this was erroneous. And it is argued that the witness should have been allowed to give the general reputation of the accused, as distinguished from his character as a fact. The ruling of the court can well be sustained, upon the ground that the question was not full and explicit, by reason of the omission to include therein the reputation in the neighborhood in which defendant lived at and before the commission of the alleged crime. The objection that the defendant was not permitted to show his good character is not well taken, because the witness was allowed to give proper evidence on that question. He was fully examined as to the defendant's character, and the answers show that the word "character" was used by the witness as synonymous with reputation.

3. The defendant introduced one Kellog as a witness, who testified that he had heard of Mrs. McGlashen, the prosecuting witness, and that he had known her for the last two or three years. He was then asked the question: "Are you acquainted with the general reputation of the prosecuting witness, Mrs. McGlashen, in that community for chastity?" The question was objected to upon the grounds, among others, that it was incompetent and immaterial. The objection was sustained. This was clearly correct, if for no other reason, because the inquiry was not limited to the reputation of the prosecuting witness up to the time and before the alleged crime was committed. This was an important consideration, inasmuch as the defense was not a denial of sexual intercourse, but was founded on the alleged fact that the intercourse was with the consent of the prosecuting witness. The defendant ought not to be allowed to show a bad reputation without expressly disconnecting therewith any animadversions there may have been against her growing out of his own act of sexual intercourse.

4. The state called two witnesses whose names were not indorsed on the indictment, and no notice was given of their testimony. When the first of these witnesses was called to the stand, the defendant objected to the witness upon the grounds above stated. The witness was excused. Thereupon counsel for the defendant said: "I desire to withdraw the objection I made to Mrs. Pettes' testimony, but waive no rights." The witness was recalled by the state and examined, to which the defendant made no objection. His counsel did not cross-examine either of these witnesses. It is claimed that the state had no right to examine these witnesses; but the defendant by withdrawing his objection to the examination of one of the witnesses, and by failing to make objection to the examination of the other, must be held to have consented thereto. It is true, he consented without waiving his legal rights. Under section 3, c. 168, Acts 17th Gen. Assem., he might have objected, and the court was evidently ready to exclude the witnesses. There can be no doubt that the defendant could, by his consent, waive the requirements of the statute, just as he may waive objection to incompetent evidence.

5. The state requested the court to give the following instruction to the jury: "The allegation of force is proved by any competent evidence showing that either the person of the woman was violated, and her resistance overcome by physical force, or that her will was overcome by duress or fear. In either case, the crime is complete, although she ceased all resistance before the act was finally consummated." The court modified the instruction as follows: "But before the defendant can be convicted of rape, it must be shown that Mrs. McGlashen did not consent to intercourse, but that she used all resistance in her power, under the circumstances, up to the time of the intercourse." As thus modified, the instruction was given to the jury. This instruction is claimed to be erroneous, because there was no evidence that the intercourse was accomplished by duress or through fear. We think there is no merit in this objection. If violently throwing the woman upon the floor, tearing the skirt of the dress from the waist, bruising her person, threatening to kill her, and struggling with her as described by the prosecuting witness, did not put her under duress and in fear, she must have been a remarkable woman. It is further claimed that the instruction is erroneous because it limits the resistance "up to the time of the intercourse." It is said this means to the commencement of intercourse only, and that, if she consented during its progress, the crime was not committed. This is an unwarranted criticism of the instruction. Its whole scope is to the effect that, in order to convict, the jury must find that she did not at any time consent to the criminal act. The judgment of the district court will be affirmed.

CANTILLON *et al.* v. DUBUQUE & N. W. R. Co.

(*Supreme Court of Iowa.* December 17, 1887.)

RAILROAD COMPANIES—TAX IN AID OF—SALE OF ROAD TO CONNECTING LINE—TAX NOT ENFORCEABLE.

The electors of a township voted a tax in aid of defendant railroad, payable when a certain number of miles of the road had been built, in return for which each taxpayer would be by law entitled to a certain number of shares of stock. Before the construction of the road was begun, defendant contracted with another railroad company, stipulating that, before a certain date, it would complete 50 miles of its road to a junction with, and then sell all its property to, the latter railroad; taking its stock in payment. This contract was signed by the officers, and approved by the directors of both railroads, but never submitted to the stockholders of either. Over a *year* later, after defendant had built miles enough of road to earn the voted tax, and had finished the stipulated 50 miles, the agreement for sale was canceled by the officers of both roads, and the cancellation approved by the stockholders of defendant company. On the same day, a formal conveyance of all its property was made by its officers and stockholders to the connecting road. It appeared that the connecting road furnished the money to build defendant's road, and, before the

conveyance, owned practically all the stock in defendant company. *Held* that, in view of all the dealings between the two companies, the contract of defendant to convey all it had to the connecting road, notwithstanding it had not been submitted to the stockholders for approval, amounted to a sale and disposal of all defendant's road and property, and, as this was accomplished before the tax was earned, payment of the tax could not be enforced. *Held, also,* that the tax-payers were not obliged to take the stock of the connecting road, instead of stock in defendant company to which the statute entitled them.

Appeal from district court, Dubuque county; C. F. COUCH, Judge.

Action in equity by W. J. Cantillon and others to enjoin the collection of a tax voted by the electors of Julien township Dubuque county, in aid of the Dubuque & Northwestern Railroad Company. The relief asked was granted, and the defendant appeals.

Fouke & Lyon and *Lusk & Bunn*, for appellant. *W. J. Cantillon* and *Wm. Graham*, for appellees.

SEEVERS, J. Counsel for the appellees contend that the tax in question is invalid, or its payment cannot be enforced, for several reasons. One is that the corporation has alienated or sold all of its road and property of every description to another corporation, and therefore cannot issue and give to each tax-payer the stock of the corporation in aid of which the tax was voted, for the amount of tax paid by him, as is provided by the statute authorizing municipalities to contribute in aid of the construction of railroads. Chapter 1331, Acts 16th Gen. Assem., and acts amendatory thereto. If the property of the corporation has been sold and conveyed to another corporation, within the meaning and intent of the rules established in *Manning* v. *Mathews*, 66 Iowa, 675, 24 N. W. Rep. 271; *Blunt* v. *Carpenter*, 68 Iowa, 265, 26 N. W. Rep. 438; and *Barttel* v. *Meader*, 33 N. W. Rep. 446,—then the payment of the tax cannot be enforced. But counsel for the appellant contend that such rule is not applicable, for the reason that the tax was earned before the sale and conveyance of the property of the corporation. It will be observed the objection concedes the sale and conveyance as broadly as is claimed, but that it was not made until after the tax was earned; that the corporation had constructed the railroad, and was entitled to the tax before the sale. This is denied by counsel for the appellees. The tax was voted, and one-half thereof was payable when the corporation completed its road-bed and track for five miles from its eastern terminus, and the remaining half when ten miles was constructed. The work of construction was commenced in the summer of 1885, and the first five miles was completed before December of that year, and the second five miles was completed before the first day of September, 1886. On the fifth day of May, 1885, which was prior to the commencement of the construction of said road, except that surveys had been made, and possibly the right of way and depot grounds had been secured, a contract was entered into between said corporation and the Minnesota & Northwestern Railroad Company, providing that the Dubuque Company should, on or before a named time, complete fifty miles of its road from Dubuque in a north-westerly direction, and the Minnesota Company should complete its line so that, by said time, a junction of the two roads should be effected, and it was further agreed as follows: "(2) That at or before the completion of said line, the two companies shall and will consolidate their properties into one line by the Dubuque Company selling to the Minnesota Company all its railways and appurtenances, subject to a mortgage of sixteen thousand dollars per mile, (bearing five per cent. interest,) and take in payment therefor the common and preferred stock of the Minnesota Company at the rate and to the extent of twenty-five thousand dollars per mile, to-wit, ten thousand dollars per mile in preferred stock, and fifteen thousand dollars per mile in common stock; or if, under the laws of Iowa, this method of consolidation cannot be effected, then the consolidation shall be perfected in some legal manner on substantially the above basis."

The contract was signed by the president and secretary of the two corporations, and the seals thereof duly attached thereto, and, as we understand, the contract was approved by the board of directors of both corporations; but it was never submitted to and approved by the stockholders of either corporation, and therefore it is claimed by counsel for the appellants that such contract is a nullity. Afterwards, on the thirteenth day of November, 1886, an agreement was entered into whereby the foregoing contract was "canceled and annulled." This agreement was executed in the manner above stated, except that it was not signed by the secretary of the Minnesota Company, and on the same day it was approved by the stockholders of the Dubuque Company; but it was not submitted to the stockholders of the Minnesota Company. On the same day a conveyance was made by the proper officials of the Dubuque Company, whereby the corporation granted, bargained, sold, and conveyed to the Minnesota Company all the railroad and railway known as the "Dubuque & Northwestern Railway, including all the railroads, railways, and rights of ways, and all depot grounds and other lands; all the tracks, bridges, viaducts, culverts, fences, and other structures; all depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and coal-houses, and other buildings; and all machine shops and other shops;" and all property of every kind and description owned by the Dubuque Company. This conveyance was approved on the day it was executed by the stockholders of the Dubuque Company. It is apparent and the evidence shows that when said conveyance was executed the Dubuque Company had nothing left except a few hundred dollars in its treasury. It had sold and conveyed all of its property, and to all practical intent and purpose ceased to exist, and its directors and stockholders so regarded it, and thereafter ceased to do any business. We are uncertain which was first executed,—the agreement canceling the contract of May 5th, or the conveyance,—and in fact it makes no difference which was first executed. Both were executed at the same time, or so nearly so as to constitute a single transaction. The conveyance simply carried into effect the contract made May 5th; and this being so, it is difficult to see why the latter was canceled. No satisfactory reason is shown why such course was adopted. To our minds it is perfectly apparent that the agreement of May 5th was canceled because it was well known and understood that the conveyance would be executed.

We are clearly of the opinion that, at the time the cancellation was made, the Dubuque Company were powerless to do any act which the Minnesota Company might see fit to object to. It was in fact at that time bound hand and foot to the Minnesota Company, and could not do otherwise than carry into effect the policy it might dictate. This conclusion is based upon the evidence, and we deem it sufficient to say that our conclusion is that the Minnesota Company furnished the money to construct the road, and, because of this fact, and certain contracts entered into, the Minnesota Company, or persons acting for such company, owned practically all the stock in the Dubuque Company for some time preceding the conveyance, and therefore the Minnesota Company could dictate the policy to be pursued, and had the power to enforce the same. We must not be understood as intimating the Minnesota Company did anything improper. On the contrary, we think that what it did was entirely consistent with and done for its best interests; but while this is so, neither of these corporations could act so as to impair the rights of the tax-payers. By the contract of May 5th, the Dubuque Company obligated itself to sell and convey all that it has. At that time the tax was not earned, and said company could not at that time have enforced the payment of the tax, and, in view of other contracts made about that time, and all the facts and circumstances, together with the subsequent acts and conduct of both corporations, the contract made in May amounted to a sale and disposal of all the road and property of the Dubuque Company, and it was so understood,

and therefore this case is within the cases above cited. Neither of the corporations regarded the contract made in May as a nullity, and it can hardly be so regarded when the question is practically considered, conceding the approval thereof by the stockholders essential. This could in all probability have been procured at any time. Again, it may be regarded as doubtful whether any one but a stockholder could avoid it. But conceding otherwise, we feel satisfied that the plaintiffs were not bound to take such risk and the burden to establish that the contract was void. It is said that the plaintiffs can have stock in the Minnesota Company in the place and instead of stock in the Dubuque Company, and that the former is of greater value than the last-named stock could ever possibly be. This last proposition is uncertain, and must ever remain so. But conceding all that is claimed, it seems to us that the tax-payers who voted against the tax are at least entitled to the thing the statute provided they should have. They cannot be compelled to take something else, which, in the opinion of some business man, is of greater value. It is claimed the plaintiffs are estopped by their conduct; but this question was considered and determined adversely to appellants in *Bartlet* v. *Meader*, before cited.

The judgment of the district court is affirmed.

ADAMS, C. J., took no part in this case.

MOORE *v.* HELD *et al.*

(*Supreme Court of Iowa.* December 17, 1887.)

1. APPEAL—FAILURE TO SERVE NOTICE OF APPEAL ON CO-PARTIES.
   Code Iowa, § 3174, provides that "a part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties." Sections 3178 and 3179, however, provide that an appeal is taken by serving a notice upon the adverse party or his agent, and that the appeal shall be deemed perfected when such service is made, and the clerk's fees secured. Where an appeal was duly taken by two of several co-parties, but without service of notice on the other co-parties, *held* that, notwithstanding appellants' omission to serve notice on the co-parties, the court had jurisdiction to determine such questions as only affected the interests of appellants and the adverse party.
2. SAME—APPEAL FROM JUDGMENT TAXING COSTS.
   Held, also, that an appeal taken by one of several co-parties from a judgment taxing costs against all of them was such an appeal as the court could not consider, unless notice had been served upon the other co-parties; for a modification of the judgment as to one co-party would affect the rights of all the others.
3. MUNICIPAL CORPORATIONS—ACTION TO PREVENT EXECUTION OF CONTRACT—TOWN NOT MADE PARTY.
   In an action by a tax-payer against the mayor and trustees of a town to prevent the execution of a contract made by them for the purchase of a tract of land from one of the defendant trustees, where the land had been conveyed to the town, and partly paid for, the court ordered the trustee to refund the money, and appointed a commissioner to reconvey to him the property. *Held*, that the town, not being made a party to the proceeding, could not be divested of the property, nor could the trustee be required to refund the money without a valid reconveyance of the land.

Appeal from district court, Boone county.

Plaintiff, John D. Moore, is a tax-payer in the town of Booneboro. The defendant George W. Hoover is mayor, and the defendants Burkly, Bowman, Sherman, Held, and Babcock are trustees, and defendant Mathews is recorder, of said town. Plaintiff brought this action to enjoin the defendants from negotiating certain bonds of the town, and from paying any money belonging to the corporation upon certain contracts for the purchase of a tract of ground, and the erection of a building thereon. The petition also prayed for general relief. The contract for the purchase of the ground was entered into with defendant Held, and before the action was commenced he had conveyed the

premises to the town, and had also received a part of the consideration agreed to be paid therefor. The district court entered judgment restraining the sale of the bonds, and the payment of any money on the contracts; also requiring defendant Held to pay back to the town the amount of money received by him under the contract, and appointing a commissioner to reconvey the premises to him.

E. L. Greene, for appellants. *S. R. Dyer* and *Rumsey & Brockett*, for appellee.

REED, J. On the eighteenth of October, 1884, a resolution was introduced in the town council, and declared adopted, whereby the council resolved to purchase certain specified real estate, at the price of $7,500, for the purpose of erecting thereon a town hall. On the third of November following, an ordinance was introduced, providing for issuing the bonds of the town to the amount of $3,500 to raise the money to pay for the real estate and for the erection of the building thereon. The ordinance was once read on the day it was offered, and at a subsequent meeting, held on the fifth of the same month, its second and third reading were dispensed with, and it was published and recorded among the ordinances of the town. Plaintiff's complaint is that it was never in fact put upon its final passage or adopted, and that the requisite number of trustees did not vote to suspend the rule requiring it to be read upon three different days before being put upon its passage, and that neither it nor the resolution received the number of votes requisite to their adoption; also, that the price agreed to be paid for the real estate was greatly in excess of its real value, and that the contract for its purchase was unlawful for that; and the further reason that defendant Held, the person with whom it was made, was a trustee and member of the council.

1. Appellants served their notice of appeal on plaintiff and the clerk, but did not serve it on the other defendants. Appellee filed a motion to dismiss the appeal, for the reason that the co-defendants were not served. The question which arises under the motion is whether this court, in the absence of the other defendants, has jurisdiction in the case. Section 3174 of the Code is as follows: "A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the supreme court." Sections 3178 and 3179 are as follows: "An appeal is taken by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some part thereof, defining such part." "An appeal shall not be perfected until the notice thereof has been served upon both the party and the clerk, and the clerk paid or secured his fees for a transcript. * * *" We think that the requirement that the notice, when the appeal is taken by a part of several co-parties, shall be served upon the other co-parties, is not a jurisdictional one. This is apparent from the language of sections 3178 and 3179. Under those sections, the appeal is taken by serving the adverse party and the clerk with the notice; and it is deemed perfected when such service is made, and the fees of the clerk for a transcript are paid or secured. When that is done, this court has jurisdiction to determine such questions in the case as affect only the rights and interests of the appellant and the adverse party. It sometimes occurs, however, that the judgment appealed from cannot be modified or reversed without injuriously affecting the interests of the co-parties with the appellant. In such cases, we will not consider the appeal unless the co-parties have been served. *Hunt* v. *Hawley*, 70 Iowa, 183, 30 N. W. Rep. 477. There are questions in this case with which the defendants who did not appeal have no concern. The motion will therefore be overruled.

2. The town of Booneboro was not made a party to the action. The judg-

ment, however, in effect rescinds the contract between it and defendant Held. He is required to pay back the money which he received under the contract, and a commissioner appointed by the court is ordered to execute to him a conveyance of the property. But the town cannot be divested of the property by a proceeding to which it is not a party; nor can he be required to refund the money without being placed *in statu quo*. The conveyance by the commissioner will not do that, for, as the town is not a party to the action, the conveyance would not divest it of the property. The case is within the principle of *Turner* v. *Cruzen*, 70 Iowa, 202, 30 N. W. Rep. 483.

3. The judgment below taxes all of the costs of the proceeding to those defendants who, as members of the town council, voted in favor of the passage of the resolution and ordinance. Appellant Bowman complains of this part of the judgment; but it is obvious that the judgment in that respect could not be modified without affecting the interests of those defendants who did not appeal. Under the rule laid down in the first division of this opinion, then, we will not consider that question.

So much of the judgment as requires the defendant Held to refund the money received by him under the contract, and directs the commissioner to reconvey the property to him, is reversed. The other provisions, we hold, cannot on this appeal be reversed. Modified.

STATE v. COLLIS.

(Supreme Court of Iowa. December 17, 1887.)

INDICTMENT AND INFORMATION — GRAND JURY INDICT SUA SPONTE AFTER DISMISSAL OF CHARGE.

Code Iowa, § 4290, providing that the dismissal of a charge against a person by a grand jury "does not prevent the same from being again submitted to a grand jury as often as the court may direct, but, without such direction, it cannot again be submitted," does not forbid the grand jury from finding an indictment upon their own motion on a charge that has once been dismissed, but which has not been resubmitted by the court.

Appeal from district court, Des Moines county; C. H. PHELPS, Judge.

This is an appeal by the state from an order dismissing an indictment against the defendant, Charles Collis.

A. J. Baker, Atty. Gen., for the State. *Antrobus & McArthur*, for defendant.

REED, J. A preliminary information was filed before a magistrate, charging the defendant and one Frank Clark with a public offense. Upon an examination, the magistrate held the parties to answer any indictment which the grand jury might return against them. At the next term of the district court, the papers relating to the preliminary examination were submitted to the grand jury, but the grand jury refused to find an indictment against the parties, and returned the papers with an indorsement thereon to the effect that the charge was dismissed. A subsequent grand jury, however, without having had the charge submitted to it by the court, returned an indictment against this defendant alone, charging him with the same public offense. The ground of the motion to dismiss is that the grand jury did not have authority, in the absence of an order of court resubmitting the charge to them, to return an indictment charging the defendant with the same offense. It is the duty of the court to submit to the grand jury all papers relating to the arrest and preliminary examination of persons who have been held to answer. Code, § 4289. The same section also provides that the grand jury, if it refuses to find an indictment in any case thus submitted to it, shall return the papers therein to the court, with an indorsement therein, signed by the foreman, to the effect that the charge is dismissed. It thereupon becomes the

duty of the court to order the discharge of the defendant from custody, or the exoneration of his trial, unless the court should be of opinion that the charge be again submitted to the grand jury, in which case the defendant may be continued on bail or in custody until the next term of court. Section 4290 is as follows: "Such dismissal of the charge does not prevent the same from being again submitted to a grand jury as often as the court may direct; but without such direction it cannot again be submitted."

The question in the case is whether the last clause of the section prohibits the grand jury from finding an indictment on a charge which has once been dismissed, but which has not been resubmitted to it by the court. We think it does not. The provision relates merely to matter of the *submission* of such causes to the grand jury. After they have been once dismissed, they can be resubmitted only by direction of the court; that is, the court can require the grand jury to again investigate the charge, only by directing it to be resubmitted. But the power of the grand jury in the premises is not dependent upon the order or direction of the court; its powers and duties are prescribed by other provisions of statute. The oath which is administered to the members of the grand jury requires them to make diligent inquiry and true presentment of all public offenses against the people of the state, committed or triable within the county, of which they have or can obtain legal evidence. Code, § 4268. And section 4272 provides that "the grand jury has power, and it is made its duty, to inquire into all indictable offenses committed or which may be tried within the county, and present them to the court by indictment." The general nature of the powers and duties imposed upon the grand jury by the provisions is in no manner qualified or limited by section 4290. Reversed.

HINSON *v.* BAILEY *et al.*

(*Supreme Court of Iowa.* December 17, 1887.)

DEED—DELIVERY—ESCROW—DEATH OF GRANTOR—TESTAMENTARY DISPOSITION.

Defendant and her mother went together to a justice of the peace, where the mother signed and acknowledged a deed conveying certain property to defendant. The mother then left the deed in the custody of the justice, with instructions to keep it until she had died, and then file it for record. The justice told her she could have the deed whenever she wanted it, but she replied: "I don't want it. You must keep it until I die." She also told defendant that she had deeded the land to her. *Held*, that the evidence showed a present delivery, and not an attempt to make a testamentary disposition of the property.

Appeal from district court, Des Moines county; C. H. PHELPS, Judge.

Action by Joab Hinson, Jr., for partition of certain land. The defendants, Sarah Bailey and Keziah Foster, deny that the plaintiff has any interest in the land, and aver that they are the sole owners of the same. The court found for the defendants, and dismissed the plaintiff's petition, and he appeals.

Newman & Blake, D. Y. Overton, and *Poor & Baldwin*, for appellant. *J. C. Power*, for appellee.

ADAMS, C. J. The land was formerly owned by one Eva Hinson, now deceased. The plaintiff and the defendants are her children and only heirs. The plaintiff avers that his mother, Eva Hinson, died intestate and seized of the land. The defendants claim to be the owners of the same by deed from Eva Hinson. The plaintiff does not deny the execution of the deed, but avers that the grantor was not of sufficiently sound mind to execute a valid deed. He also avers that there was no delivery of the deed by the grantor.

As to the alleged lack of mental capacity of Mrs. Hinson to make the deed, we have to say that we have all read the evidence separately, and have all reached the conclusion that the plaintiff's position cannot be sustained.

The alleged want of delivery presents a question of more difficulty. The facts are that Mrs. Hinson had previously made a will devising the land to her daughters. Afterwards she concluded to revoke her will, and make a deed of the land to her daughters. She and the defendant Sarah Bailey went to a justice of the peace, and she signed and acknowledged a deed before him. She then left the deed in the custody of the justice, with instructions to keep it until she had died, and then file the deed for record. The justice told her that she could have the deed whenever she should want it, but she replied: "I don't want it. You must keep it until I die." She told the defendant Sarah Bailey, who had accompanied her to the justice, that she had deeded the land to her, as Mrs. Bailey understood. The plaintiff claims that the design of Mrs. Hinson was that the deed should take effect only after her death, and that, such being the fact, it was testamentary in its character, and invalid, because not executed with the formalities which would enable it to take effect as a will; citing *Leaver* v. *Gauss*, 62 Iowa, 314, 17 N. W. Rep. 522; *Baker* v. *Haskell*, 47 N. H. 479. The defendants contend that the grantor intended that the deed should take effect immediately, but that it should not be recorded until after her death, and that the justice of the peace was made by her custodian of the deed to carry out her intentions in that respect. In supporting this, our attention is called to the fact that the evidence shows indisputably that Mrs. Hinson did not contemplate the possibility of reclaiming the deed, and did express herself to Mrs. Bailey as having made a conveyance. In our opinion, this position must be sustained. It may be, as claimed by plaintiff, that she did not surrender possession to the grantees; but the circumstances are such that we cannot attach much importance to such fact. In view of what Mrs. Hinson appears to have said to the justice, and of what she said to Mrs. Bailey, we do not discover any motive which she could have had in making the justice the custodian, except to keep the deed from the record during her life. We reach the conclusion that she understood that it operated as a deed, and that the justice was the custodian for the grantees. We think the judgment must be affirmed.

McCORMICK HARVESTING MACHINE CO. v. JACOBSON.

(*Supreme Court of Iowa.* December 17, 1887.)

1. EVIDENCE—DECLARATIONS OF DEFENDANT OFFERED IN HIS OWN FAVOR.
   In an action on a note given for a mower, defendant claimed as a defense that he afterwards paid for the mower by giving plaintiff a note executed by other persons. On the trial, defendant was permitted to introduce evidence of declarations and statements made by him to a witness to the effect that he had traded the latter note for the mower. *Held*, that the evidence was improper.
2. APPEAL—ERRORS PRESUMED TO BE PREJUDICIAL.
   One who claims that an error was without prejudice must affirmatively show it to be so. Prejudice will be presumed until the contrary is shown.

Appeal from district court, Story county. D. D. MIRACLE, Judge.

Action upon a promissory note. Verdict and judgment for defendant, Knut Jacobson. Plaintiff appeals.

O. L. Binford and *J. H. Bradley*, for appellant. *Geo. A. Underwood*, for appellee.

BECK, J. 1. Among other matters urged at the trial as a defense to the note, defendant claimed that it was given for a mower purchased of the agents of plaintiff, and that he afterwards paid for the mower by giving to the agents a note executed by other persons. The abstract of defendant shows, in support of this defense, that he was permitted, against plaintiff's objection, to introduce the declarations and statements made by him to a witness, to the effect that he had traded the note for the mower. An additional abstract filed

by defendant avers that the evidence was not admitted to prove defendant's declarations, but only "as a circumstance," and the court below so held, in ruling upon the question of its admissibility. What is meant by this statement is not explained. If it was admitted "as a circumstance," there was some purpose in it. Counsel for defendant thinks it was a proper "circumstance" to show the time when plaintiff's agents received the note. If the evidence was admissible for that purpose, the jury should have been directed to consider it for no other purpose. Defendant's abstract may be understood as so declaring, but this is denied by plaintiff, and the transcript supports the denial, and shows that the evidence was admitted without any restriction as to the purpose for which it should be considered. Being so admitted, the jury were authorized to consider it in finding whether defendant had paid for the mower; thus permitting defendant to introduce his own declarations as evidence in his behalf. This was erroneous, under the most familiar rules of evidence. We will not be expected to cite authorities in support of this conclusion.

2. But defendant's counsel insists that, if the admission of the evidence is error, it was without prejudice, for the reason that it shows that defendant did not execute the note; but we cannot say that the jury found for defendant on one issue or the other. It is plain that the evidence in question may have influenced their verdict, and it will be regarded that it did until the contrary be shown, which has not been done. Prejudice will be presumed until the contrary is affirmatively shown. *George* v. *Railway Co.*, 53 Iowa, 503, 5 N. W. Rep. 615.

For the error in admitting the evidence in question, the judgment of the district court is reversed.

STATE v. GRAHAM.

(*Supreme Court of Iowa.* December 19, 1887.)

1. INTOXICATING LIQUORS—PLEA OF FORMER CONVICTION—CODE IOWA, §§ 1542, 1543.
On appeal to the district court, from a conviction on information before a justice under Code Iowa, § 1542, which provides that "no person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquors with intent to sell the same within the state," etc., defendant pleaded a former conviction under an indictment under section 1543, providing that "whoever shall erect or establish or continue or use any building, erection, or place for, [keeping intoxicating liquors, with intent to sell the same,] shall be deemed guilty of a nuisance," etc. Both the information and indictment covered about the same period of time. *Held*, that the two sections of the Code relate to different offenses, and that the plea of former conviction was bad on demurrer.[1]

Appeal from district court, Polk county; JOSIAH GIVEN, Judge.

The defendant, Richard Graham, was tried on an information before a justice of the peace for the crime of keeping intoxicating liquors, with intent to sell the same, in violation of law. He was convicted, and appealed to the district court. After the appeal, by leave of the district court, he filed a plea in which he set forth, in substance, that he was indicted for the crime of maintaining a nuisance by keeping intoxicating liquors, with intent to sell the same, in a certain building in Polk county, and that he was convicted on said indictment on the sixteenth day of November, 1886, and has paid the penalty inflicted upon him; that by the information before the justice of the

[1] A single act may be an offense against two statutes. The sufficiency of the plea of former jeopardy depends, not upon whether the defendant has already been tried for the same act, but whether he has been tried for the same offense. State v. Stewart, (Or.) 4 Pac. Rep. 128. A statute which provides that a person who has been repeatedly convicted of being intoxicated under circumstances amounting to a violation of decency, shall be deemed a common drunkard, and punishable therefor, is not unconstitutional, as subjecting the offender to be twice put in jeopardy for the same offense. State v. Flynn, (R. I.) 11 Atl. Rep. 170.

peace he was charged with violating the law between the first day of July, 1885, and the twenty-fifth day of December, 1885, and that the time stated in said indictment was between the first day of July, 1885, and the first day of April, 1886. It is averred in the plea that the keeping charged in the information was the identical keeping charged in the indictment, and that having been convicted on the indictment, he has been convicted of the crime charged in the information. There was a demurrer to the plea, which was sustained, and defendant appeals.

McHenry, McHenry & McHenry, for appellant. *A. J. Baker*, Atty. Gen., for the State.

ROTHROCK, J. The information was for a violation of section 1542 of the Code, which provides that "no person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquors, with intent to sell the same, within this state, or permit the same to be sold therein, in violation of the provision hereof; and any person who shall so own or keep, or be concerned, engaged, or employed in owning or keeping, such liquors with such intent, shall be deemed, for the first offense, guilty of a misdemeanor," etc. The statute, a conviction under which is pleaded, (section 1543 of the Code,) provides that "whoever shall erect or establish or continue or use any building, erection, or place for any of the purposes prohibited in said sections [the three preceding sections] shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and, upon conviction, shall pay a fine of not exceeding one thousand dollars," etc. We think it is quite plain that the two offenses are not the same. Section 1542 provides for the punishment of the offense of keeping or owning intoxicating liquors, with the intent to sell the same within this state, and the next section is for erecting, establishing, continuing, or using any building for the prohibited purposes. In the first case, the offense is complete wherever the liquors may be located, or whether in the possession of the accused or another. In the last case, the punishment is for keeping a building, and using the same for the violation of the law. The crime consists in establishing and maintaining a nuisance. We think the demurrer was correctly sustained. Affirmed.

YOUNG v. SHAUER and another.

(Supreme Court of Iowa. December 19, 1887.)

MORTGAGES—CANCELLATION AND RENEWAL—LIEN NOT POSTPONED.

Defendant and S., owners in common of certain land, gave a mortgage thereon to plaintiff to secure the payment of a $400 note. Subsequently a third person recovered a judgment against S. in the county where the land lay, which judgment became a lien on S.'s interest in the land. The next year S. conveyed his interest to defendant, who thereafter applied to plaintiff for a further loan, stating that she desired to take up the $400 note, and to borrow $200 additional, giving a new note for $600, payable at a later date, and secured by a mortgage which should be a first lien on the land. Plaintiff acceded to this, and the old mortgage was canceled; both of the parties believing there was no other lien on the land. Had plaintiff known of the judgment against S., he would not have canceled the first mortgage. *Held*, that the new mortgage, to the amount of the old, was to be regarded as a mere renewal, and that plaintiff was entitled to have such amount declared a lien superior to that of the judgment.

Appeal from district court, Wright county.

This is an action in equity, and the question involved is whether a certain real-estate mortgage held by the plaintiff, Duane Young, is a superior lien to a judgment lien held by Witmer Bros., defendants. There was a demurrer to the petition, which was sustained, and defendants Witmer Bros. appeal.

Weber & Whipple, for appellants. *Nagle & Birdsall*, for appellee.

ROTHROCK, J. The facts of the case as shown by the averments of the petition are as follows: On the twenty-second day of January, 1884, John H. Shauer and Sarah B. Shauer were the owners in common of 160 acres of land. On that day they borrowed $400 of the plaintiff, for which they executed to him their promissory note, and a mortgage upon said land to secure the payment of the loan. On the twenty-ninth day of September, 1886, Witmer Bros. recovered a judgment against John H. Shauer in the district court of Wright county. The land being situated in that county, said judgment became a lien on the interest of John H. Shauer therein, but inferior to the lien of plaintiff's mortgage. In February, 1887, John H. Shauer conveyed his interest in the land to Sarah B. Shauer. Afterwards Sarah B. Shauer applied to the plaintiff for a further loan. She stated to the plaintiff that John H. Shauer had conveyed his interest in the land to her, and she proposed to take up the note for $400 and give a new note for the amount thereof, and to borrow enough in addition to make the new note $600, to extend the time of payment, and secure the new note by a mortgage on the land which should be a first lien thereon. The plaintiff acceded to the proposition. A new note for $600 was made, and a new mortgage was made to secure the same, and placed on record, and the old mortgage was canceled. Both of the parties to the new mortgage believed at the time it was made that there was no other lien on the land; neither had any knowledge of the existence of the judgment against John H. Shauer. It is averred that, if plaintiff had known of the judgment against John H. Shauer, he would not have canceled the old mortgage, and that both of said parties were mistaken as to the facts. The prayer of the petition is that the first mortgage be reinstated, and the amount thereof be deemed to be a lien prior and superior to said judgment. The demurrer was upon the ground that the facts stated in the petition do not entitle the plaintiff to the relief demanded.

It appears to us that *Bruse* v. *Nelson*, 35 Iowa, 157, is decisive of the case. The facts are so nearly alike as that the same rule must be applied to one case as the other. Indeed, the case at bar is stronger in favor of the plaintiff than the cited case. In this case, it appears affirmatively that the plaintiff would not have surrendered the old mortgage and taken a new one if he had known there was a judgment lien on the land. The cases of *Mather* v. *Jenswold*, 32 N. W. Rep. 512; *Womer* v. *Agricultural Works*, 62 Iowa, 699, 14 N. W. Rep. 331; *Weiden* v. *Thompson*, 28 N. W. Rep. 422; and *Goodyear* v. *Goodyear*, 33 N. W. Rep. 142,—are unlike the case at bar. In all those cases, the parties seeking to revive satisfied mortgages were neither the mortgagees nor their assignees. They were either purchasers of the mortgaged property, or persons who sought to be subrogated to the rights of the mortgagees by reason of having paid the mortgage. In the case at bar, the new mortgage to the amount of the old may be regarded as a mere renewal, and the amount thereof a superior lien to the lien of the judgment. If the old mortgage had been paid off with money furnished by a stranger to it, as in *Mather* v. *Jenswold*, *supra*, and a new mortgage made for the money furnished, this would be payment in fact and in law. In the case at bar, the transaction was between the parties to the mortgage, and the old one was not paid.

We think the demurrer was properly overruled. Affirmed.

STATE v. MCAVOY.

(*Supreme Court of Iowa.* December 19, 1887.)

INDICTMENT AND INFORMATION—CONVICTION FOR LESSER OFFENSE—ASSAULT TO RAPE—ASSAULT AND BATTERY.

Under Code Iowa, § 4466, providing that the defendant in a criminal case may be convicted of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, a defendant cannot be convicted of

assault and battery on an indictment charging assault with intent to commit rape, unless it is averred in the indictment that the attempt was accompanied by actual violence.

Appeal from district court, Appanoose county.

The defendant, L. C. McAvoy, was accused of the crime of assault with intent to commit a rape. The jury found him guilty of assault and battery, and the court pronounced judgment against him on the verdict.

McNett & Tisdale, for defendant. *A. J. Baker*, Atty. Gen., for the State.

REED, J. That part of the indictment which charges the offense is as follows: "The said L. C. McAvoy, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and eighty-five, in the county aforesaid, did then and there feloniously, willfully, by force and violence, make an assault on one Martha I. Jarvis, a female, with intent then and there to have carnal knowledge of, and sexual intercourse with, the said Martha I. Jarvis by force, and used violence and against the will of the said Martha I. Jarvis." The district court directed the jury that the evidence was not sufficient to warrant them in convicting the defendant of assault with intent to commit rape; but that, under the indictment, he might be found guilty of assault and battery. It is provided by statute (Code, § 4466) that the defendant in a criminal case may be convicted of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. It was held by this court in *State* v. *Graham*, 52 Iowa, 720, 2 N. W. Rep. 1050, that while assault and battery is not necessarily included in the crime of assault with intent to commit murder, still, as it was charged in the indictment that the assault was accompanied with actual violence to the person of the one assaulted, the defendant was properly convicted of assault and battery. But the defendant can be convicted of an offense distinct from the one specifically charged in the indictment, only when such offense is an essential element of that charged, or when it is shown by proper averment in the indictment that a minor offense was in fact included in the perpetration of the one charged. The crime of assault and battery is not necessarily included in an assault with intent to commit rape; for that offense might be committed without doing any actual violence to the person of the one assailed, although in the majority of cases, perhaps, the actual battery is involved in the commission of the offense. To justify a conviction of assault and battery, then, in an indictment charging assault with intent to commit rape, it must be averred in the indictment that the attempt was accompanied by some actual violence to the person of the woman. The present indictment does not contain such averment, and the direction of the court that defendant might be found guilty of assault and battery is erroneous. Reversed.

REIHER v. WEBB

(*Supreme Court of Iowa.* December 19, 1887.)

JUDGMENT—BY DEFAULT—SETTING ASIDE—BELIEF THAT JUDGE WAS ABSENT—SICKNESS OF DEFENDANT.

One day prior to the day assigned for the hearing of appellant's cause, the judge went home to a town 20 miles away from the town where the court was held. The only passenger train on the day of the trial from the town where the judge lived was three hours late; but three freight trains which carried passengers arrived at the town where the court was held before the time set for the trial, and the judge came on one of them. Appellant's attorney, knowing of the delay to the passenger train, and learning that the judge was not at the hotel where he usually stayed, failed to appear in court at the appointed time, and judgment was entered by default against appellant, who also failed to appear. *Held*, that it did not so clearly appear that the trial court had improperly exercised its discretion in refusing to set aside the default as to warrant an interference with its decision. *Held, also*, that a lame back, which appellant set up as a further excuse for his failure to appear in court, was not such an illness as called for a setting aside of the default.

Appeal from district court, Boone county; JOHN STEVENS, Judge.

A judgment by default was rendered against the defendant, S. S. Webb, which he moved to set aside. The motion was overruled, and the defendant appeals.

Hull & Bicksler, for appellant. *E. L. Green*, for appellee.

SEEVERS, J. The facts are that a railroad company condemned the right of way over certain real estate, and paid the money awarded by the sheriff's jury to the defendant, who was at that time sheriff. This was in 1881. This action was commenced in 1885 to recover the amount so paid. The defendant answered the petition, and admitted that he received the money, and pleaded the statute of limitations as a defense. "On this twenty-sixth day of January, 1887, the cause was assigned by the court for trial to a jury on the afternoon of Monday of the second week of the term" then being held. On that day the defendant failed to appear, and a judgment by default was entered against him. When court was adjourned on Saturday preceding the Monday on which the default was entered, the judge went to his home at Ames, some 20 miles distant from the place the court was held. The Northwestern Railroad is constructed and operated practically through said places, and the regular passenger train from Ames usually arrived at Boone at noon, but, on the day in question, it was about three hours late, which fact was known to the attorney for the defendant. Such attorney inquired of the clerk of the hotel at which the judge usually stopped if he had arrived, and was informed he had not. The judge in fact came by a freight train, upon which, however, passengers were carried, and there were three of such trains passed over the road from Ames westward, and which arrived at Boone prior to 1 o'clock on the day in question. The foregoing facts are shown by affidavits, and the defendant, Webb, states that he was sick with a lame back, and was unable to get out of doors, and he further states, under oath, that he received the money, and has it in his possession and under his control. A large discretion is vested in the court below in setting aside defaults, and it should not ordinarily be exercised in favor of a party in default in consequence of his own negligence, or that of his attorney. The sickness of the defendant does not appear so serious or of such a satisfactory character as to warrant us in interfering with the judgment for that reason. *Miracle* v. *Lancaster*, 46 Iowa, 179. The district court had knowledge of facts not shown by the record, such as the attendance of the bar generally at the time appointed for opening the court, and in relation to the movement of trains and amount of travel thereon, and possibly of other matters. Therefore the discretion with which the court is vested should not be interfered with, unless it quite clearly appears from the affidavits such discretion has been improperly exercised. The attorney seems to have relied on the fact that the judge would arrive by the passenger train, and that it was late on the day in question. We think the attorney had no right to rely on such assumption when the fact is shown there were other trains on which he could come in time to open court at the appointed hour. In the absence of reasonable information otherwise, he should have assumed and acted on the assumption that the court would be in session at the appointed time. Affirmed.

PRINGEY v. WARRALL and others.

(*Supreme Court of Iowa.* December 19, 1887.)

FRAUDULENT CONVEYANCES—TRANSACTIONS BETWEEN RELATIVES.

About the time an insolvent debtor became financially embarrassed, he transferred to his mother, for $1,200, certain promissory notes to that amount. He also conveyed to her, without consideration, his homestead, worth $650. His mother soon afterwards bought a piece of land for $1,500, and had the conveyance made out in the name of the debtor's wife. No part of the $1,200 received by the debtor

from his mother was used in buying the land, nor was any of it returned by him to his mother, but it was used by him for his own purposes. In an action to subject the land to the payment of a judgment against the debtor, *held*, that no such fraud was shown as to entitle the creditors to have the land so applied, even though the mother's object in taking the deed in the name of the debtor's wife was to put the property beyond the reach of his creditors.

Appeal from district court, Guthrie county; J. H. HENDERSON, Judge.

Action in equity by Jonathan Pringey to subject certain real estate, the title to which is in the defendant Emma A. Warrall, to the payment of a judgment against her husband, Arthur Warrall, who is a defendant in the action. Judgment for the plaintiff, and the defendants appeal.

J. H. Applegate, for appellant. *Chas. S. Fogg*, for appellee.

SEEVERS, J. In 1877, the defendant Arthur Warrall became financially embarrassed. Prior to that time he owned a farm in Muscatine county, which he sold to Anderson in 1875 or 1876, and in part payment therefor Anderson executed to him notes for $2,700. After he became insolvent, he transferred said notes to the amount of $1,200 to his mother. He was also the owner of a homestead, which he had acquired prior to contracting the indebtedness to the plaintiff. Such homestead was worth at least $650. This he conveyed to his mother, and she purchased the land in controversy, and had it conveyed to the defendant Emma after her husband became insolvent. Mrs. Emma Warrall paid nothing for the land conveyed to her. What has been stated is as the plaintiff claims the facts to be. The defendants claim that, about the time Arthur Warrall became financially embarrassed, his mother gave him $1,200, which he either paid to his creditors, or used for other purposes, and that he transferred the Anderson notes to his mother in consideration therefor, and that she gave for the land in controversy $2,000, on which there was a mortgage of $500, the payment of which was assumed by the defendants. So, in fact, as the defendants claim, Arthur Warrall's mother paid $1,500 for the land in controversy. Now, the question is whether she gave Arthur money for the Anderson notes, or paid his debts on which she was security to that amount. If she did, he could legitimately transfer to her, and she could receive, the Anderson notes in payment or satisfaction of the amount Arthur Warrall owed her. It is equally clear, if the Anderson notes belonged to her she could purchase the land therewith, and give the land to the defendant Emma or any one else, and it could not be subjected to the payment of the debts of the latter's husband.

We have each separately read the evidence, and separately have reached the conclusion that the claim of the defendants just stated is sustained by the evidence. Arthur Warrall and his mother so testify, and there are no sufficient circumstances or badges of fraud shown to justify us in rejecting their evidence. There is no evidence contradictory thereto which materially affects their credibility, and there are some circumstances which tend to strengthen their evidence. Besides this, the story told by them, to our minds, seems natural and probable. It is true, no doubt, that the land was conveyed to the defendant Emma so that it could not be reached by his creditors, but this the elder Mrs. Warrall had the legal right to do if she saw proper. It is also true that Arthur Warrall is unable to tell, with any degree of certainty, which of his creditors he paid with the money his mother let him have, or what he did with it. Such transactions occurred, however, more than 10 years prior to the time he gave his evidence, and it in fact makes no difference what he did with the money, if he legitimately applied it to his own purposes. We feel satisfied that he got the money, and none of it was returned to his mother, and it was not used in purchasing the premises in controversy. It is clear that the proceeds of the old homestead could be used in purchasing the premises in controversy which constitutes the new homestead of Arthur Warrall and his family, and it is immaterial that the title

thereto vested in his wife. A decree must be entered in accord with this opinion, either here or in the district court, as the defendants may elect. Reversed.

TEMPLIN *et al.* *v.* CHICAGO, B. & P. R. Co. *et al.*

(*Supreme Court of Iowa.* December 17, 1887.)

1. MECHANIC'S LIEN—WORK ON RAILROAD—OWNERSHIP—SUBCONTRACTORS.
Plaintiffs contracted with the president of one of the defendants to do work on a railroad. Prior to the contract the road had been sold to the other defendant. In a suit to recover a balance due for work on said road, and to establish a lien thereon, *held*, the contract not having been made with the company then owning the road, plaintiffs could not acquire a lien as against that company unless they were subcontractors.

2. SAME—CONTRACTORS—WHO ARE SUBCONTRACTORS.
Where one railroad company sells its road to another company before completion, and agrees to complete the same, the seller is a contractor, and persons working under it, by contract made subsequent to the sale, are subcontractors; and, to acquire a lien, the persons thus working must bring themselves within the statute providing for subcontractors.

3. RAILROAD COMPANIES—POWER OF PRESIDENT TO MAKE CONSTRUCTION CONTRACT.
The president of a railroad company has no power, by virtue of his office simply, to let a contract, on behalf of the company, for the construction of its road.

Appeal from circuit court, Henry county; W. J. JEFFRIES, Judge.

Action in equity to establish and foreclose an alleged mechanic's lien. There was a decree for the plaintiffs. The defendants appealed.

R. Ambler, *J. H. Blair*, and *A. C. Daly*, for appellants. *Woolson & Babb*, for appellees.

ADAMS, C. J. The plaintiffs performed labor in laying a part of a track, and in doing other work, on a certain railroad in Iowa. They received payment in part, and bring this action to recover of the defendant the Chicago, Burlington & Pacific Railroad Company for an alleged balance, and to establish the same as a lien upon the road. The parties are not agreed as to who contracted with the plaintiffs to do the work, nor as to who owned the road at the time, nor as to who received the benefit of the work. The plaintiffs claim that the road was owned by the defendant the Chicago, Burlington & Pacific Railroad Company, and that that company contracted with them to do the work in question, and received the benefit of the work. The company, in its answer, denies all three of these propositions. Its counsel, in their argument, contend that the evidence shows that the road was owned by the defendant the Central Iowa Railway Company, and that the work in question was done for the Trunk Line Construction Company, a corporation organized under the laws of Connecticut, and engaged in constructing railroads. The construction company is not made defendant.

It is conceded that the road was owned at one time by the defendant, the Chicago, Burlington & Pacific Railroad Company; but we think that the evidence shows that, before the contract sued upon was entered into, that company sold and conveyed the road by a duly-recorded deed to the defendant, the Central Iowa Railway Company. The court decreed a mechanic's lien against the latter company, but there is no pretense that the plaintiffs had any contract with that company. The contract not having been made with the company then owning the road, the plaintiffs could not acquire a lien as against that company unless they were subcontractors. But the action is not brought upon that theory, nor is there any pretense that the requisite steps were taken to establish a subcontractor's lien. The plaintiffs' claim is that they were original contractors, by virtue of a contract with the Chicago, Burlington & Pacific Railroad Company, and that they are entitled to a lien notwithstanding the fact that that company had already sold and conveyed its road before

their contract was entered into. At the time of the sale of the road it was only partially constructed, and the seller, the Chicago, Burlington & Pacific Railroad Company, entered into a contract with the purchaser binding itself to construct the remainder; and it is contended by the plaintiffs that the seller agreed to complete the road for the consideration agreed upon in the sale. But such fact would not give the plaintiffs a contract with the owner of the road; and it is only under a contract with the owner that the plaintiffs, under the statute, can be allowed a lien as original contractors. It was the Central Iowa Railway Company's right to proceed and settle for the road with the only party with whom it had contracted, unless labor and materials had been furnished under a subcontract, and the requisite steps had been taken to obtain a subcontractor's lien. If, after the sale and conveyance, the Chicago, Burlington & Pacific Railroad Company was under contract to complete the road, its relation to the road was substantially the same as if it had never owned it. The company was virtually a contractor; and persons working under it, by contract made subsequent to the sale, were virtually subcontractors. To acquire a lien, the persons thus working should bring themselves within the statute providing for subcontractors.

The defendants contend that the plaintiffs did not have a contract even with the company which once owned the road, but that their work was performed for the Trunk Line Construction Company, and that they have been paid for their work by that company, so far as they have been paid at all. The plaintiffs base their claim upon an alleged written contract, and that contract purports to be signed by one S. C. Cook, who was at the time the president of the Chicago, Burlington & Pacific Railroad Company, and the contract purports to bind that company. It is undisputed, however, that the company had at the time a contract with the Trunk Line Construction Company to do all the work in the construction of the road, including the work in question, and that the railroad company paid, or arranged for the payment of, the construction company for the same. If the Chicago, Burlington & Pacific Railroad Company must pay the plaintiffs for the work, it must pay for it twice. The evidence shows that, at the time the plaintiffs' contract was made, Cook was not only president of the railroad company, but superintendent of a part of the work for the construction company. As such superintendent, he had occasion to employ some one to lay the rails and do some other work. He accordingly employed the plaintiffs. For some reason, however, not very apparent from the evidence, he executed the written contract in the name of the railroad company, by himself as president. He undoubtedly thought that the construction company would pay promptly for the work according to the contract, and that no one would be injured; and we surmise that he was led into his irregular action by the supposition that the plaintiffs would prefer a contract with the railroad company. But it is not important to inquire how the irregularity occurred; the important question is as to whether the railroad company is bound by Cook's action. It is shown by undisputed evidence that Cook had no express authority to make such a contract in behalf of the company. Witnesses so testify, and there was no evidence, by introduction of the articles of incorporation or otherwise, tending to show to the contrary. There is no evidence that he had been accustomed to make such contracts in behalf of the company from which his authority could be inferred. He had not been held out by the company in any way particularly, and the plaintiffs were not justified in inferring that he had larger powers than those which he actually possessed; nor do we understand the plaintiffs as contending that he had been so held out. Their contention is, as we understand them, that he had such power simply by virtue of his office as president, and without any express provision therefor in the articles of incorporation, or authorization by the board of directors.

We have, then, the question, has the president of a railroad company the

power, by virtue of his office simply, to let a contract in behalf of the company for the construction of its road, when the same is already under contract by the board of directors? No authority has been cited which so holds, and we conclude that such is not the law. In Taylor on Corporations, § 236, the author says: "*Virtute officii*, a president has very little authority to act for his corporation, and can bind it only by such contracts as plainly come within its most ordinary routine of business;" citing *Bank* v. *Hock*, 89 Pa. St. 324; *Bien* v. *Water Co.*, 20 Cal. 602; *Risley* v. *Railroad Co.*, 1 Hun, 202. In *Adriance* v. *Boone*, 52 Barb. 399, it was held that the officers of a corporation are special, and not general, agents; that there is no grant of power in the name by which they are designated; that they have no power to bind the corporation, except within the limits prescribed by the charter and by-laws; and that persons dealing with such officers are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon it contained in the charter and by-laws.

In our opinion the decree must be reversed.

COVERT v. SEBERN *et al.*

(*Supreme Court of Iowa.* December 19, 1887.)

1. WILL—LATENT AMBIGUITY—PAROL EVIDENCE.
   Where a will contained devises and bequests to testatrix's "step-son H. S. Covert," and it appeared that testatrix had no step-son named H. S. Covert, and no such person was known to exist, *held*, that there was a latent ambiguity, and parol evidence was admissible to show that testatrix directed the scrivener, who drew up the will, to devise and bequeath the property in controversy to her "step-son Harvey," and that the scrivener, believing Harvey's initials to be H. S. instead of J. H., wrote those initials to designate him.[1]
2. SAME—REPUGNANT CLAUSES—LAST CLAUSE PREVAILS.
   A will contained the following provisions: "*Fourth.* The balance, residue, and remainder I give and bequeath to my brothers and sisters, the same to be equally divided among them." "*Lastly.* I give and bequeath to my step-son H. S. Covert all the remainder and residue of my property, be it real or personal, of what kind or character whatsoever." *Held*, that there was an irreconcilable repugnancy between these clauses, and the last one, being the latest expression of testatrix's intention, must prevail.
3. SAME—RESIDUARY LEGATEES—CONFLICTING CLAUSES.
   The first clause of a will devised land; the second and third clauses bequeathed money; the fourth clause bequeathed "the balance, residue, and remainder" to certain legatees; the sixth and last clause gave "all the remainder and residue of my property" to another legatee; while the fifth clause bequeathed articles of furniture. It was contended that, since all the estate, except the land and chattels specifically disposed of, consisted of promissory notes, testatrix in the fourth clause meant to bequeath the balance of the promissory notes after satisfying out of them the money bequests. *Held* that, as the promissory notes were undated, and there was no evidence showing the character or quantity of testatrix's estate at the time the will was made, such could not be declared to be her intention.
4. SAME—CONSTRUCTION—JURISDICTION OF COURTS.
   Notwithstanding courts of chancery have exclusive jurisdiction over cases brought for the sole purpose of interpreting wills, other courts, in which are cases involving rights under wills, have the power to interpret their language when such interpretation is necessary for the decision of the cases.

Appeal from circuit court, Pottawattamie county.

The plaintiff, John H. Covert, filed his petition in the circuit court, sitting as a court of probate, praying that the executor of the estate of Catherine Covert be ordered, after the payment of certain special legacies bequeathed by the will and all legal fees and disbursements, to deliver and pay to plaintiff, as the residuary legatee, the remaining property and money of the estate.

[1] As to the admission of parol evidence to remove ambiguities in a will, see Decker v. Decker, (Ill.) 12 N. E. Rep. 750, and note; Couch v. Eastham, (W. Va.) 3 S. E. Rep. 23; Rogers v. Rogers, (Ga.) Id. 451; Christy v. Badger, (Iowa,) 34 N. W. Rep. 427.

The defendants in their answer deny that plaintiff is the residuary legatee, and aver that they are the residuary legatees. They show that the clause of the will under which plaintiff claims as legatee bequeaths the remainder of the estate to *H. S.* Covert, and that, in a prior clause, they are made the residuary legatees. The circuit court rendered an order, in effect, declaring the plaintiff and defendants all to be residuary legatees, and ordered the remainder of the estate, after payment of specific legacies and debts, to be divided equally between plaintiff and the several defendants. Both parties appeal.

Clinton N. Powel, for plaintiff. *Deemer & Junkin* and *Shaw & Kuehnle*, for defendants.

BECK, J. 1. The following is a copy of the will involved in this case: "*First.* I give and bequeath to my step-son H. S. Covert all my right, title, and interest in and to lots 1 and 2, in block 9, with all the improvements thereon in 'Meridith's addition' to the town of Avoca, Iowa. *Second.* After all my funeral expenses are paid, I give and bequeath to my niece, Amanda McClew, of Carroll county, Iowa, the sum of one hundred and fifty dollars. *Third.* I give and bequeath unto Leah Christiana Smock, of Benton county, in the state of Iowa, the sum of one hundred and fifty dollars. *Fourth.* The balance, residue, and remainder I give and bequeath to my brothers and sisters, the same to be equally divided by and between them, Mrs. L. J. Sebern, of Crawford county, Iowa, A. V. Varrice, John N. Varrice, and Elizabeth Williams, the three latter of Benton county, in the state of Iowa, except my beds and bed-clothing, and this I give and bequeath to my two dearly beloved sisters, and ask them to divide them satisfactorily by and between themselves. *Fifth.* All my household furniture, except the said beds and bed-clothing, of which I die seized I give and bequeath unto my step-son H. S. Covert. *Lastly.* I give and bequeath to my step-son H. S. Covert all the remainder and residue of my property, be it real or personal, of what character or kind whatsoever. And I hereby appoint J. G. Tipton my executor of this my last will and testament, revoking all others; he being a neighbor of mine, and a resident of the town of Avoca, in the county of Pottawattamie, and state of Iowa."

The plaintiff, it is shown without dispute, was one of four step-sons of the testatrix. His real first name was John Harvey, and he was usually called by the testatrix "Harvey." No one of the step-sons was named or known by the name of "H. S.," nor were these letters the initials of the names of any one of them. The scrivener who wrote the will was permitted, against defendant's objection, to testify, in effect, that the testatrix, in instructing him to prepare the will, the items thereof devising and bequeathing the property specified in the first, fifth, and last items of the will, designated the beneficiary in these items as her step-son "Harvey," and directed him to prepare the will devising and bequeathing the property specified in these items to her step-son Harvey; that he supposed and believed that the initials of plaintiff's first name were "H. S.," and, so believing, wrote these initials to designate him, and that he knew the plaintiff by the name of "Harvey." This witness testifies that he was acquainted with plaintiff, and that he knows of no person whose name is *H. S.* Covert. It is not shown that any person bears that name.

2. Two questions arise in this case which require determination in order to reach a decision therein, viz.: (1) Is it competent, by parol evidence, to apply the items of the will wherein H. S. Covert is the beneficiary to the plaintiff, showing thereby that the testatrix intended to will the property to him? (2) Is plaintiff the sole residuary legatee, being last-named as such, after a prior item names the defendants as the residuary legatees? In our opinion, as to the name of the beneficiary in the items designated "first," "fifth," and "lastly," there is a latent ambiguity. On the face of the will there appears no uncer-

tainty or ambiguity; but, as the truth is that there is no living person of the name of H. S. Covert, there arises, upon that fact being made to appear, a latent ambiguity. This ambiguity must be explained, otherwise the bequests made in these items fail, and the testatrix's intentions will be defeated. But the law will uphold her intentions when they may be made sufficiently certain. The law will not, by holding the items void, declare that the testatrix had no intentions, but will seek to discover her true intentions by evidence which will with certainty identify the beneficiary, and connect him with the will. The law will thus find and produce the person upon whom the testatrix intended to bestow her bounty.

It will be remembered that the intention of a testator is the polar star guiding courts to the interpretations of wills, and that it may be sought for by oral evidence identifying the beneficiaries named in the will, and, when necessary, the property bequeathed. In this case the parol evidence certainly identifies the plaintiff as the legatee named in the first and fifth items of the will, and the residuary legatee named in the last. He is described in these items as the step-son of the testatrix. She had no step-son bearing the name written to designate plaintiff. She designated him to the scrivener as "Harvey," a part of his real name by which she usually called him, and by which he was known. It seems to us that this evidence discloses with absolute certainty the intention of the testatrix, which must be enforced by the law. We have no doubt that the parol evidence above referred to, under a familiar rule of the law, is competent. In support of these views see the following authorities: *Fitzpatrick* v. *Fitzpatrick*, 86 Iowa, 674; *Hawkins* v. *Garland*, 76 Va. 149, 3 Amer. Prob. Rep. 550; *Mann* v. *Executors of Mann*, 1 Johns. Ch. 231; *Morse* v. *Stearns*, 131 Mass. 389, 2 Amer. Prob. Rep. 51; *Morgan* v. *Burrows*, 45 Wis. 211; *Case* v. *Young*, 8 Minn. 209, (Gil. 140;) 1 Jarm. Wills, (5th Ed.) 429 *et seq.*, and notes; *Loriaux* v. *Keller*, 5 Iowa, 196.

Palmer v. *Albee*, 50 Iowa, 429, cited by defendants' counsel, involved the interpretation of a contract. We understand the rules pertaining to ambiguities differ as to wills and contracts. This decision is not, therefore, applicable to the case before us. *Dunham* v. *Averill*, 45 Conn. 61, cited by same counsel, is a case where it was sought to contradict the express language of a will by directing the bequest to a person other than the one named as the beneficiary. In the case before us, by a latent ambiguity, the beneficiary does not certainly appear, but is discovered by competent parol evidence. The cases are wholly unlike.

8. It will be observed that there is an irreconcilable repugnancy between the fourth and last items of the will. The fourth declares that the defendants shall be the residuary legatees. The last, in express and direct language, makes plaintiff the residuary legatee. It is plain that these provisions are incapable of being reconciled; if one stands, the other must fall. The law provides a plain rule to be followed in such cases, which holds that the last clause, being the last expression of the testatrix's intention, must be enforced, and the other be disregarded. 1 Redf. Wills, 451; 1 Jarm. Wills, 472; *Armstrong* v. *Crapo*, 84 N. W. Rep. 437; *Heidlebough* v. *Wagner*, Id. 439; *Johnson* v. *Mayne*, 4 Iowa, 180. This familiar rule requires us to hold that plaintiff is the sole residuary legatee, and that the defendants can take no part of the residue of the estate under the fourth item of the will, which, so far as it provides that they shall be the residuary legatees, is superseded by the last item.

4. Counsel for defendants argue that the language of the fourth item is such that it disposes of the promissory notes of which the testatrix died possessed, and which constitutes, with the personalty specifically bequeathed and the real estate mentioned in the first item, the whole of the estate. The inventory filed by the executor probably shows the fact that no other property of the testatrix was found by the executor,—certainly no other is reported by

him. But there is not one word of evidence showing the quantity or character of the testatrix's property at the time the will was made, which was more than three years before the will was admitted to probate and the inventory filed. The date of the testatrix's death is not shown by the record, nor do the dates of the promissory notes appear therein. We cannot presume that the property of the testator was the same when the will was made as at her death. The very foundation of counsel's argument is overthrown by these considerations.

But, did the facts as assumed by counsel appear, we do not think they would support his conclusion. The second and third items bequeath money; the fourth declares that "the balance, residue, and remainder" shall go to defendants. The remainder of what? The language of the items means the balance of the money of the estate or the balance of money realized from the assets of the estate or the remainder of the property of the estate which shall go to defendants. Whichever of these meanings be given to it, the provision is wholly and plainly repugnant to the last item under which plaintiff claims.

5. Counsel for defendants insist that the probate court had no jurisdiction in the case, for the reason that it is brought for the interpretation of the will of which the court of chancery has exclusive jurisdiction. The action is brought to require the executor to distribute the property of the estate as provided for by the terms of the will. The statute clearly gives authority to the probate court to direct the payment of legacies, and to enforce its order made in that regard. Code, §§ 2429, 2430, 2433, 2435.

In order to determine the questions presented by plaintiff's petition, it was necessary for the probate court to interpret the will. Indeed, no order affecting the rights of the legatees, based upon the will, can be made by the probate court unless the will be interpreted so as to discover what these rights are. If the court may require, by order, the executor to distribute the property, or the money realized therefrom, to the legatees, the exercise of this power involves the interpretation of the will. Indeed, the authority to interpret the will is possessed by all courts called upon to enforce rights under it. While the court of chancery has jurisdiction of cases brought for the sole purpose of construing or interpreting wills, it is not so far exclusive as to forbid other courts, in which are cases involving rights under wills to interpret their language. After chancery, in a proper action, has put an interpretation on a will, other courts will follow it as between parties bound by the decree in the action.

6. The circuit court held (1) that it was competent for plaintiff to show that he was the beneficiary intended by the testatrix when she used the name H. S. Covert; but (2) that defendants and plaintiff all together should be regarded as the residuary legatees, and the remainder of the estate should be equally divided between them. The plaintiff appeals from the decision last named, and the defendants from both.

The first decision, upon defendants' appeal, is affirmed. The second decision, on plaintiff's appeal, is reversed. The case will be remanded to the court below for further proceedings in harmony with this opinion.

WATKINS *v.* JENKINS *et al.*

(*Supreme Court of Iowa.* December 19, 1887.)

WILL—CONSTRUCTION—PAYMENT OF DEBTS.

Provisions of a will construed, and *held* that the rents and profits of a farm devised, and not the general assets of the estate, should be first appropriated to the payment of certain incumbrances.

Appeal from circuit court, Scott county; NATHANIEL FRENCH, Judge.

Action wherein the plaintiff, as executor, prays for a decree fixing the interpretation of the will of his testate. A decree answering the prayer of the petition was rendered, from which a part of the defendants appeal.

D. B. Nash, for appellants. *Cook & Dodge*, for Charles Haskins, appellee.

BECK, J. 1. The plaintiff, the executor of the estate of William E. Haskins, deceased, presented his petition to the district court alleging that the construction and meaning of some of the provisions of the will under which he is acting are involved in doubt, and that it is necessary that such provisions be judicially construed. The portion of the petition presenting the questions for determination, arising in the construction of the will, and the parts of the will and codicils necessary to be considered in making such construction, are presented by the abstract in the following language:

"PETITION.

"(3) That petition presents for the court's consideration, with respect to their construction and meaning, the following provisions of said will:

"Sections 4 and 13 thereof: Can petitioner sell the north half of said town lot, and apply the proceeds as payment on the $1,500 mortgage which is on the farm? * * *

"Sections 4 and 18 of will, and section 2, codicil 1, and section 2, codicil 3: (*a*) Shall the trustee pay off the mortage of $1,500 which is on the farm? (*b*) Shall he do so with the general funds of the estate? (*c*) If so, shall he reserve a lien in favor of the general estate against said farm for amount of such payment? (*d*) Shall he refund the debt, and make a new mortgage at 8 per cent.? If so, shall he mortgage the fee, or only Harriet Purdy's life-estate? (*e*) The trustee has expended some of the general funds of the estate in making payment of two notes,—one for $125, and one for $15,—which were given by testator for articles bought for the farm. *Question.* Should the trustee sell the town lot, (sections 4 and 13,) and from the proceeds pay the general fund what said notes amounted to when paid? The trustee has also made permanent improvements on the farm from proceeds of the rents. *Question.* Can trustee, from the sale of the lot, repay upon the $1,500 mortgage an amount equal to what was so expended in such permanent improvements out of such rents, which rents could have been applied on the mortgage? * * *"

"WILL.

"I devise * * * to Charles S. Watkins * * * all my property, real and personal and mixed, * * * *in trust* * * * for the following uses and purposes: * * * (4) To deliver to my daughter, Harriet, (wife of Wm. Purdy,) all my household goods * * * including silver and plated ware, also * * * buggy, * * * blankets, * * * robe, harness, and sleigh, * * * all of which I bequeath to her. Also to deliver to said Harriet, on the first day of March next after my decease, the full possession of the following tracts and parcels of real estate, situated in Scott county, Iowa, to-wit: The certain farm of 114 * * * acres, situated in Pleasant Valley township, formerly belonging to S. P. Matthews, and which I purchased of him by written contract for deed, of date October, 1882, providing for the delivery to me by said Matthews of a deed thereof, on the first day of January, 1883; also the north half of the lot of land situated on the east side of Brady street, north of 16th street, in Davenport; * * * in which said farm property, and in which said north half of said lot of land, respectively, I hereby bequeath to her, said Harriet, a life-estate during her natural life. And it is my will, during the existence of said life-estate in each of said tracts and parcels of land, said Harriet shall keep the improvements thereon in good repair, and keep the taxes paid, and the tenements thereon properly insured. And in case said trustee shall at any time think it for the best interests of said Harriet, he is hereby authorized to sell the north half of said lot of land above described,

and expend the net proceeds thereof in making any improvements on said farm property he may deem best; and the life-estate in said north half of said lot * * * is made subject to such sale for such purpose. And it is further my will, as soon as practicable after the decease of said Harriet, that said trustee shall sell said farm property, and the tract of real estate last above described, (if not already having been sold to make improvements on said farm property, as above provided;) said trustee using his discretion as to the terms of sale. * * * And it is further my will that * * * said trustee shall pay the net proceeds of such sale or sales to such child or children of said Harriet as shall survive her, share and share alike; such payment to be made to each such child upon attaining the age of twenty-five years, if not already having attained such age; and, if necessary, such proceeds are to be invested by said trustee to that end,—which said distributive shares I hereby bequeath to them, respectively." "(13) It is my will that said trustee be authorized at any time during the life of said Harriet, in his discretion, to sell the north half of said real estate situated on the west side of Brady street, north of Sixteenth street, in which I have bequeathed to her a life-estate, and apply the net proceeds thereof in making improvements on the above-mentioned farm property; and the bequest of said life-estate * * * is subject to this provision. Said trustee, in his action in the matter, is to be guided by the best interest of Harriet. * * * (18) I having purchased the farm property above mentioned from S. P. Matthews by contract for deed, of date October 25, 1882, which contract provides that the sale shall be finally consummated on the first day of January, 1883, by the said Matthews delivering to me a good and sufficient deed of conveyance for said farm, and by the said Matthews receiving from me a certain house and lot on the east side of Farnam street, near Locust street, and the payment by me of the balance of the purchase money with and out of the avails of certain mortgages owned by me, it is my will that said trustee shall carry out and consummate the purchase of said farm in accordance with said contract. * * *"

"*Codicil* 1.

"(2) It is my will that said trustee shall, for the period of six years next after my decease, have control of the possession of the farm mentioned in my last will, (and which I purchased of S. P. Matthews,) together with the rents, issues, and profits thereof, and shall, during that period, so far as practicable, pay from and out of such rents, issues, and profits any mortgage, incumbrance, or any charge upon said farm, and existing as an indebteness properly chargeable against my estate; and, also, shall further pay, during the aforesaid period of time, out of such rents, issues, and profits, all other indebtedness, either evidenced by promissory notes, or in open accounts against my estate, and which indebtedness accrued through and by means of purchases by me of agricultural implements, horses, hay, etc., and now being and used upon the aforesaid farm by Wm. Purdy as my tenant. But it is my will that my said trustee shall so control such possession of such farm, and such rents, issues, and profits, and the payment from and out of the same, any such indebtedness or incumbrance as aforesaid, in view of the promotion of the best interest and welfare of my daughter, Harriet; it being my will that said Harriet shall yearly receive all the net rents and profits of said farm which may be consistent with the due satisfaction of any such indebtedness as aforesaid within a reasonable time, and after the paying all the yearly taxes, proper repairs, and insurance on said farm, which it is my will shall be paid from and out of such rents, issues, and profits. All the provisions of my last will is hereby modified so as to be consistent with the provisions of this codicil. * * *"

The district court, declaring the construction of the will, rendered a decree in this language: "It is ordered, adjudged, and decreed that the general es-

tate and assets are not liable for the payment of the farm mortgage; that the trustee should use the rents and profits of the farm for six years from the decease of the testator towards the payment of the mortgage debt, or any renewal thereof; and he may, in his discretion, under the will, sell the farm subject to the mortgage, and invest the proceeds. It is further decreed that he cannot mortgage the farm, nor sell a portion thereof, unless first having obtained the order of court, upon due notice to all concerned, upon which notice and order he may be authorized to make such sale or mortgage, and with the proceeds pay the present mortgage debt, which is by the holder thereof enforceable against said farm. It is also ordered that the Brady street lot may be sold by the trustee, in his discretion, and proceeds paid upon the mortgage debt to the extent that the rents have been used to make permanent improvements. And it is ordered that the trustee take the rents from said farm, and therewith reimburse the general estate, for the amounts paid upon the debts which were chargeable upon the farm for articles bought for the farm."

2. In our opinion, the district court, in the decree, correctly construed the will. It holds that the general assets of the estate cannot be applied to the payment of the mortgage in question; that is, the funds arising from the sale of personal property or lands cannot be applied to that purpose, but that, under the provisions of the will, the rents and profits of the farm for six years shall be applied upon the mortgage, and that the Brady-street lot may be sold, and the proceeds paid upon the mortgage to the extent to which the rents of the farm have been used in payment of improvements thereon, and the rents of the farm be appropriated to take the place of general assets used to make permanent improvements. We think the decree is in accord with the plain meaning of the will and the intention of the testator as therein expressed. The will gives to Mrs. Harriet Purdy a life-estate in the farm and the Brady-street lot. Paragraph 4. The Brady-street lot may be sold, and the proceeds applied in payment of improvements made on the farm. Paragraph 13. But it is provided by the second paragraph of the first codicil that the executor shall take the rents and profits of the land, and apply them to the payment of any mortgage or charge thereon, and any sum remaining from the proceeds of the rent after the payment of the incumbrance shall be paid to Mrs. Purdy. The will thus, in the plainest language, directs that the rents and profits of the land be first appropriated to the payment of the incumbrance. In the thirteenth paragraph of the will, and the second paragraph of the first codicil, the trustee is directed to be guided by the best interest and the welfare of Mrs. Purdy; but, in express language, the second paragraph of the first codicil declares that the payment of the rents and profits to her is to be made after the indebtedness specified is paid. The expressions found in the will and codicil directing her interest and welfare to be promoted by acts of the executor do not express the thought that her interest and welfare shall nullify the provision to the effect that the rents and profits shall be applied to the payment of the incumbrance, which is positive and plain in its language, and cannot be defeated upon inference and construction.

3. Counsel for defendants insist that the personal estate constitutes the primary fund for the payment of the testator's debts, but that funds arising from his real estate may, by express provisions of the will, be devoted to that purpose. We need not determine the correctness of this view of the law, but may assume that it is correct for the purposes of the case. In this view of the law, the decree of the district court is correct, for, in our opinion, the will and codicils in the plainest language direct that the incumbrance be paid out of the rents and profits of the land.

4. The will directs that the Brady-street lot may be sold to pay for improvements upon the land. The decree properly directs that lot to be sold, and the proceeds applied upon the mortgage, so far as may be necessary, to take the

place of rents applied in payment of improvements. The rents should not have been so applied, and the Brady-street lot is set apart for that purpose. The decree thus carries out the directions of the will, and provides for correcting what was done contrary to such directions.

5. The provision of the decree for reimbursing out of the rents the general funds of the estate for payments made for articles bought for the farm, we think is correct, being in accord with paragraph 2 of the first codicil.

6. The eighteenth paragraph of the will cannot be construed as a direction for the payment of the mortgage out of any particular fund, nor does it nullify other provisions requiring it to be paid out of the rent of the land. It contains no provision whatever as to payments, but simply directs that the purchase be consummated. It cannot be said that this paragraph gives any directions as to the funds to be used in the payment due on the land. That, however, is done in other parts of the will, which requires the rent to be used for that purpose. Paragraph 2 of the first codicil so provides in plain language.

These considerations dispose of all disputed questions found in the case, and lead us to the conclusion that the decree of the district court ought to be affirmed.

HOLLENBECK *et al.* v. STEARNS.

(*Supreme Court of Iowa.* December 19, 1887.)

MORTGAGES—PURCHASE AND FORECLOSURE BY AGENT OF MORTGAGOR.

The evidence showed that defendant, who had assumed a mortgage, ordered plaintiff, who was acting as his agent, to send certain money to pay the mortgage to a person named. The latter misappropriated and failed to use the money for the purpose specified, and plaintiff afterwards bought the mortgage from the mortgagee. *Held*, that plaintiff might properly buy and foreclose the mortgage.

Appeal from district court, Harrison county; C. H. LEWIS, Judge.

This is an action in equity, brought by the appellee, Dureun Stearns, to foreclose a mortgage against the appellants, F. D. Hollenbeck and others. The relief asked was granted.

L. R. Bolter & Sons and *S. H. Cochran*, for appellants. *D. H. Ettien*, for appellee.

SEEVERS, J. This case is wrongly entitled. It should be *Stearns* v. *Hollenbeck et al.* It is provided by statute that causes in this court shall be entitled as in the court below, and such has been the uniform practice for years. In so disregarding the statute counsel have exhibited a singular want of knowledge, or shown great carelessness in the preparation of the case. We indulge the hope it will not be repeated.

The undisputed facts are that one Severance executed a mortgage on real estate, which he sold to Hollenbeck, and the latter agreed to pay such mortgage, which belonged to one Hyde. The money due on the mortgage was payable in Connecticut. A short time prior to the time the mortgage became due, Hollenbeck applied to Stearns to procure for him a loan on the same real estate, for the purpose of paying off the Hyde mortgage and other purposes. Hollenbeck made and signed an application directed to the Lombard Investment Company for such loan, and the same was forwarded to such company by Stearns. The loan was made, to secure which Hollenbeck executed a mortgage to said company, upon whom Hollenbeck drew a draft in favor of Stearns for the proceeds of the loan, and such amount was received by Stearns, and a sufficient sum of money was forwarded by him to one Creighton at Des Moines to pay the Hyde mortgage, and it was so forwarded for the purpose. The evidence clearly shows that Creighton failed to so apply the money, and he was not authorized by Hyde to receive it. Stearns afterwards purchased

the mortgage of Hyde, and paid full value for it, and this action is brought to foreclose such mortgage.

The only disputed question is one of fact, and that is whether Hollenbeck directed Stearns to send the money to Creighton, or whether he did so upon his own motion, or whether the investment company so directed. We are satisfied that the money, when received by Stearns, was the property of Hollenbeck; but the understanding between him and Stearns was that it should be applied in payment of the Hyde mortgage. By direction of Hollenbeck, money had been sent to Creighton to pay interest due on the mortgage on several occasions prior to the transaction in question, and Creighton had with the money paid the interest to Hyde, and returned the coupons as evidence that the money had been properly applied. Hollenbeck had reason to suppose that, if the money in question was so sent it would be properly applied, and we find he directed Stearns to send the money required to pay the mortgage to Creighton. This fact is established by a preponderance of the evidence. Stearns and his son so testify, and Hollenbeck, to an extent only, contradicts them. His evidence, as appears from an additional abstract, which is not denied, is not direct and certain that he did not give such directions. Besides this, the fact that prior payments on the mortgage had been so sent renders it fairly certain, and naturally so, that he directed the money in question to be sent to the same person. As the money was sent to the person he directed it to be, it is certain that the loss must be borne by him. This is clearly so as between him and Hyde, and Stearns bought the mortgage of Hyde, and paid him full value therefor; and therefore, under the circumstances, he is entitled to all the rights of Hyde. Stearns bought the mortgage to protect the mortgage of the investment company, for the reason that he had made the loan. This, we think, he could properly do, and it is immaterial whether, as between him and such company, he was liable for negligence or not. If he is, Hollenbeck cannot so assert, because his directions in relation to the money were obeyed by Stearns. Affirmed.

DURAND *et al. v.* BOWEN.

(*Supreme Court of Iowa.* December 19, 1887.)

GUARANTY—DEFENSES—FAILURE TO USE DILIGENCE TO COLLECT OF DEBTOR.

Defendant gave plaintiff a written guaranty that he would pay certain indebtedness of D., if D. failed to pay it. The facts showed that, if plaintiff had used due diligence, he might have collected the indebtedness from D. *Held*, in an action against the guarantor, that this was a good defense.

Appeal from district court, Carroll county; J. P. CONNER, Judge.

Plaintiffs, H. C. & C. Durand, brought this action against George W. Bowen, to recover an indebtedness of $200 arising out of the sale by them to John C. Davis and his wife of certain goods and merchandise. Their claim against this defendant is upon the following writing:

"CARROLL, October 22, 1885.

"*H. C. & C. Durand:* For value received, I hereby guaranty collection of all the present indebtedness of John C. Davis or Mrs. O. W. Davis, to whom he has sold or transferred his stock at Maple River Junction, Iowa, and authorize you to sell her goods on credit the same as you have heretofore to John C. Davis; my liability herein, however, not to exceed $200, and may be canceled by giving thirty days notice to you in writing in Chicago. This guaranty supersedes the one given you July 20, 1885.

"GEORGE W. BOWEN."

The defense pleaded is that the writing is a guaranty of collection, and that plaintiffs had not used due diligence to collect the debt from the principal. The cause was tried to the court, without the intervention of a jury, and the judgment was for defendant.

George R. Cloud, for appellants. *George W. Bowen, pro se.*

REED, J. For some time before the date of the instrument set out above, John C. Davis had been engaged in business as a merchant at Maple River Junction. On the twentieth of July, 1885, defendant wrote to plaintiffs, who are wholesale dealers in Chicago, requesting them to sell to Davis such goods as he should need in his business on credit, and guarantying the payment by Davis of any indebtedness he might contract with them, not exceeding $200. On the first of October following, Davis was indebted to plaintiffs in a considerable amount for goods obtained after the execution of the guaranty, and was unable to pay his debts at their maturity. Being desirous of engaging in other business, he proposed to transfer the stock of goods on hand to O. W. Davis, his wife, she to assume his indebtedness to plaintiffs, and continue the business. Defendant wrote to plaintiffs informing them of this proposed arrangement, and urging them to consent to it. They wrote him that they would consent to this arrangement provided Mrs. Davis would enter into a written undertaking to pay the amount of her husband's indebtedness to them, and he (defendant) would give them a written contract binding himself to the same extent under the new arrangement that he was under the old. Mrs. Davis accordingly executed a written contract, assuming and binding herself to pay the amount of her husband's indebtedness to plaintiffs, and defendant executed the instrument set out above. Mrs. Davis is now indebted to plaintiffs to the amount of $210, of which amount $163.75 is for goods sold her after the arrangement was entered into. The whole amount was past due on the twenty-fifth of August, 1886. From the time she took possession of the store up to about the first of October, 1886, she carried a stock of goods of the value of from $340 to $500. But she had no other property, and her husband was insolvent. About October 1st her store was consumed by fire, and the stock of goods therein totally destroyed. Plaintiffs took no steps at any time against the Davises to enforce collection of the debt. It does not appear that they had any grounds for suing out an attachment, but a term of the circuit court was held in Carroll county, (that being the county in which the Davises lived,) commencing on the twentieth of September.

The contract sued on is a guaranty of the collection of the debt. Defendant's undertaking was that he would pay the debt if the principal failed to pay it at maturity, and plaintiffs were not able by due diligence to enforce collection from the principal. In the absence of special facts, due diligence would require that suit should be brought against the principal at the first regular term of court after the maturity of the debt, and that judgment be taken, and execution issued thereon, as soon as practicable, by the ordinary rules and practice of the court. *Voorhies* v. *Atlee*, 29 Iowa, 49. If the principal debtor had been insolvent when the debt matured, that, perhaps, would have excused the failure to institute suit and obtain judgment against her. But she was not insolvent. On the twenty-fifth of August, and from that time up to the time of the fire, she had property in her possession sufficient to pay the debt. If suit had been brought in the September term of court, judgment might have been taken on the second day of the term. If that had been done, execution could have been issued at once, and the property might have been seized before the fire. The failure to institute suit at that time was clearly prejudicial to defendant.

The judgment of the district court is right and it will be affirmed.

RABEN v. CENTRAL IOWA RY. CO.

(*Supreme Court of Iowa.* December 20, 1887.)

1. CARRIERS—OF PASSENGERS—DUTY OF CONDUCTOR TO ASSIST PASSENGERS TO ALIGHT. It is not the duty of a conductor of a railway train to assist a passenger to alight from a car.

2. SAME—DUTY OF CONDUCTOR IN STARTING TRAIN.
It is not the duty of a conductor of a railway train "to know" that a passenger has left the cars before he gives the signal to start. He is only required, after having the station announced, to stop the train, and hold it such reasonable time as will permit the passengers to alight in safety.[1]

Appeal from district court, Keokuk county; D. RYAN, Judge.

Action by James B. Raben to recover for personal injuries sustained by his wife through the negligence of plaintiff's employes, while she was getting off of a car in which she was a passenger. There was a judgment upon a verdict for plaintiff. Defendant appeals.

A. C. Daly and *Geo. D. Woodin*, for appellant. *Sampson & Brown*, for appellee.

BECK, J. 1. This action is brought to recover by the husband for injuries sustained by his wife, who had brought a suit in her own name to recover for the same injuries. A judgment in favor of the wife in her action was reversed by this court. See 34 N. W. Rep. 621. The petition of plaintiff in this case alleges that his wife was a passenger upon a car on defendant's railroad, having her own two small children with her. When she reached her place of destination, she proceeded to leave the car with her children, who were taken from the car, when the train began to move, through the negligence of defendant's employes, without allowing her sufficient time to get off, and, in attempting to do so, she was thrown down and injured. Plaintiff alleges, (referring to his wife getting off of the car:) "The conductor did not help her, nor offer to do so, nor advise her that it was not safe to get off, wherefore, he says that the said injury was caused by the negligence and want of care of the conductor," etc. The evidence tended to support the allegations of the plaintiff's petition.

2. The district court, in presenting the issues of the case to the jury, among other things, stated that the petition alleges that the conductor negligently failed to see whether plaintiff's wife had alighted from the car, and caused the train to start before she had time to do so safely, and that "defendant failed to assist her to alight," thereby causing the injuries. In the third instruction the court directs the jury that, to entitle plaintiff to recover, he must show by affirmative evidence, among other things, "that such injuries were caused directly by the negligence of defendant's employes, as substantially alleged." In the fourth instruction the court directed the jury that it was the conductor's duty "to place her [plaintiff's wife] or enable her to alight in safety on the platform." In these instructions the court plainly directs the jury that it was the conductor's duty to assist plaintiff's wife to alight from the car. This court has held the law to be different, and that no such duty rests upon the conductor. *Raben* v. *Railway Co.*, 34 N. W. Rep. 621. The instructions just referred to are therefore erroneous.

3. The seventh instruction directs the jury that, if the conductor "negligently failed to look and know that she [plaintiff's wife] had left the train in safety," and negligently started the train before she had done so, without her fault or negligence, plaintiff is entitled to recover. The instruction announces the rule that it was the conductor's duty to ascertain—"to look and know"—whether the plaintiff's wife had safely alighted. It imposes the duty upon the conductor not to start the train until he had made sufficient inspection of the car and passengers to be certain—"to know"—whether the passengers had left the car, and were safely on the platform. We think the law imposes no such duty. The conductor is required, after having, at a proper time, an-

[1] Respecting the duty of a railway company to stop its trains in such manner that passengers may safely enter them and alight therefrom, see Bullard v. Railroad Co., (N. H.) 5 Atl. Rep. 838, and note; Moses v. Railroad Co., (La.) 2 South. Rep. 567; Railway Co. v. White, (Ark.) 4 S. W. Rep. 52; Railroad Co. v. Prinnell, (Va.) 3 S. E. Rep. 95.

nounced the station, to stop the train and hold it such reasonable time as will permit passengers to alight in safety. He is not required to do what, in many cases, would be impossible to ascertain,—"to know" that all passengers intending to stop at the station have alighted in safety. *Imhoff* v. *Railway Co.*, 20 Wis. 344; *Railroad Co.* v. *Slatton*, 54 Ill. 133; *Clotworthy* v. *Railroad Co.*, 80 Mo. 220; Shear. & R. Neg. § 275; *Railway Co.* v. *Stutler*, 54 Pa. St. 375.

Other instructions than those just noticed we think unobjectionable. Other objections, or the rulings on which they are founded, may not be repeated in a new trial, and need not be considered.

For the errors pointed out the judgment of the district court is reversed.

MOHLER *v.* CARDER *et al.*

(*Supreme Court of Iowa.* December 20, 1887.)

1. FRAUD—MISREPRESENTATIONS IN SALE OF LAND—RESCISSION IN EQUITY.
   Representations which mislead and deceive a party, whereby he makes a contract for the sale of land, are ground for the exercise of equity in rescinding the contract so induced, whether the party making the representations willfully deceived or otherwise.[1]
2. SAME—EXCHANGE OF LANDS—DECEIT—OFFER TO RECONVEY—RESCISSION.
   The evidence showed that defendants deceived and misled plaintiff, by representations as to the quality and value of certain land, into making a trade of property owned by defendants for such land. *Held*, upon plaintiff's offer to reconvey, that equity would rescind the contract so made.

Appeal from district court, Marion county; A. M. WILKINSON, Judge.

This is an action in equity by which the plaintiff, T. K. Mohler, seeks to rescind and set aside a conveyance of certain real estate made to the defendants, H. M. and Horton Carder, upon the ground that said conveyance was procured by false and fraudulent representations, made by the defendant H. M. Carder. There was a decree for the plaintiff, and defendants appeal.

Whiting S. Clark, for appellants. *Stone & Gamble*, for appellee.

ROTHROCK, J. The plaintiff was the owner of a grist-mill, saw-mill, house, and 14 acres of land in Marion county. Being somewhat advanced in years, he desired to dispose of said property. In February, 1886, he advertised it for sale by a notice in a newspaper. The defendants are husband and wife, and at that time, and for a year previous thereto, they resided in Sioux county. Before that, and for some 12 years, they lived at Garden Grove, in Decatur county. The defendant H. M. Carder, wife of Horton Carder, was the owner of 100 acres of land in Decatur county, and a house and lot in Garden Grove. Horton Carder saw the plaintiff's newspaper advertisement, and on March 1, 1886, he addressed a letter to the plaintiff, proposing to exchange the Decatur county land for the mill property. This opened up a correspondence by letter between the parties, which continued until about the first of June, 1886, at which time the defendant Horton Carder went to the residence of the plaintiff, and looked over and examined the mill property, and on the next day the parties went to a justice of the peace, and the plaintiff conveyed his mill property to the defendants, and they conveyed the 100 acres of land, and the house and lot in Garden Grove, to the plaintiff. The plaintiff claims

[1] When a representation is made of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving it has the absolute right to rely upon its truthfulness, though the means of ascertaining its falsity were fully open to him. Gammill v. Johnson, (Ark.) 1 S. W. Rep. 610. See note to Id. And where one, on discovering the ownership of certain property which the owner did not know she possessed, made fraudulent representations to her husband that the same was greatly incumbered, and thereby obtained a deed of the land for a sum far below its value, the deed was ordered canceled. Havlin v. Reed, (Ky.) 5 S. W. Rep. 554.

that the defendant H. Carder misrepresented the character, quality, location, and value of the land and the house and lot; that he was deceived and misled by these misrepresentations, and induced thereby to enter into the trade, to his great damage. He exhibited with the petition, and tendered to the defendants, a reconveyance of the Decatur county property, and demanded a reconveyance of the mill property.

There is no disputed proposition of law in the case, so far as the rights of the parties are concerned, upon the merits. The questions of law involved in a proceeding of this character are so well settled that there is no ground for debate as to them. The main question is, has the plaintiff established the averments of the petition (or such of them as are necessary to be established) by clear and satisfactory evidence? *McClanahan* v. *McKinley*, 52 Iowa, 222, 2 N. W. Rep. 1101; *Dirkson* v. *Knox*, 30 N. W. Rep. 49. Another equally well-established rule is that, to entitle a party to relief in equity by reason of fraudulent misrepresentations, it is not necessary that it be shown that the party making the false statements knew they were false when he made them. They may have been innocently made, yet if represented as positive statements of fact, as distinguished from mere opinions, and relied upon by the other party to his prejudice to the extent that he is led to act thereon, equity will afford relief. *Wilcox* v. *Wesleyan University*, 32 Iowa, 367. Applying these familiar rules to the evidence in the case, we concur with the district court in holding that the contract between these parties should be rescinded. A number of letters were offered in evidence written by the defendant H. Carder to the plaintiff. These letters appear to be one side of the correspondence between the parties. There was a copy of but one letter written by plaintiff to the defendants. All of these letters, which led up to the final consummation of the contract, were excluded by the court. Counsel for the defendants contend that they should have been admitted. We concur in that proposition, and, in reaching a conclusion, we have given all of the letters, as well as the parol evidence, a careful consideration.

Counsel for appellants strenuously contends that the letter wrttten by the plaintiff on the second day of May, 1886, closed the contract between the parties, and that no consideration should be given to certain alleged false representations made at the plaintiff's house on the day before the deeds were exchanged. It is true that in that letter the plaintiff used this language:

"I think that we will deal on the square. Now, when you get this, and read it over carefully, then you can arrange the details of fixing up papers, and write at once. If you have to have the house immediately, I will try and get one to move in. I have three or four days' sawing that I must do, as I have yet to saw, and must do the work. Now, Mr. Carder, don't think because I am so generous, I am so sick, or anything of that kind; I am hard run only. Think of an old man that has been laid up at least half his time for five years, and you will see my condition, and I would sell cheaper than any other man, though I did not say I would trade for land at too high figures. Still, I will say this is a trade, though I think a hard one for me. I wrote Mr. Stearns, and he said if the land was in better shape, it would be worth ten dollars per acre. He said he paid eight dollars for his, and give three to have it brushed off, and now held it at fifteen dollars; said your land was good grass land, and had good water. I suppose, by what he said, it was brushy. Be that as it may, I hope I can get something out of it. I shan't take time to go and look, but take your word for it." He further stated as follows: "But enough of this. What I want to say is that we are going to trade. I feel sure, if you was here, you would offer at least $500 difference; and so sure am I that you will do it when you see my place. But I will say that I will leave that part entirely with you, and call it a trade; and when you see my place, if you don't say I am entitled to $500, I will say nothing, for your talk seems square, and I have that much confidence in mankind yet that I am willing to

risk it on you. I will say that if you need time, and think you ought to pay any difference, you can have what time you want."

It will be observed from these extracts from the letter that, while the plaintiff said he would trade, he also said he should not take the time to go and look at defendant's property, but would take his word for it. That the parties did not then regard the bargain as closed, is made plain by the fact that, when the defendant went to the plaintiff's place, he carefully examined the mill property, and, while doing so, he was fully interrogated by plaintiff as to the character, quality, and location of the Decatur county property. The evidence makes it quite plain to us that he then misrepresented his property in many material respects, and that the plaintiff made the deed by reason of said misrepresentations, and relying thereon. In the course of the correspondence, the defendant referred the plaintiff to one Stearns, who resided in Decatur county, for information about the land and house and lot. Plaintiff wrote a letter of inquiry to Stearns, and received a reply. Neither the letter nor reply was introduced in evidence. The defendants introduced Stearns as a witness to testify to the contents of the reply. It is insisted, on behalf of the defendants, that the evidence of Stearns, and other facts and circumstances in the case, show that the plaintiff was not justified in relying upon the representations made by the defendant. We do not think this position is well taken. The evidence of Stearns shows that his letter to the plaintiff was very general in its character. Indeed, the witness does not appear to be positive as to the contents of his letter. A careful examination of all the evidence leads the mind to the conclusion that the plaintiff placed implicit confidence in Carder. The extracts we have given from his letter make this plain; and we think in view of this fact, of which Carder was well advised, he cannot be allowed to escape the consequences of having made statements which, to say the least, he did not know to be true. That they were material can admit of no question. It is true, the property consisted of 100 acres of land and a house and lot. He did not misrepresent the quantity of land, nor the size of the lot; but as to the quality and location of the land, and the improvements on the lot, he made very material misrepresentations, which we need not here repeat. There is no escape from the conclusion that, if he had told the plaintiff the truth about his property, the deeds would not have been made. Affirmed.

WESCOTT v. WESCOTT.

(*Supreme Court of Iowa.* December 20, 1887.)

GIFT—EVIDENCE—PRESUMPTION FROM POSSESSION.

On the issue of fact between plaintiff and defendant, as to the ownership of certain notes, it appeared that defendant claimed that the money for which they were taken in his name was given him by plaintiff's intestate. Plaintiff showed, to rebut the presumption arising from defendant's possession, only certain statements of deceased to the effect that she intended to divide all of her property equally, etc. *Held*, that such statements, if admissible, were not sufficient to disprove defendant's claim.

Appeal from district court, Cerro Gordo county; JOHN B. CLELAND, Judge.

Action in chancery by John Wescott, as administrator, to restrain defendant, Amos Wescott, from disposing of certain promissory notes in his possession, and for the appointment of a receiver to hold the same pending the action, on the alleged ground that the notes are the property of the estate of which plaintiff is administrator, and defendant is insolvent. A decree as prayed for by plaintiff was rendered. Defendant appeals.

Blythe & Markley, for appellant. *John Cliggett*, for appellee.

BECK, J. 1. The plaintiff is the administrator of the estate of Mary Horning, deceased. The plaintiff and defendant are both sons and heirs of the de-

cedent. The plaintiff, as the ground for relief, claims that certain promissory notes, payable to, and in the possession of, defendant, are the property of the estate, having been executed to defendant for money of the decedent, which, in her life-time, he had received to be loaned, and, on loaning it, took the promissory notes and securities given therefor in his own name. Defendant maintains that the money loaned was his own; that he had received it from his mother in her life-time as a gift, and that it was her purpose that it should become his property absolutely, free from any claim by her or her estate.

2. The only question in the case is one of fact, and involves the decision of the issue as to the ownership of the money for which the notes in controversy were given. If the money was given to defendant by his mother, as he claims, he is entitled to retain the notes; if not, they or their proceeds must be surrendered to plaintiff; or, if the notes have been paid, he must have judgment against defendant for the amount of the notes, with interest. Our inquiries, therefore, are limited to the one question, did his mother give the money to defendant?

The evidence on neither side is wholly satisfactory, but, in our opinion, the preponderance is for defendant. In the first place the possession of the money by defendant, and the execution of the notes to him, raises a presumption of ownership in him. To overcome his presumption, plaintiff relies almost wholly upon declarations and statements made by the mother. They are to the effect that she intended to divide all of her property at her death between her children, retaining it for her own use as long as she lived; no declarations or statements to the direct effect that she had not given the money to the defendant, or that, after its receipt, it was held by him as her agent or for her use. If these declarations are to be regarded as a claim made by the mother to the property, not being against her own interests, but in support of it, they are not competent to defeat the adverse claim of defendant. We believe the rules of the law will not permit declarations of a deceased person to be introduced in evidence, unless they were when made against his interest. 1 Greenl. Ev. § 147. Under our statute such is the rule as to witnesses. Code, § 3657. See *County of Mahaska* v. *Ingalls*, 16 Iowa, 81; *State* v. *Wooderd*, 20 Iowa, 541. But, as we have said, the declarations are almost wholly expressions of intentions and purposes to be executed in the future. If they should be regarded as competent evidence, they could not, in our opinion, overcome the presumption, arising from the possession of the money by, and execution of the notes to, defendant. Intentions and purposes may be changed, and proof of their expression raise but a slight presumption against subsequent acts.

The evidence for defendant discloses frequent declarations of the deceased to the effect that she had given the money to defendant. In addition to this evidence, it appears that the decedent never made any claim to the notes, or the money for which they were given to the person who made the loans and took the security for defendant, though it appears from plaintiff's evidence that she knew this person had made the loans, and she had an interview with him before her death, in which she expressed a wish as to the disposition of her property. Other facts and circumstances tend to support defendant's claim of title to the notes. They need not be here mentioned, as their discussion would not be of profit to the parties or of interest to the profession.

The decree of the district court is reversed, and plaintiff's petition is dismissed. Reversed.

STATE v. DOW.

(*Supreme Court of Iowa.* December 20, 1887.)

INDICTMENT AND INFORMATION—SEPARATE COUNTS—OMISSION TO NUMBER.

An indictment charged the keeping of a nuisance in a building. It further charged the keeping of a nuisance in a building on a certain lot. Each charge was full and complete in itself. There was a blank in the indictment separating the two charges, but no numbers were used to designate it as two counts. *Held*, that the indictment contained two counts, and the court below did not err in so construing it.

Appeal from district court, Mahaska county; W. R. LEWIS, Judge.

Indictment for a nuisance. Trial by jury, verdict guilty, and judgment. The defendant, Nathan Dow, appeals.

Bolton & McCoy and *John F. Lacey*, for appellant. *A. J. Baker*, Atty. Gen., for the State.

SEEVERS, J. The indictment is as follows:

"DISTRICT COURT OF MAHASKA COUNTY.

"*The State of Iowa* vs. *Nathan Dow and William Greenway.*

"The grand jury of Mahaska county, state of Iowa, in the name and by the authority of the state of Iowa, accuse Nathan Dow and Wm. Greenway of the crime of causing a nuisance committed as follows: The said Nathan Dow and Wm. Greenway, at the county of Mahaska, and state of Iowa, on the thirtieth day of March, A. D. 1887, unlawfully did use a certain building, then and there situate, and under the control of Nathan Dow and Wm. Greenway, for the purpose of unlawfully selling certain intoxicating liquors, to-wit, rum, gin, brandy, whisky, wine, bitters, beer, Irish and mum, and alcohol, therein, and did unlawfully sell said liquors in said building in said state and county, to the common nuisance of all the people of the state of Iowa, and contrary to the form of the statute in such cases made and provided.

"And the grand jury of Mahaska county, and state of Iowa, in the name and by the authority of the state of Iowa, further accuse Nathan Dow and Wm. Greenway of the crime of causing a nuisance, committed as follows: The said Nathan Dow and Wm. Greenway, at the county of Mahaska and state of Iowa, on the thirtieth day of March, A. D. 1887, unlawfully did use a certain building, then and there situate, and under the control of Nathan Dow and Wm. Greenway, for the purpose of unlawfully keeping certain intoxicating liquors, to-wit, rum, gin, brandy, whisky, bitters, beer, Irish and mum, and alcohol, therein, and did unlawfully keep said liquors in said building, in said state, with the intent then and there unlawfully to sell the same, to the common nuisance of all the people of the state of Iowa, and contrary to the form of the statute in such cases made and provided, the premises being the east one-third of lot No. two, (2,) in block No. 35, old plat in Oskaloosa, Iowa.

W. W. HASKELL,

"County Atty. for Mahaska County, Iowa."

The court below held that the indictment contained two counts, and instructed the jury to acquit the defendant on what the court designated as the second count, for the reason that the evidence failed to show that any nuisance had been committed in a building situate on the premises therein described. To the holding of the court that the indictment contained two counts, the defendants excepted, and, by instructions asked, which were refused, and otherwise, the correctness of the ruling just stated is fairly presented. It will be observed there is a blank space about the middle of the indictment; and if what preceded had been numbered or designated as the first count, and what followed as the second, there would be no doubt, we think, that the ruling of the court would be correct; for what precedes the blank space is a perfect and

complete count, and so is that which follows such space. The only defect, therefore, it seems to us, is the failure to number the two counts, or to divide the matter of the indictment, or otherwise designate what is claimed to be two counts, so as to render it absolutely certain that such was the intention of the pleader. An indictment is defined by statute to be "a statement of the facts constituting the offense, * * * in such manner as to enable a person of common understanding to know what is intended." It "must charge but one offense, but it may be charged in different forms to meet the evidence; * * * but this section shall in no manner affect any provisions of this Code providing for the suspension of intemperance." Code, §§ 4296–4300. It seems to us the court did not err in construing the indictment. It seems to us that no other construction could be fairly adopted. It fairly appears that appellant was charged with keeping a nuisance in a building. This charge is full and complete. He was further charged with keeping a nuisance in a building on a particular lot. This charge is full and complete, without reference to, nor is it in any way connected with, what precedes it. What precedes and what follows the blank space contain all the formal words necessary to make two separate and distinct counts, and such evidently was the intention of the pleader, and counsel for the defendant, we think, must have so understood. Affirmed.

STATE *v.* CLOUGHLY.

(*Supreme Court of Iowa.* December 21, 1887.)

1. INTOXICATING LIQUORS—SALES BY PHYSICIAN WITHOUT PRESCRIPTION.
When a physician sells liquor to persons who apply therefor by their own suggestion, and not because of his prescription as their medical adviser, the fact that he is a practicing physician is no defense to a prosecution for illegally selling intoxicating liquors.
2. SAME—PROOF THAT LIQUOR SOLD WAS INTOXICATING.
Evidence showing that a customer called for beer, was given liquor that looked like beer, and other evidence tending to prove the sale of intoxicating liquor, is sufficient to justify the finding of a jury that such liquor was sold. The burden rests upon defendant, after such proof, to disprove the intoxicating character of the liquor.
3. SAME—BURDEN OF PROOF TO SHOW LEGALITY OF SALE.
After proof of the sale of intoxicating liquor in a store in Iowa, the burden rests upon defendant to show such sales were lawful.
4. SAME—LIQUOR DRANK IN PHARMACY—PRESUMPTION OF ILLEGAL SALE.
Proof that persons drank liquor in a pharmacy raises the presumption that such liquor had been unlawfully given or sold to them by the proprietor thereof, as directly provided by Acts 21st Gen. Assem. Iowa, c. 83.

Appeal from district court, Audubon county; H. E. DEEMER, Judge.

The defendant, J. F. Cloughly, was convicted of the crime of nuisance by the verdict of a jury, and the court pronounced judgment imposing upon him a fine of $500.

John M. Griggs and *Theo. F. Myers*, for appellant. *A. J. Baker*, Atty. Gen., for the State.

REED, J. It is charged in the indictment that defendant kept a building and place in which he kept intoxicating liquors, with intent to sell the same contrary to law, and in which he sold such liquors contrary to law. The indictment was entered on the twenty-seventh day of August, 1886, and it alleged that the offense was committed on the first day of that month. The defendant is the proprietor of a drug store. He is also a registered pharmacist; and on the ninth day of June, 1886, the board of supervisors of the county issued to him a permit to buy and sell intoxicating liquors for the actual "necessities of medicine."

1. It is first insisted that the verdict is not supported by the evidence. There was evidence, however, which tended to prove at least one sale of whisky in defendant's drug store before the date of his permit. It is true that the sale was not made by defendant in person, but the jury might well have found that it was made from his stock, and by a clerk in his employ. At that time defendant had no authority to sell liquors for any purpose. The sale was unlawful, and the jury might have found from the evidence that it was made by the clerk in the ordinary course of his employment. There was also evidence which tended to prove numerous sales after the permit was granted, some of which the jury might have found were not for "the actual necessities of medicine." It was proven that on one occasion a person applied to defendant to purchase a bottle of beer, and that defendant sold and delivered to him a bottle of liquor which had the appearance of beer. The customer, who was examined as a witness on the trial, was not able to testify with certainty that the liquor in the bottle was beer. It is insisted that there was not sufficient evidence either as to the kind of liquor sold, or that it was intoxicating. As the defendant, by delivering it to the customer in answer to his request for beer, represented it to be that kind of liquor, the prosecution as against him is that it was beer, and the statute classes beer as an intoxicating liquor. Chapter 8, Acts 20th Gen. Assem. If there are kinds of beer not in fact intoxicating, the burden was on defendant to show that the beer in question was of that kind, if he claimed such to be the fact. It is clear that we ought not to distrust the judgment on this ground.

2. Defendant offered to prove that he is a practicing physician, and that he was engaged in the general practice of his profession at the time of the transactions in question. His counsel stated, when this offer was made, that he would follow it with proof that the sales in question were made by him in the course of his practice as a physician; but the evidence was excluded. It may be conceded, for the purpose of the case, that a physician who, in the course of his practice, should find that his patient required intoxicating liquors, might lawfully dispense such liquors to him. That, however, does not appear to have been the character of the transactions in question. The liquors were dispensed, not upon the judgment of the physician as to the needs of his patients, but upon the demands of the customers; that is, they did not apply to defendant for medical treatment for their diseases, and leave it to him to determine what remedies should be administered, but determined for themselves that whisky or beer was the proper remedy for their maladies, and applied to him to supply it. The transactions on his part were commercial, rather than professional.

3. The district court instructed the jury that, on proof of the sale of intoxicating liquors in defendant's place of business, the burden would be on him to prove that the sales were lawful. The instruction is right. The sale of intoxicating liquors generally is forbidden by the statute. It permits the sale, however, for special purposes, by persons holding permits to sell for those purposes. The privilege of selling for those purposes is in the nature of an exception; prohibition being the rule of the statute. Defendant claims that his sales were within the exception, and the burden is on him to prove that fact. 1 Greenl. Ev. § 79.

4. The court also directed the jury that, if it was proven that persons drank intoxicating liquors in defendant's pharmacy, that fact would be presumptive evidence that the liquors so drank had been unlawfully sold or given to the party by defendant. It is expressly provided by chapter 83, Acts 21st Gen. Assem., that the fact of drinking intoxicating liquors in the place of business of a registered pharmacist shall be regarded as presumptive evidence of the unlawful sale of the liquors.

We have found no error in the record. Affirmed.

CHICAGO, B. & Q. R. CO. *v.* BURLINGTON & M. ELEVATOR CO.

(*Supreme Court of Iowa.* December 21, 1887.)

LANDLORD AND TENANT—ACTION FOR RENT—PLEADING.

In an action on a contract giving to plaintiff, as rent for land, the balance remaining after certain payments were made, the petition failed to aver that, after making such payments, a balance remained in defendant's hands. *Held*, that a demurrer to the petition was properly sustained.

Appeal from district court, Des Moines county; CHARLES H. PHELPS, Judge.

Action to recover upon a contract for rent of land reserved therein. A demurrer to the petition was sustained. From this ruling plaintiff appeals.

J. W. Blythe and *Thomas Hedge, Jr.*, for appellant. *Newman & Blake*, for appellee.

BECK, J. 1. The contract upon which the action is based was entered into between plaintiff and Benjamin D. Brown. The petition alleges that defendant became bound to perform the covenants of the contract assumed by Brown. It is alleged that certain rent is due plaintiff under the contract, to recover which this action is brought.

It becomes necessary, for a proper understanding of the case, to state with sufficient particularity some of the covenants therein, and to quote all others. The lease is divided into sections, numbered consecutively, which affords a convenient means of referring to the covenants of the respective parties: (1) The plaintiff leases to Brown, for the rent reserved in the contract, certain land in the city of Burlington, particularly described, for the term of 18 years. (2) Brown agrees to build thereon an elevator, of the capacity of 400,000 bushels of grain, to be constructed in the manner and according to plans specified. (3) The third section prescribes the charges to be made for handling grain. (4) Brown agrees to handle promptly all grain brought to the elevator by plaintiff, who is obligated to switch cars bringing the grain with reasonable dispatch. (5) Grain brought to the elevator is to be shipped therefrom by plaintiff's road, unless it be found expedient to ship by the river. (6) The plaintiff, any time after two years, shall have the right to purchase the elevator and the machinery therein, "paying therefor a sum which shall not exceed its value as a structure merely, and in ascertaining such value no account shall be taken of its commercial value, nor any other element of value it may have, except as a mere structure." The method of ascertaining the value and other matters are prescribed, which need not be more particularly referred to here. (7) In case Brown or his successors wish to dispose of the elevator, it shall be first offered to plaintiff. (8) Sections 8 and 9 are in the following language: "Sec. 8. The said second party further agrees to keep accurate books of account of the business transacted by him, which shall at all times be open to the inspection of the vice-president of the first party, or any person duly authorized by him. Such books of account shall show the annual net profits accruing to said second party from the operation of said elevator, which net profits shall be determined as follows, to-wit: From the gross receipts of said elevator business there shall be deducted—*First*, all current operating expenses, including reasonable salaries of officers and men employed by said second party, and daily occurring repairs; *second*, all taxes and insurance paid by said second party upon the building and leased premises and appurtenances; *third*, a salary of two thousand five hundred dollars ($2,500) per annum to the manager of the said elevator; *fourth*, all general or extraordinary repairs on the elevator building or tracks therein, and on the premises hereby leased, and tracks and other appurtenances thereon; *fifth*, six per cent. interest per annum on the amount herein

fixed as the value of the premises, and the tracks thereon hereby leased to said second party, and also six per cent. interest per annum upon the cost of any additional tracks or improvements made by said first party for elevator purposes on the said demised premises, which interest shall be paid to the first party yearly as rentals; *sixth*, six per cent. interest per annum on the cost of the elevator and appurtenances, and upon the cost of all extensions and enlargements of the same, which interest shall be paid to the second party yearly. The balance of the gross receipts remaining after the above payments have been made shall be divided between the first and second parties as follows: The second party shall retain ten thousand dollars, if said balances shall amount to that sum during any year; if it does not amount to that sum during any year, then the said second party is to retain all of the said balance. All of said balance above ten thousand dollars, and up to twenty thousand dollars, each year, shall be paid to the first party. All of said balance above twenty thousand dollars earned in any year shall be divided equally between the first and second parties. Sec. 9. All of the foregoing payments of said first party, on account of the said balance, shall be additional rental for the premises herein described." (10) The plaintiff agrees that, so far as it may legally do so, it will give the other party preference of all grain controlled by it, and will give as good rates before shipments as are given to any other parties under similar conditions and circumstances. (11) Section 11 prescribes the charges to be made by plaintiff for switching. Other stipulations of the contract need not be recited.

The petition does not aver that, after the payments provided for in paragraphs 1, 2, 3, and 4 of the eighth section, any sum remained in the hands of the defendant. The demurrer is based upon the ground that, under the contract, plaintiff is entitled to receive and recover nothing unless a balance remains in the hands of defendant after the payments required by these paragraphs are made, and as no such balance is shown or averred, the petition fails to present a cause of action against defendant.

2. In our opinion, the demurrer was rightly sustained. The language and form of the contract unmistakably indicate the purposes of the payments to be made out of the earnings of the elevator, and their order. Those contemplated in paragraphs 1, 2, 3, and 4 of section 8 are to be made before those provided for in the following sections. The order of the enumeration of their payments settles their order of priority. The reason of these provisions of the contract is quite plain. The defendant depended largely, if not wholly, upon the business brought to it by plaintiff for its income, and the plaintiff became bound by the agreement to furnish defendant all the grain transported to Burlington over its road. A failure to perform this obligation would largely diminish the income of defendant. The elevator could not be operated successfully unless the expenses contemplated in the paragraph above referred to were first paid out of its earnings. The plaintiff, by the terms of the contract, became interested in the successful prosecution of the business done at the elevator. These considerations, doubtless, induced the provision requiring expenses of operating it to be first paid out of its earnings, and support the construction we give to the contract.

3. Counsel for the plaintiff insist that, as the payments to be made to it under the contract were in fact rent, and were so denominated in the instrument, the law will presume defendant's obligation to pay it, but no such presumption will arise against the language and the plain interpretation of the contract. It is entirely competent for a landlord to stipulate that the rent he receives shall be contingent upon the income of the tenant from the demised premises. The leasing of farm lands upon the shares, or for cash, rent to be determined by the quantity of grain raised, and sometimes by its price, is a common way of renting, under which the rent to be received by the landlord is contingent upon the success of the tenant in raising crops. Leasing

of land in this way is somewhat like the contract of the parties sought to be enforced in this action.

In our opinion, the judgment of the district court ought to be affirmed.

STATE *v.* O'BRIEN.

(*Supreme Court of Iowa.* December 17, 1887.)

CRIMINAL PRACTICE—APPEAL.

Appeal from district court, Chickasaw county.

The defendant, John O'Brien, was indicted for keeping a gambling house. He pleaded guilty, and a fine of $75 was assessed against him, and he appeals.

No appearance for appellant. *A. J. Baker*, Atty. Gen., for the State.

ROTHROCK, J. The judgment was entered in the court below more than five years ago. The defendant filed a *supersedeas* bond, and appealed, and the cause was submitted to this court in a transcript of the record. We discover no ground for disturbing the judgment. Affirmed.

KEYES *v.* BRADLEY.

(*Supreme Court of Iowa.* December 20, 1887.)

1. PRINCIPAL AND AGENT—FALSE REPRESENTATIONS IN SALE—EVIDENCE.
In an action for the recovery of money alleged to have been obtained by defendant by false representations as to the price paid for mining stock purchased by him as plaintiff's agent, the issue being as to the fact of agency, plaintiff offered to prove that in a transaction with a witness who had purchased like stock of defendant under an agreement to pay the price paid by defendant, witness had originally paid one-half the price paid by plaintiff, and that subsequently, having been accused of charging more than he paid for the stock, defendant returned to witness a portion of the money. *Held* that, while inadmissible as to the question of motive on the part of defendant, the evidence was material, as tending to show the price actually paid by him for the stock delivered to plaintiff.

2. SAME—ERROR WITHOUT PREJUDICE.
In an action for the recovery of money alleged to have been obtained by defendant by false representations as to the price paid for certain mining stock purchased by him as plaintiff's agent, the issues were as to the fact of agency, and whether the shares delivered by defendant were identical with those contemplated in the agreement. The court permitted defendant to testify as to the purchase of other shares, before the date of the agreement, at the price charged plaintiff, and instructed the jury that plaintiff could not recover unless defendant was acting as his agent when he purchased the shares in question; that defendant would only be bound to deliver such stock as he purchased subsequent to the agreement; and that, if they should find that the shares delivered were in fact owned by defendant before the agreement, they should disregard certain evidence of plaintiff tending to show the price paid for stock after the agreement. The jury found for defendant. *Held*, that as the jury would understand from the rulings of the court that plaintiff could not recover, even though he had proved the agency, and the fact that the purchase in question was made as agent, if the shares delivered were not part of that purchase, the verdict did not necessarily determine the question of agency, and that defendant could not claim that the exclusion of testimony as to the price paid while acting as agent was error without prejudice.

3. SAME—DUTIES OF AGENT TO PRINCIPAL.
When one agrees to act as the agent of another in making a purchase of certain stock, he is not bound to deliver any shares except those purchased under such agreement; but, if he deliver other shares, he is bound to deliver them at the price paid for those purchased while acting as agent.

Appeal from district court, Linn county; J. H. PRESTON, Judge.

This is an action by A. C. Keyes for the recovery of a sum of money obtained by defendant, H. O. Bradley, from plaintiff by a false representation, as is alleged, as to the price which he had paid for certain shares of mining

stock which he had purchased for plaintiff while acting as his agent. There was a verdict and judgment for defendant, and plaintiff appealed.

Henry Rickel, for plaintiff. *Mills & Keeler*, for defendant.

REED, J. The petition charges, in substance, that plaintiff employed or engaged defendant as his agent to purchase for him 3,000 shares of the stock of the Golden Summit Consolidated Gold Mining Company; that afterwards defendant purchased and delivered to him 3,000 shares of the stock of said company, representing to him that he had paid 50 cents per share therefor, which amount plaintiff thereupon paid him, but that in truth defendant had not paid more than 6½ cents per share for said stock. The answer admits that at the time alleged defendant delivered to plaintiff 3,000 shares of the stock of said company, but denies that the relation of principal and agent existed between the parties, or that defendant was acting for plaintiff when he purchased the stock, and alleges that the transaction was a sale by defendant to plaintiff of said shares of stock at the price of 50 cents per share. For some time before the transaction in question, defendant had been a stockholder in the company. The parties were neighbors, and in June or July, 1883, there was a conversation between them with reference to the stock. In that conversation defendant stated that he did not desire to dispose of any of the stock held by him, but that he knew of a party who held a large amount of the stock, which he would be compelled to sell; that the party lived in Dakota territory, where the mine belonging to the company is situated, and that he (defendant) was going there in a short time. Plaintiff testified that, in that conversation, defendant agreed to purchase some of the stock for him; but defendant's testimony was to the effect that his agreement was that he would make an effort to purchase the stock from the party in Dakota, and that, if he succeeded in doing so, he would sell a portion of it to plaintiff. Soon after the conversation, defendant went to Dakota, and while there he purchased from one Wardner 12,000 shares of the stock. On his return to this state he delivered certificates for 3,000 shares to plaintiff, who paid him $1,500 therefor. While in Dakota, he surrendered the certificates he received from Wardner, as well as those formerly held by him, to the secretary of the company, and received new certificates in lieu thereof, and it is uncertain whether the certificates which he delivered to plaintiff represent any of the stock purchased from Wardner. While defendant was in Dakota, plaintiff telegraphed to him instructing him to purchase 3,000 shares of the stock for him, but the dispatch was not received by defendant until after his return to Iowa, and after the transaction was closed, when it reached him through the mail.

1. Plaintiff introduced as a witness one P. H. French, who testified that he and defendant entered into an agreement, before the latter went to Dakota, whereby it was agreed that defendant, in case he should be able to purchase any additional stock, would sell the same, or a portion of it, to the witness, at the same price at which he should purchase it, the witness agreeing to pay his traveling expenses to Dakota, and that upon his return to Iowa he delivered to the witness 6,000 shares of the stock, representing that he had purchased it at 25 cents per share, which price the witness paid him for it. Plaintiff then offered to prove by the witness that he subsequently heard that defendant had purchased the stock at less than 25 cents per share, that he thereupon asserted a claim against him on account of his misrepresentation as to the price he had paid for it, and that defendant paid him $300 in satisfaction of the claim; but the court excluded the evidence, on the ground of irrelevancy and immateriality. Counsel for appellant contended that the evidence was admissible to prove a fraudulent intent on the part of the defendant in the transaction. His position is that, when fraud is the *gravamen* of the action, proof of other acts similar to those charged and done at about the same time is admissible to show the intent with which the party

acted in the transaction. When it is material to inquire as to the motive or intent with which an act has been done, it may be conceded that the rule is as claimed by counsel; but in the present case the motive which prompted defendant's conduct is not material. If the facts were as claimed by plaintiff, viz., that defendant was acting as his agent when he purchased the stock, and that he misrepresented the price at which he bought it, he is liable, whatever the motive may have been. We are of the opinion, however, that the evidence was admissible on another ground. Under the issue, it was material for plaintiff to show the price at which defendant bought the stock from Wardner. The excluded evidence would have tended to prove that fact. Defendant's act in paying the amount demanded by French was in effect an admission that he had paid not to exceed 20 cents per share for the stock. It is contended, however, that the verdict necessarily determines that defendant was not acting as the agent of plaintiff when he purchased the stock, and, with that fact determined, the exclusion of the evidence, which related merely to the measure of plaintiff's recovery in case his right to recover had been established, was not prejudicial. Whether the verdict does necessarily determine that the relation of principal and agent did not exist between the parties depends upon matters which we will consider in the next division of the opinion.

2. The district court instructed the jury that, unless plaintiff had proven that defendant was acting as his agent when he purchased the 3,000 shares of stock in question, he could not recover. Another instruction given by the court is as follows: "If you find from the evidence that the defendant was, by agreement with the plaintiff, to act as agent for the plaintiff in purchasing mining stock held by other parties, then the defendant was required to deliver, under his agency, to the plaintiff, only such mining stock as the defendant should purchase for the plaintiff after said agreement between plaintiff and defendant." And, at the request of defendant's counsel, the following instruction was given: "If the jury should find from the evidence that the Keyes shares of stock in controversy were not a part of the stock bought by defendant from Wardner, but were part of other stock owned by Bradley, then they will disregard all the evidence of the witness Dr. French as to transactions and conversations between himself and Bradley, and not consider the same in making up their verdict." The testimony of the witness French, it will be borne in mind, established that defendant represented, when he returned from Dakota, that he had purchased the stock from Wardner at 25 cents per share. Defendant was also permitted, against plaintiff's objection, to testify that, before going to Dakota, he purchased 4,000 shares from Charles O'Harra, for which he paid 50 cents per share. The jury would understand from the ruling admitting that evidence, and from the instructions given, that plaintiff was entitled to recover only in case he had proven that the particular 3,000 shares which defendant delivered to him were purchased under the agency, and that he was not entitled to recover even if he had proven the agency, and that the purchase from Wardner was made by defendant as agent, if the shares delivered were not part of that purchase. It is very clear, then, that the verdict does not necessarily determine that the relation of principal and agent was not created between the parties, and the exclusion of the evidence of the witness French may have been prejudicial. We are clear, also, that the theory of the court is erroneous. It is true, as the court told the jury, that defendant was bound to deliver to plaintiff only such shares as he had purchased under the agency; but, if he accepted the agency, and made the purchase from Wardner in that capacity, while he was not bound to deliver to plaintiff any shares except those so purchased, still, if he did deliver others, he was bound to deliver them at the price which he paid for those he purchased while acting as plaintiff's agent. He was bound to act in good faith with his principal. The principal was entitled to whatever benefits accrued under the

purchase by the agent. The delivery to him of shares not acquired by that particular purchase would not, perhaps, have afforded him any ground of complaint; but he was entitled to have them delivered at the price paid for those purchased in that transaction. Reversed.

MAXWELL v. PALMER.

(*Supreme Court of Iowa.* December 20, 1887.)

1. TAXATION—QUESTIONING TAX TITLE—OFFER TO PAY ALL TAXES.
Code Iowa, § 897, subsec. 3, provides that no one shall be permitted to question the title acquired by a treasurer's deed, without showing "that all taxes due upon the property have been paid by such person, or the person under whom he claims title." Plaintiff's land had been sold for the taxes of 1876 and 1877, and tax deeds given in 1881. The taxes of 1883 were yet unpaid. In an action to set aside the tax deeds, and to enforce the right to redeem, *held*, that plaintiff's offer in his petition to pay the taxes, if it should be determined that he was entitled to redeem, was not such a compliance with the provisions of the statute as enabled him to maintain his action. *Held, also*, that the objection that the taxes had not been paid could be taken advantage of by the holder of the tax title, notwithstanding he had not been prejudiced by plaintiff's failure to pay the tax.

2. SAME—ACTION NOT MAINTAINABLE UNTIL TAXES PAID—VOID DEEDS.
Under this provision of the Code, a plaintiff is not entitled to maintain an action to set aside tax deeds unless he has paid all the taxes due on the property, even though he claims that the tax deeds are void as having been unlawfully issued without proper notice of expiration of the time for redemption.

Appeal from district court, Wright county.

Action in chancery by James N. Maxwell against S. G. Palmer to set aside tax deeds and to enforce the right to redeem from tax sales. There was a decree dismissing plaintiff's petition and quieting the title in defendant as prayed for in his cross-bill. Plaintiff appeals.

N. F. Weber, J. A. Rogers, and *R. H. Whipple*, for appellant. *Nagle & Birdsall*, for appellee.

BECK, J. 1. Plaintiff seeks the relief prayed for in his petition on the ground that the notice of the expiration of the time of redemption required by law was not given. Upon this fact he bases his claim that the tax deeds are void, and that he has the right to redeem from the taxes which he offers to do in petition. We need not inquire whether there was such a failure to give notice as will avoid the deeds, for the reason, as we shall point out, that plaintiff is not in a position to question the validity of the tax deeds.

2. The record shows that plaintiff, who entered the land at the United States land-office in 1858, received a duplicate receipt in due form from the register, and in 1860 a patent was issued. In 1867 he executed an assignment upon, or on a paper attached to, the duplicate receipt, assigning the same, "and the warrant, [the entry being made upon a land warrant,] and the land therein described," to one Cory. This instrument was, on the day of the execution, acknowledged, and was recorded in the proper county in 1873. The land was sold for taxes of 1876 and 1877, in 1877 and 1878, respectively. The tax deeds were executed in 1881. The taxes for the year 1883 have not been paid to the county treasurer. We may assume, for the purposes of the case that notice of redemption was duly given before the tax deeds were executed. This, however, is denied by defendants.

Code, § 897, subsec. 3, provides that "no person shall be permitted to question the title acquired by a treasurer's deed, without first showing that he, or the persons under whom he claims title, had title to the property at the time of the sale, * * * and that all taxes due upon the property have been paid by such person or the person under whom he claims title as aforesaid." Defendant insists that the assignment of the duplicate receipt divested plaintiff of the title, and vested it in Cory, and therefore, as plaintiff under this statute

does not hold the title, he cannot redeem. It cannot be claimed that Cory holds the legal title unless it be held that the assignment is sufficient as a conveyance. If it have that effect, then was plaintiff divested of the title, and Cory vested by it? If such be the effect of the assignment, plaintiff cannot redeem. If plaintiff holds the legal title of the land in trust for Cory, it may he that the provision of the statute just quoted authorizes him, as a trustee holding such title, to redeem. The questions here suggested we do not determine, for the reasons that we have not wholly agreed in our conclusions thereon, and their decision is not necessary, as we determine the case on another point.

3. If plaintiff be not the holder of the title of the land, as contemplated by the statute above cited, he cannot redeem. If he be such holder, he cannot redeem, for the reason that he has failed to pay the taxes for 1883 as required by the statute to which we have just referred. The purpose of this provision is to enforce the payment of taxes, and to stimulate land-owners to discharge the duty imposed on all citizens to pay taxes levied upon their lands. The statute was not enacted to protect holders of tax titles, but to enforce public policy, which demands the payment of taxes by all who contribute by taxation to the revenue of the state. The requirement is just. No citizen ought to have the aid of the courts of the state to enforce his rights to land who refuses or neglects to pay the taxes levied thereon for the support of the government of the state.

4. But it is now said that plaintiff in his petition *offers* to pay the taxes, if it be determined that he is entitled to redeem. As we have seen, he cannot redeem unless he holds the title. He asks the relief on the very ground that he does hold it. Yet, while averring that he holds it, and thereon basing his right to redeem, he refuses to discharge the duty of a land-owner by payment of taxes. He proposes to discharge this duty in the future upon the contingency that the courts find him to be the owner of the land. The law does not provide that he may so bargain with the state.

5. Counsel for plaintiff insists that, as defendant is not prejudiced by the non-payment of the taxes, he can ground no objection upon plaintiff's failure to pay them. But, as we have seen, the requirement is not for defendant's benefit or protection, but rather for the enforcement of the rights of the state to collect its revenue.

6. Counsel also contend that, as the treasurer's deeds were unlawfully issued without notice of the expiration of the time for redemption, they are void, and therefore plaintiff is not required, under Code, § 897, subsec. 3, to pay the taxes due the state before he can maintain his action to redeem from the purchaser at the tax sale. But the section forbids him to question the tax deed if he has failed to pay taxes on the land, and raises a bar to his right to maintain the action in order to determine the invalidity of the deed. *Adams* v. *Snow*, 65 Iowa, 435, 21 N. W. Rep. 765, cited by counsel, does not sustain their position. It holds that this provision is not applicable to taxes paid by the holder of the tax deed, either by the purchase of the land or by subsequent payments, and that, in case the tax deed is void, the owner of the land contesting the tax title and claiming the right to redeem is not required to tender to the holder of the tax deed the sum required to redeem.

We reach the conclusion that plaintiff fails to show that he is entitled to redeem from the tax sale. The judgment of the district court is affirmed.

KUHN v. GUSTAFSON.

(*Supreme Court of Iowa.* December 21, 1887.)

1. FRAUDULENT CONVEYANCES—WHAT CONSTITUTES FRAUD.
The sale of all non-exempt property of a debtor, his failure to pay his debts, and knowledge of these facts by the purchaser, does not constitute, but only indicates, fraud.

2. SAME—INDUCEMENT—EVIDENCE—COMMISSION OF CRIME BY GRANTOR.
The evidence showed that a party who had disposed of his goods had been convicted of a crime two days before the sale. For the purpose of further showing fraudulent intent in disposing of the goods, the United States statutes prescribing the fine for such crime were offered, to show an inducement for the fraudulent transfer. *Held*, that the rejection of these was not prejudicial error.

3. PLEADING—AMENDMENT—OBJECTION WAIVED.
A bill of goods alleged to have been wrongfully taken was made a part of the petition in the action. At the trial, evidence of other articles not included was introduced, but no formal amendment of the petition appeared of record to have been allowed. *Held*, as it fully appeared that the court admitted the evidence on the ground that an amendment had been filed, and counsel did not call attention to the fact that it had not, the objection could not be made for the first time on appeal.

4. TRIAL—OBJECTIONS TO EVIDENCE.
When a question does not indicate its purpose, and no declaration of what is expected to be proved by the answer is made, such question cannot be held erroneously rejected.

Appeal from district court, Webster county; S. M. WEAVER, Judge.

Action to recover the value of a stock of goods which the plaintiff, Mary E. Kuhn, claims belonged to her, and which the defendant, G. F. Gustafson, took possession of as sheriff under certain writs of attachment as the property of Rody Allen, the plaintiff's father. The defendant pleaded that plaintiff purchased, and that said Allen sold, her the goods for the purpose of defrauding his creditors. Trial by jury, verdict for the plaintiff, and judgment. The defendant appeals.

Wright & Farrell, for appellant. *Dolliver & Moore*, for appellee.

SEEVERS, J. 1. It is claimed the verdict is against the weight of the evidence and the instructions of the court, and also several of the instructions are objected to. We have read the record and argument of counsel, and deem it sufficient to say that we cannot interfere with the verdict on the grounds that it is not supported by the evidence or is against the instructions of the court. The material question submitted to the jury was whether the sale of the goods was fraudulent. The burden of this issue was on the defendant, and that the evidence tends to show fraud must be conceded; but its sufficiency was a question for the jury, and, at most, it may be said different minds might reach different conclusions in relation thereto. It is by no means certain the sale was of a fraudulent character. Counsel concede that the instructions are correct as abstract questions of law; but their contention is that they are not applicable to the facts in this case. In this view we do not concur, but, on the contrary, think they fully, fairly, and correctly submit to the jury all controverted questions in the case. We do not deem it necessary to set out the instructions, or do more than, in this general way, indicate our view in relation thereto. An instruction was asked and refused, which, in substance, states that if Allen conveyed all his property liable to execution, and did not pay his debts, that such sale is fraudulent on his part, and, if the plaintiff had knowledge of such facts, they must find for the defendant. This instruction was correctly refused, because the law is otherwise. It has never been held, we think, that a sale of all a person's property, and a refusal to pay his debts, constitutes fraud. That it is a badge of fraud is conceded; but the instruction asked goes much further than this, and omits the element of fraudulent intent.

2. The defendant introduced evidence tending to show that Allen was indicted in January, 1886, in the federal court for selling intoxicating liquors without having paid the tax imposed by the laws of the United States; and this indictment was pending at the time the plaintiff purchased the goods. The defendant further proved that, on the day succeeding the sale, Allen was fined $100, and costs, by the federal court. The defendant offered to introduce in evidence the statute of the United States prescribing the penalty for such offense, which may be a fine not exceeding $5,000 nor less than $100.

This evidence was objected to, and the objection sustained. Counsel claim the court erred in so holding, because the fact that so large a fine may be imposed has a tendency to show the sale was made to avoid its payment. But as the defendant introduced evidence showing that Allen was convicted two days before the sale, and that he was fined as above stated afterwards, no possible prejudice could have resulted from the rulings of the court. The jury knew that Allen had been convicted of a crime, and that punishment would follow. Besides this, the statute is the law of the land, which every one is presumed to know. It cannot be regarded as a fact, nor did it tend to prove a fact.

3. When this action was commenced, the plaintiff attached to, and made it a part of the petition, a bill of particulars of the goods seized by the defendant for which a recovery was asked. During the progress of the trial, it was disclosed that there were other goods taken, and thereupon the plaintiff sought and obtained leave to amend the petition so as to base a right to recover for the goods last referred to, and introduced evidence to support such claim, which evidence was objected to, but the objection was overruled. This is said to be erroneous, because in fact no such amendment was filed, and it does not affirmatively appear there was. The ruling of the court was based on the ground that an amendment had been filed, and the trial proceeded accordingly. We are inclined to think counsel understood an amendment was filed; but whether this is so or not is immaterial. Counsel knew the ground on which the court made the ruling, and we think they should have called the attention of the court to the fact that the proper amendment was not filed, and therefore asked the court to strike out the evidence; and, as this was not done, the defendant cannot raise the objection that no amended petition was filed for the first time in this court. We desire to say that the verdict was in the nature of a special verdict, and that we are inclined to think the defendant was in no respect prejudiced by the ruling, conceding it to be erroneous.

4. The defendant asked a witness the following question: "Did you have a conversation with R. Allen, in Fort Dodge, on the twenty-first day of June, 1886,—the day that R. Allen had his trial in the federal court at Fort Dodge?" An objection to this question was sustained, upon what ground we are not advised. Appellant claims it was competent and material to show that Allen sold the goods for the purpose of defrauding his creditors, and that it was competent to prove this fact by his declarations made when the plaintiff was not present. Conceding this to be so, we do not know that such evidence was expected to be elicited. The declarations of Allen were not competent against the plaintiff, and therefore we think counsel should have disclosed what they expected to prove, or have framed the question so as to indicate on the face of the question its object and intent. In other words, it should have been shown by the question or otherwise that the evidence sought to be obtained was both material and competent. *Jenks* v. *Mining Co.*, 58 Iowa, 549, 12 N. W. Rep. 588; *Mitchell* v. *Harcourt*, 62 Iowa, 349, 17 N. W. Rep. 581; *Votaw* v. *Diehl*, 62 Iowa, 676, 13 N. W. Rep. 757, 18 N. W. Rep. 805.

Other assignments of error are insisted upon, which it is not deemed essential should be specifically referred to. They all, we think, are based on the thought generally stated that the verdict is against the evidence. Such errors should be regarded as reasons why the verdict should have been for the defendant, and upon this branch of the case sufficient has been said in the first paragraph of this opinion. Affirmed.

HARBACH *v.* COLVIN *et al.*

(Supreme Court of Iowa. December 21, 1887.)

1. PAYMENT—BY CHECK TO AGENT.
An attorney, having a mortgage in his hands to collect, received a check for it, which he placed in his bank to his credit. The check was paid by the bank on which it was drawn. *Held*, that it was a payment of the mortgage.

2. MORTGAGES—ASSIGNMENT TO JUNIOR LIENOR—PAYMENT TO ATTORNEY.
Code Iowa, § 3323, provides that, any time prior to the sale under a foreclosure, a person holding a junior lien may pay the amount of the senior mortgage, with costs, and any other liens attaching, and receive an assignment of the mortgage. Code, § 213, subsec. 3, provides that an attorney may receive the money claimed during the pendency of a suit, and discharge the claim. Plaintiff, being a junior mortgagee, paid the amount of a senior mortgage to an attorney having begun a suit to foreclose it, in which plaintiff was a defendant. *Held*, that the attorney was authorized to receive it.

3. SAME—FORECLOSURE BY SENIOR MORTGAGEE AFTER ASSIGNMENT—JUDGMENT IN TRUST.
Plaintiff, a junior mortgagee, was made defendant in a suit to foreclose a senior mortgage. He paid the amount of the senior mortgage, with costs, to the attorney of the owner. The mortgage and notes were delivered to him, and it was agreed that the foreclosure suit should be continued in the name of the senior mortgagee. *Held*, that the judgment was held in trust for plaintiff by the senior mortgagee; and at the sale, upon bidding in the property, and tendering the costs, he was entitled to the certificate of purchase.

Appeal from circuit court, Polk county.

The defendant, Almira Colvin, was the owner of a promissory note for $600 given by James W. Kelly, and which was secured by mortgage on real estate in the city of Des Moines. The indebtedness was for money loaned to Kelly by Mrs. Colvin. Kelly procured the loan through H. R. Creighton, who was a loan agent at Des Moines. Creighton sent the application to Smith & Tennant, at Westfield, in the state of New York, and they procured the money from Mrs. Colvin, who is also a resident of that state. When the indebtedness fell due, Creighton, who is also an attorney, instituted a suit in Mrs. Colvin's name for the foreclosure of the mortgage. This was done without any previous direction or authority from her; but, when she was informed that it was necessary for the enforcement of her rights to foreclose the mortgage, she delivered it and the note to Smith & Tennant, with directions to send them to some attorney for that purpose, and they sent them to Creighton. The plaintiff, L. Harbach, held a junior mortgage on the premises, and he was made a party defendant in the action. For the purpose of securing his own claim, he desired to pay Mrs. Colvin's debt, and procure an assignment of her note and mortgage, and he applied to Creighton to make the payment to him. It was agreed between them that plaintiff should pay the amount of the debt, and that the note and mortgage should be delivered to him, and that the action should be prosecuted to judgment in Mrs. Colvin's name, but for his benefit. He accordingly drew his check to Creighton on the Des Moines Savings Bank for the amount of the debt, and Creighton delivered the note and mortgage to him. Creighton deposited the check to his own credit in the bank in which he kept his account, and it was paid on presentation by the bank on which it was drawn. The action was subsequently prosecuted to judgment by plaintiff's attorney. The judgment entered in the cause is in favor of Mrs. Colvin, against Kelly, for the amount of the debt, and for the foreclosure of the mortgage, and it establishes the priority of her mortgage to the one held by plaintiff. Creighton did not pay over to Mrs. Colvin the money paid him by plaintiff, but converted the same to his own use. Plaintiff caused a special execution to be issued on the judgment, and at the sale thereunder he bid the amount of the judgment and costs, and his bid was accepted by the sheriff. He tendered to the officer, however, only the amount of the costs, which was rejected, on the ground

that he did not, either by the terms of the judgment or by any assignment, appear to be the owner thereof, and the sheriff thereupon adjourned the sale for three days. At the adjourned sale, Mrs. Colvin bid in the property at the amount of the judgment and costs, and the sheriff gave her a certificate of purchase. Plaintiff thereupon brought this action in equity to establish, as against Mrs. Colvin, his ownership of the judgment, and to compel the sheriff to issue to him a certificate of purchase under the first sale of the property. The circuit court entered judgment in accordance with the prayer of the petition. Mrs. Colvin appealed.

Millard & Fletcher, for appellant. *Phillips & Day* and *St. John & Whisenand*, for appellees.

REED, J. 1. It is urged that the transaction between plaintiff and Creighton did not amount to a payment of the debt, for the reason that the latter had no authority to receive anything but money in payment. The general rule undoubtedly is that one who undertakes as agent for another to collect a money demand, in the absence of special instructions, has no authority to accept anything but money in payment. *McCarver* v. *Nealey*, 1 G. Greene, 360; *Graydon* v. *Patterson*, 13 Iowa, 256; *Drain* v. *Doggett*, 41 Iowa, 682. We have no occasion in the present case to determine whether such agent would have authority, where the usage was to pay by check, to accept a check in payment, but, for the purposes of the case, it may be conceded that he would not have such authority. If, however, he receives the money on a check which he has taken in payment, there can be no question that that would amount to payment. If the debt should not be satisfied by the acceptance of the check, it clearly would be by the receipt of the money thereon. Now, while the money was not actually delivered to Creighton on the check, what was done was equivalent to that. The bank in which he deposited it gave him a credit for the amount, and paid it to him when he chose to draw it out, and the bank upon which the check was drawn paid the amount when the check was presented.

2. It is next contended that the transaction between plaintiff and Creighton was in effect but an attempt by the latter to sell and assign the note and mortgage to plaintiff, and that, as he had them in his possession for collection only, he had no authority to make any such disposition of them. It is certainly true that the power to enforce collection of the debt did not carry with it the general power to sell the evidence of indebtedness; and, if Creighton had undertaken to transfer the note and mortgage to one having no interest in the mortgaged property, there would no doubt, perhaps, that his client would not have been bound by his action. But plaintiff held a junior mortgage on the premises. He was entitled by reason of that fact to pay the debt for the protection of his own security, and upon payment of the amount he was entitled to an assignment of the interest of the senior mortgagee. Section 3328 of the Code is as follows: "At any time prior to the sale, a person having a lien on the property which is junior to the mortgage will be entitled to an assignment of all the interest of the holder of the mortgage by paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. He may then proceed with the foreclosure, or discontinue it, at his option."

There can be no question but plaintiff, under this provision, could have compelled the assignment of the mortgage to him, by paying to Mrs. Colvin, or to any person authorized to receive it for her, the amount of the mortgage, with the interest thereon and the costs of the action. But the question is whether Creighton had authority, by virtue of his relation to her, to receive the money for her. We think he had such authority. It is provided by statute (Code, § 213, subsec. 3) that an attorney has power "to receive money

claimed by his client in an action or proceeding during the pendency thereof, or afterwards, unless he has been previously discharged by his client; and upon payment thereof, and not otherwise, to discharge the claim, or acknowledge satisfaction of the judgment." As the attorney has the authority to receive "any money claimed by his attorney in the action," it follows, necessarily, that he has authority to receive it from any person from whom it may be collected in the action, or who, for the protection of any interest of his own, has the right to pay it. As we have seen, plaintiff had the right, for the protection of his junior lien, to pay the money in question. He was made a party to the foreclosure proceeding for the purpose of compelling him to pay it, or, in case of his refusal to pay, of foreclosing his lien. The money paid was the amount claimed by Mrs. Colvin in the action, and in effect it was claimed of plaintiff. We think the authority of Creighton to receive it for his client is clear.

3. Another position urged by counsel for appellant is that plaintiff is estopped by the judgment from asserting the right he is now seeking to enforce. The facts upon which this position is based, are that plaintiff was a party to the action in which the judgment was rendered, and that by its terms it is a judgment in favor of appellant adjudging that she is entitled to have and recover of the defendant, Kelly, the amount of the indebtedness, and ordering the sale of the mortgaged premises for the satisfaction of the debt, and determining that the lien of her mortgage is senior and superior to any interest of the plaintiff in the premises. It is contended that the rights which plaintiff is now seeking to enforce are necessarily concluded by the judgment. Of course, the general proposition is conceded that, as between the parties thereto, a judgment is conclusive as to all rights which were put in issue by the pleadings. But plaintiff's claim is not in derogation of that rule. He was a defendant in the action in which the judgment was rendered, it is true; but he could not have asserted the right he is now seeking to enforce in that relation to the case. The right which he acquired by his payment of the money was the right to an assignment of the interest of the mortgagee. But that was not a right which he could have pleaded as a defense. He could have asserted it only by a motion to substitute as plaintiff in the action, or, possibly, by a petition of intervention. He did neither, and his right to the assignment was in no manner put in issue; nor could it have been, while the parties retained the relations to the case in which they then stood. He does not deny the validity of the judgment; nor does he assert any right in opposition to it. His claim is merely that, while the judgment is by its terms in favor of appellant, she holds it in trust for him, and we think he is not precluded by the judgment from asserting that claim. Affirmed.

PETROSKY v. FLANAGAN.

(Supreme Court of Minnesota. December 19, 1887.)

1. COSTS—OFFER OF JUDGMENT—"ACCRUED COSTS."
   An offer for judgment in favor of the plaintiff in an action for a specified sum, and "accrued costs," is a substantial compliance with the provisions of Gen. St. 1878, c. 66, § 259.

2. SAME—ACCEPTANCE—WHAT COSTS TAXABLE.
   Upon the acceptance of such offer as provided by the statute, the plaintiff's right to enter judgment carries with it the costs lawfully taxable to carry the offer into effect.

(Syllabus by the Court.)

Appeal from district court, Blue Earth county; SEVERANCE, Judge.

Wm. N. Plymat, M. E. Berry, and *Collester & Foster,* for Isaac N. Flanagan, appellant. *Alfred E. Hawes,* for August Petrosky, respondent.

VANDERBURGH, J. The complaint was for trespass to real property, and claimed damages in the sum of $300. A few days after the action was brought, the defendant served upon the plaintiff an "offer to allow judgment to be taken against him for the sum of fifty dollars and accrued costs." The offer was not accepted, and at the trial the jury found a verdict for $50 in plaintiff's favor.

The question arises whether upon this verdict, and under the offer, the plaintiff is entitled to costs, or must pay defendant's costs. The plaintiff claims that the terms of the offer are insufficient under the statute (Gen. St. 1878, c. 66, § 259) in respect to costs, inasmuch as it is an offer for judgment for the sum named, and "accrued costs," instead of "with costs." But we do not think there is any substantial difference between these terms as applied to the facts of the case. Unlike the case of a tender, the defendant evidently contemplated the entry of judgment upon the offer, and the allowance of such costs as would legitimately follow such entry and be included therein. Upon the acceptance of the offer, the right to judgment accrued, and with it the costs lawfully taxable upon the entry thereof; that is to say, the costs of carrying the offer into effect if accepted. *Holland* v. *Pugh*, 16 Ind. 21; *Keller* v. *Allee*, 87 Ind. 254. The offer, we think, could not have misled the plaintiff, or have been reasonably understood to mean the trifling disbursements already incurred, leaving the plaintiff to carry out the offer at his own expense and charges.

Judgment reversed, and cause remanded, with directions to tax costs in defendant's favor.

SANBORN and another *v.* MUELLER and Wife.

(*Supreme Court of Minnesota.* December 19, 1887.)

1. TAXATION—ACTION TO TEST VALIDITY OF TAX TITLE—PLAINTIFF NEED NOT ALLEGE POSSESSION OR VACANCY OF LAND.
   An action brought under chapter 127, Laws 1887, to test the validity of an adverse claim under a tax deed or certificate, may be maintained by the land-owner, without alleging or proving, either that the land is vacant or in the possession of himself or another.

2. SAME—DEED—REFERENCE TO PLAT—USE IN EVIDENCE.
   When, in the description in a deed, reference is made to a plat, it may be used to identify the lands referred to, though it does not conform to the statute, and is not duly certified.

3. SAME—NOTICE OF EXPIRATION OF REDEMPTION.
   Title will not be presumed to have been acquired under a tax certificate, issued upon the tax judgment and sale for 1879, until notice of the expiration of the time of redemption has been served.

4. SAME—SALE OF DISTINCT LOTS IN GROSS—VALIDITY.
   A tax certificate issued under the sale made in pursuance of chapter 135, Laws 1881, which shows on its face that several separate and distinct lots are sold together in gross for one price, is void; but where several village lots are contiguous, so that they may be used and assessed together as one tract, it will not be presumed from the certificate that such sale thereof was irregularly made in violation of the statute.

5. SAME—SPECIAL SALE—RECITAL OF DATES.
   A tax certificate, issued under the same statute, which purports to have been made in pursuance of "a real estate tax judgment entered August 15, 1881," on "the thirty-first day of December," (year not stated,) was dated December 31, 1881. It will be presumed that the sale was made December 31, 1881, and, in the absence of any evidence or finding on the subject, it will not be held, as matter of law, that the special sale under that statute must necessarily have been completed prior to the date mentioned.

6. SAME—VALUE OF DEFENDANTS' IMPROVEMENTS.

The plaintiffs do not seek to recover possession, but to have the validity of the tax titles under which defendants claim determined. *Held*, that it was not error for the court to refuse to assess or allow in this action the value of defendants' improvement upon the land in question.

(*Syllabus by the Court.*)

Appeal from district court, Dakota county; CROSBY, Judge.

John B. & W. H. Sanborn, for Sanborn and another, respondents. *E. St. Julien Cox* and *W. H. Adams*, for Mueller and wife, appellants.

VANDERBURGH, J. The plaintiffs allege that they are the owners in fee of lots 1, 2, 4, 7, 9, and 10, in block 21, and lots 1 and 2, in block 31,—all in Jackson & Bidwell's addition to West St. Paul,—according to the plat thereof on file and of record in the office of register of deeds, Dakota county, and allege that the defendants claim some right or interest in the property adverse to them under certain tax certificates, which they allege to be invalid, and ask the court to judge accordingly, and to quiet their title.

1. The action is brought in this form under chapter 127, Laws 1887. It was unnecessary for the plaintiffs to prove anything more than the foregoing allegations. It is not fatal to their right to recover that they failed to prove, or that the court has not found, the further allegations that the lands were unoccupied and vacant; nor is it material to inquire whether the action could have been maintained in this form or for the same relief independently of the statute referred to. The action is well brought, whatever be the character of the possession,—whether actual, constructive, or adverse,—and since the evidence does not appear to have been all returned, the judgment must be affirmed unless the conclusions of law are not supported by the findings of fact, or unless there are substantial errors in the admission of evidence, duly excepted to.

2. The objection to the plat of Jackson & Bidwell's additior cannot be considered, since the plat is not made part of the record, and is not before us. It will be observed, however, that the defendants also claim by the same description under the same plat, and the lots are so described in the tax certificate referred to. And it does not follow, because the plat does not conform to the statute, or is not duly certified or recorded, that the lands therein described may not be identified. *Ames* v. *Lowry*, 30 Minn. 283, 15 N. W. Rep. 247; *Reed* v. *Lammel*, 28 Minn. 306, 9 N. W. Rep. 858.

3. The court finds that the time for the redemption under the tax certificates, Exhibit A and Exhibit B, offered in evidence has not expired; that they were issued upon the sale for taxes in 1879, and that no notice of the expiration of the period of redemption has been served, and no evidence of such notice has been returned here. Presumptively, therefore, defendants have not yet acquired title thereunder.

4. In respect to Exhibit D, the certificate, as returned to the court, does not purport to include the lots in controversy; but, assuming that they are left out by mistake in the copy, and that the description is as claimed by defendant, the certificate is void on its face, under the decision of this court in *Farnham* v. *Jones*, 32 Minn. 8, 19 N. W. Rep. 83. Several separate and distinct parcels appear to have been sold together as one lot and for one price, bid for the whole in gross, in violation of the statute of 1881, c. 135, under which the sale purports to have been made.

5. It is also assigned as error that the court refused to allow and direct judgment in favor of the defendants for the value of their improvements under the occupying claimant statute, (Gen. St. 1878, c. 75, § 15;) but as the object of this action is simply to determine the validity of the tax titles in question, and the possession is not asked or adjudged, defendants' rights in the premises are not affected, and they are not prejudiced. No writ could be issued upon

the judgment for the recovery of the possession; and in any subsequent action for the possession, their claim for their improvements must be adjudged and determined before execution for the possession will be allowed to issue.

6. The court found that tax certificate, Exhibit C, is void on its face, on the ground that it contains no date of sale. It is dated and found to have been issued on the thirty-first day of December, 1881, and purports on its face to have been issued upon a sale made "on the thirty-first day of December," and pursuant to a real-estate tax judgment entered August 15, 1881, in proceedings to enforce payment of taxes delinquent in 1879, and prior years. The sale and certificate purport to be had and issued under chapter 135, Laws 1881. The date of the judgment and date of the certificate between which dates the sale must have been made sufficiently indicate that the date intended was December 31, 1881. It was not void for this cause. Until the contrary appears, every presumption will be indulged in favor of the regularity of the proceedings, if the certificate conforms to the statute. Several lots in this instance also appear to have been sold together, but the description indicates that they are or may be contiguous, and it is not found that they may not have been properly assessed together, or did not in fact constitute one parcel. We cannot determine, therefore, as a matter of law, that the certificate is invalid for this cause.

It is also urged by respondents that the public sale provided for by the statute must necessarily have been ended prior to the date indicated, and that the certificate is void for this reason. The day of sale of particular tracts, as recited in a certificate, might be so remote as to rebut the presumption of regularity, but we are hardly prepared to say, in the absence of any finding on the subject, that the special sale of delinquent lands for that county had necessarily terminated before the day mentioned. We apprehend it might easily be shown if such were the case. This certificate is not, we think, void on its face, and there must therefore be a new trial.

Judgment reversed, and new trial granted.

McKINNEY and others *v.* HARVIE.

(*Supreme Court of Minnesota.* December 19, 1887.)

1. VENDOR AND VENDEE—RECEIPT—EVIDENCE TO EXPLAIN.
   The instrument set forth in the complaint acknowledging the receipt of a sum of money in part payment of a certain lot described, and signed by the defendant, *held* to be a receipt only, and not a contract for the sale of land, and hence subject to be explained or supplemented by evidence *aliunde*.
2. PRINCIPAL AND AGENT—PAYMENT OF MONEY BY AGENT.
   Evidence in this case *held* sufficient to show that the sum specified in the receipt was paid by the plaintiff as agent, on a parol agreement for the purchase of land for another person, who was the principal in the transaction.
3. FRAUDS, STATUTE OF—AGREEMENT FOR SALE OF LANDS—REPUDIATION BY VENDEE—RECOVERY OF MONEY PAID.
   Where a vendor under a contract for the sale of lands, which is within the statute of frauds because not in writing, is nevertheless willing and offers to perform on his part, but the vendee refuses to fulfill, and repudiates the contract, the latter is not entitled to recover an installment of purchase money previously paid.

(*Syllabus by the Court.*)

Appeal from municipal court, city of Duluth; MARTIN, Judge.

D'Autremont & Cheeseman, for McKinney and others, appellants. *White, Shannon & Reynolds*, for Harvie, respondent.

VANDERBURGH, J. The receipt set forth in the complaint, as follows: "Received of F. W. McKinney one hundred dollars in part payment of lot seventy-six, block 82, Duluth, Minn., third division,"—and signed by defendant, was open to explanation, and the defendant was properly permitted to

show the transactions connected with it, and that in the matter of the purchase of the lot the plaintiffs were acting as the agents of a third party, and paid the money for him. It is not a contract for the sale or purchase of land, and it is subject to be explained and supplemented by evidence *aliunde*. It is simply evidence of the payment of the sum of money specified for the particular object named. *Eighmie* v. *Taylor*, 98 N. Y. 295; *Filkins* v. *Whyland*, 24 N. Y. 339; *Ryan* v. *Ward*, 48 N. Y. 208; *Barickman* v. *Kuykendall*, 6 Blackf. 24, 25.

The evidence in the case tended to show that plaintiffs were real-estate brokers at Duluth, and on or about the eighteenth day of June, 1886, applied to appellant to purchase the lot in question, obtained his terms, and agreed by parol to take the lot at the price named by him, and paid him $100, and took the receipt referred to. That this was done in contemplation of the purchase of the lot by a customer procured by them, one Chapman, with whom they had previously conferred, and who was expected to purchase it. Soon after, the parties were brought together, and it was mutually understood that the negotiations for the purchase were made for Chapman, who agreed to take the lot, and pay the price indicated. That afterwards, on or about July 15, 1886, plaintiffs prepared a deed in due form running to Chapman, and, at their instance, it was executed by defendant to be delivered to him, and left with them. That Chapman subsequently refused absolutely to take the deed and complete the purchase, though he made no objection to the title. Defendant's evidence also tends to show that he subsequently applied to the plaintiffs, and that they refused to take the lot, and referred defendant to Chapman. There is no evidence that Chapman at any time afterwards offered or was willing to pay for the property, and fulfill the agreement. On the contrary, he finally abandoned and repudiated it altogether; and it also expressly appears by the testimony of the plaintiff McKinney, who attended to the matter exclusively, that he never asked for a deed for himself, or offered to pay the purchase money; and it does not appear that, after he disclosed that the purchase was made for Chapman, he made any claim that it was made for himself. The evidence also shows that plaintiffs, after Chapman refused the deed, sued him for their fees and expenses, including the $100 in question, which they alleged was advanced and expended by them for him as his agents in the premises, and recovered judgment therefor. Upon this evidence the jury were entitled to find that the plaintiffs were the agents of Chapman in the negotiations, and that the defendant was fully warranted in treating the latter as the principal in the transaction.

The instructions upon this subject given by the court, as applied to the evidence, were substantially correct. The following request of plaintiff was refused: "That the defendant putting it out of his power to convey the lot to McKinney, by a sale of the same to the church society, McKinney may treat the contract as rescinded, and recover back the money paid as part consideration." But if, as the jury might find, and doubtless did find, McKinney was merely a broker negotiating for Chapman, whom he put forward as the purchaser, he has no right now to change his position, and claim the benefit of the alleged contract for himself. But this instruction was improper for another reason. The jury might find, upon the evidence, not only that defendant was not in default, and that Chapman was, and had forfeited all his rights under the alleged contract, and to recover any moneys paid thereunder, but there is evidence tending to show, also, a refusal on the part of the plaintiffs to take the property themselves. The defendant testifies, and it is not contradicted: "I went to plaintiff's office four or five times to see what he was going to do about it." And after Chapman refused to take the lot he says: "I went to plaintiff and asked him if he was going to take that lot. He said 'No; I have nothing to do with it. Go to Chapman.' This was three weeks after I had signed that deed. McKinney requested me to sign the deed at the time.

I went then to close it up. I signed it at his request." And there was no subsequent offer or demand by the plaintiffs. It is true that, in October following, the defendant sold and conveyed the lot to a third party; but as he had given both principal and agent ample opportunity to take it under the agreement, and as the evidence tends to show both had notified him of their refusal, and the contract had been repudiated by them, he had done all that was reasonably necessary for his own protection. He was not obliged to hold the property always, but might, as he did, dispose of it after a reasonable time.

It is not material that the contract was by parol, and within the statute of frauds. The purchaser cannot recover moneys paid under it if the defendant was not in default. It was not his fault that it was not fulfilled, but wholly that of Chapman and the plaintiff. Under such circumstances the installment ought not, *ex æquo et bono*, to be recovered back. *Plummer* v. *Buckman*, 55 Me. 106; *Gray* v. *Gray*, 2 J. J. Marsh. 24; *Coughlin* v. *Knowles*, 7 Metc. 62; *Sennett* v. *Shehan*, 27 Minn. 329, 7 N. W. Rep. 266; *Ketchum* v. *Evertson*, 13 Johns. *365.

The affidavits disclosing the statements and admissions of a juror subsequent to the trial, and showing prejudice on his part, cannot be considered. Judgment affirmed.

MARTY *v.* CHICAGO, ST. P., M. & O. RY. CO., (two cases.)

(*Supreme Court of Minnesota.* January 2, 1888.)

RAILROAD COMPANIES—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where a highway crosses a double-track railway, over which trains are liable to run frequently in opposite directions, it is contributory negligence for a traveler thereon, whose view of the second track is obscured by the presence of a passing train on the track nearest to him, to pass immediately upon the crossing as soon as the way is clear, without waiting to look or listen for the approach of a train in the opposite direction on the second track.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county; BRILL, Judge.

J. H. Howe and *C. D. O'Brien*, for Chicago, St. P., M. & O. Ry. Co., respondent. *I. V. D. Heard*, for Fred Marty and John Marty, appellants.

VANDERBURGH, J. These two cases were tried together, and were dismissed at the close of plaintiffs' testimony. The cause of action arose out of alleged injuries to the plaintiff Fred Marty, and to the team and wagon of John Marty, driven by the former, occasioned by a collision with one of defendant's trains at a railway crossing in the suburbs of the city of St. Paul. At the place in question the road or highway traveled by the plaintiff crossed first the track of the St. Paul & Duluth Railroad, which was distant west of the defendant's track about 100 feet. It then runs south between the two railroads for a short distance, and turns and crosses at right angles the roadway of the defendant, which at that place has a double track, the inside rails of which are 11 feet apart.

The accident occurred on the fourteenth day of May, 1886, between 7 and 8 o'clock in the evening, as the plaintiff, who was a butcher, accompanied by a friend, who occupied the same seat with him, was attempting to cross the tracks of defendant with the loaded wagon. He was returning from the slaughter-house of his brother, the plaintiff John Marty, where he was employed every day. It was situated north-west of the railroads, which he had been in the habit of crossing daily for years, at the place in question. After he had crossed the track of the St. Paul & Duluth road, he came up to within about 25 feet of the westerly track of the defendant's road, which was used for incoming trains, and stopped to wait for the passing of a freight train then occupying the crossing and going into the city. This train obscured the

view of the other track, and the plaintiff did not see or hear the approach of the outgoing passenger train due at or about that time at the crossing on its way east. But as soon as the freight train had passed, he immediately started up, and drove on the second track used for outgoing trains, and was intercepted by the engine of the passenger train. He knew that the easterly track was used for outgoing trains, and had before on several occasions seen two trains there under similar circumstances, and knew that the trains there were frequent, and knew that a train went out in the evening, and that no flag-man was stationed there. He testifies that he could not see the passenger train because the freight train was in the way, and he drove on behind the latter, so that he did not discover the approach of the engine till it was within a few feet of him.

The plaintiff testifies that he has, since the accident, made the crossing under similar circumstances in safety, but has waited till the intervening train got out of the way, so that he could see several hundred feet down the track, before attempting to cross. He admits that but for the freight train the track could have been seen at least 500 feet in the direction from which the passenger train came.

The trial court dismissed the action upon the plaintiff's evidence, on the ground that he was careless in thus driving upon the second track behind the freight train, without waiting for an opportunity to look, and was guilty of contributory negligence.

The court was clearly right. The plaintiff was familiar with the situation and the danger, and it is quite clear, as one of his witnesses testifies, that there is no reason why a man should be caught at this crossing if he uses care and chooses to look. A trifling delay would have enabled him to look, and this precaution was the more important because the noise of the passing freight train would prevent him from hearing the approach of the other train. The evidence is clear, not conflicting, and the facts not complicated, and the case was properly passed on by the court, without submitting it to the jury. *Abbett* v. *Railroad*, 30 Minn. 482, 16 N. W. Rep. 266; *Donaldson* v. *Railway*, 21 Minn. 294; *Rogstad* v. *Railway*, 31 Minn. 210, 17 N. W. Rep. 287; *Mantel* v. *Railway*, 33 Minn. 62, 21 N. W. Rep. 853. Order affirmed.

SAWYER *v.* MINNEAPOLIS & ST. L. RY. CO.

(Supreme Court of Minnesota. January 2, 1888.)

RAILROAD COMPANIES—DEFECTIVE CAR—INJURY TO EMPLOYE OF ANOTHER COMPANY.

The plaintiff was injured in consequence of a defective step-ladder on one of defendant's freight cars. He was not at the time in the service of the defendant, but of another company, which was then using the car in its own business. The car had been sent over the road of the latter company, which connects with that of the defendant, consigned to a point in another state; but, on its return, it was transferred beyond the point of junction at which it should have been returned to defendant, and was loaded with freight consigned to a distant point on such connecting road. *Held*, that the defendant owed no duty to the plaintiff in respect to the condition of the car growing out of contract or otherwise, and that this action cannot be maintained.

(Syllabus by the Court.)

Appeal from district court, Waseca county; BUCKHAM, Judge.

Lusk & Bunn, for Sawyer, appellant. *B. S. Lewis*, for Minneapolis & St. L. Ry. Co., respondent.

VANDERBURGH, J. One of defendant's cars was loaded with plaster at Fort Dodge, Iowa, and transported over its line to Waseca, in this state, a point of junction with the Winona & St. Peter Railroad. It was consigned to Alma Center, in Wisconsin, a station on the Green Bay Railroad, and was thereupon transferred and taken over the two last-named roads to its place of destination. On its return trip, it was reloaded with freight, (emigrant movables,) and consigned to Huron, Dakota, over the Winona & St. Peter

Railroad and Chicago & Northwestern roads. The car was sent out from Waseca March 15, 1886, and passed through the same place on its return, April 15th. Huron is 260 miles west of Waseca. The car arrived at Tracy, a point on the Winona & St. Peter road 135 miles west of Waseca, on the evening of the last-named day. Winona, Waseca, and Tracy are division stations, where trains are made up and cars inspected and repairs made. A new train was made up at Tracy for Huron, including the car in question, and the same evening the plaintiff, a brakeman in the employ of the Chicago & Northwestern Railroad Company, was injured while attempting to ascend the ladder of the car. As he took hold of the second round, it pulled off, and he was thrown between the cars and seriously hurt. The car was repaired and returned empty, billed from "Huron to Winona," but stopped at Waseca on April 13th, and was then returned to the defendant. The evidence tends to prove that the round which broke loose had not been securely or properly attached to the body of the car, and that, apparently, when repaired, it had been fastened with a screw which was fixed in or beside a piece of wood which, in process of time, ceased to hold it firmly, and the ladder had become unsafe.

At the time of the accident it is clear that the car was not in the service of the defendant. There is no evidence that its use beyond and west of Waseca was authorized by defendant. And though railway companies, for convenience or by reason of the urgency of their business, not unfrequently make such use of foreign cars, or cars from connecting lines belonging to other companies, when they get possession of them, yet the evidence fails to show any general custom from which an authority can be implied to retain or divert such cars to a special or general use in their own business, further than is necessary or proper on their return to the place or point of junction whence they may have been taken. The evidence shows that while, from the nature of the case, it is difficult to prevent such use of cars, yet that the owners object to it, and that it is considered "an abuse of a car" to retain it and use it in the business of the bailee on its own lines further than is reasonably necessary in returning it. If the defendant had seasonably regained control of the car, it may be presumed that it would have inspected and repaired the same in due course. It is evident that its liability could not continue indefinitely for defects which might be developed from the faulty construction of cars kept out of its use.

At the time of the accident the car was under the management and control of the company operating it, and not of the defendant. It did not come to the hands of the plaintiff through the agency or by the authority of the defendant, and there is no privity between them. It owed him no duty growing out of contract, and was not bound to furnish him safe instrumentalities. As to the defendant, the plaintiff was a mere stranger. *Winterbottom* v. *Wright*, 10 Mees. & W. 108; *Loop* v. *Litchfield*, 42 N. Y. 358; Thomp. Neg. 227, 237.

There is a class of actions in tort which are maintained on the ground that the wrongful acts or omissions on the part of the defendant are such as are in themselves imminently dangerous to others, and from which a general liability arises to any one for injuries which can be traced as the natural and probable consequences of such acts. *Thomas* v. *Winchester*, 6 N. Y. 402, and cases cited; *Smith* v. *Railroad Co.*, 19 N Y. 130. But this case evidently does not belong to that class, and the defendant owed no such general duty to the plaintiff or others not in privity with it. *Kahl* v. *Love*, 37 N. J. Law, 8; *Longmeid* v. *Holliday*, 6 Exch. 761; *Collis* v. *Selden*, L. R. 3 C. P. 495. The liability of the defendant in respect to the condition of its cars did not extend beyond those to whom it owed some duty by reason of its relation to them as master, employer, or carrier. Any other rule would be found impracticable of application in ordinary business operations. *Thomas* v. *Winchester*, *supra*, 408; *Kahl* v. *Love*, *supra*.

A new trial was properly granted. Order affirmed.

STATE v. REDFIELD.

(*Supreme Court of Iowa.* December 21, 1887.)

ASSAULT—INTENT—EVIDENCE.

The testimony of a physician as to the result which, according to medical science, *might* follow blows and violence of a given character, when it is not claimed the result did follow, is not competent as tending to prove assault with intent to inflict great bodily injury.

Appeal from district court, Page county.

The defendant, George Z. Redfield, was convicted of the crime of assault with intent to inflict a great bodily injury, and a fine of $250 was imposed upon him.

W. P. Ferguson, for defendant. *A. J. Baker*, Atty. Gen., for the State.

REED, J. The offense charged is alleged to have been committed against May Redfield, who is a daughter-in-law of the defendant. The said May Redfield lived in a house which belonged to defendant. Some trouble arose between the parties, in consequence of which defendant ordered her to leave the premises, and, on her refusing to leave, he ejected her from the house. She testified, in effect, that he seized her by the arm and jerked her violently out of the chair in which she was sitting, and that he pushed or pulled her out of the house, and struck her a blow which knocked her off the porch, and that she fell to the ground, a distance of two or three feet, and that the injuries she received caused her back and head to ache, and caused sickness at the stomach. Defendant, in his testimony, admitted that he used some degree of force in expelling her from the house, but denied that he struck her, or that she was thrown or fell from the porch.

The state called as a witness one Dr. Enfield, a practicing physician, and asked him a number of questions, the purpose of which was to elicit his opinions as to the results which might be expected to follow from a blow, and violence of the character of that which the prosecutrix claimed to have received in the transaction in question. The answers of the witness, which were received against defendant's objection, were to the effect that concussion of the brain might be caused by such injuries. In our opinion, the objection should have been sustained. It was proper to inquire as to the injuries which the prosecutrix actually sustained in the transaction, but the only legitimate purpose of such inquiry was to show the intent with which defendant acted in committing the assault. But the questions were asked, not for the purpose of showing the extent of the injuries actually sustained, but with the object of proving that other results more serious than those might have followed from the act. Defendant is presumed to have intended all such consequences as were ordinarily to be apprehended as the result of his act; but if a result might have followed which could have been anticipated only by a person of learning or experience in medical science, it cannot be said that defendant, who is not possessed of such learning or experience, intended that result, for as he could not have known that the result would or might follow from his act, he could not have contemplated or intended it. The witness was examined as an expert, and his testimony tended to prove that a physician of skill and experience might have apprehended that consequences of a serious character would or might follow from the act. The evidence was incompetent and immaterial. Reversed.

FLEMING v. HULL *et al.*

(*Supreme Court of Iowa.* December 20, 1887.)

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—TAKING PRIVATE PROPERTY WITHOUT CONSENT—DRAINS.

Acts 20th Gen. Assem. Iowa, *c.* 188, providing for the laying of drains through property of private owners, for the benefit of land belonging to other individuals,

is unconstitutional, as its purpose is to take property without "due process of law," and also because it provides for taking private property for private use without the owner's consent. BECK, J., dissents.

Appeal from district court, Mahaska county; J. K. JOHNSON, Judge.

Plaintiff, Orrin Fleming, owned certain land through which defendants, E. C. Hull and others, as the trustees of the town, attempted to lay out a ditch, for the benefit of the lands of a private individual. The further facts are recited in the opinion.

Blanchard & Preston, for appellants. *John F. & W. R. Lacey* and *Bolton & McCoy*, for appellee.

SEEVERS, J. Chapter 188, Acts 20th Gen. Assem., provides "that whenever any person shall desire to contruct any tile or other under-ground drain through the land of another, and he shall be unable to agree with the owner or owners of such land as to the same, he may file with the clerk of the township where said land is situated an application therefor, giving a description of the land or lands through which he may desire to construct the same." Following this are provisions requiring the clerk to notify the township trustees, who are required to fix a time for hearing the application, and notice of the hearing is required to be served on the applicant and land-owner. It is then provided that, at such time, "the trustees may fix the point or points of entrance and exit or outlet of said tile or other under-ground drain on said land, the general course of the same through said land, the size and depth of the same, when the same shall be constructed, how kept in repair, what connections may be made with the same, what compensation, if any, shall be made therefor, or any other questions arising in the construction of the same, and they shall reduce their finding to writing, which shall be filed with the clerk of said township, who shall record it in full in his book of records of said township; and said finding and decision shall be final, except as to the amount of damages, if any such shall be awarded." It is further provided that "either party may appeal to the circuit court of said county from so much of said finding and order as relates to the amount of damages: * * * provided, however, that said appeal shall not delay the construction of said tile or other under-ground drain, if the applicant shall, in case the land-owner appeals, deposit with the township clerk the amount of damages awarded by the trustees, and, in case the applicant appears, that he shall first file the appeal-bond required by law."

Under this statute, William Varmest made the application therein contemplated, stating that he desired to construct two tile or under-ground drains through the lands of the plaintiff, describing them. The trustees fixed a day for the hearing, and the requisite notices were served, and they made and reduced their finding to writing as required by the statute. The trustees found that "one of said ditches is necessary for the proper cultivation of said lands; that the permanent value will be increased thereby; and that it is necessary, in order to drain said lands and adjacent lands, that said tile ditches should pass through the lands of others than the applicant herein." The trustees also found and directed that the drain should be constructed over the land of the plaintiff, where the same should enter his premises, the depth and size of the drain, the length thereof, and that he would sustain no damages by reason thereof. Afterwards the plaintiff caused to be issued a *certiorari* directed to the defendants, who are the township trustees, and in their return thereto the foregoing facts appear. Afterwards the plaintiff appealed from the decision of the trustees to the proper court, so that both appeal and the *certiorari* proceedings were pending at the same time. No motion was filed to dismiss either, nor was the pendency of one pleaded in abatement or in bar of the other. In both such proceedings a motion was filed by the plaintiff to dismiss the same, because the statute above referred to was unconstitutional,

and therefore the proceedings from the beginning must be regarded as absolutely void. These motions were sustained, and the defendants appeal.

1. It is said that the appeal must be regarded as a waiver or abandonment of the *certiorari* proceedings. For aught that appears, this question is presented for the first time in this court, and this cannot be done; but, conceding the point made to be well taken, the question as to the constitutionality of the law could be raised in the appeal in the manner it was in this case. *Blankhead* v. *Brown*, 25 Iowa, 540. Besides this, if the statute is unconstitutional, the whole proceeding is void, and no right whatever was or can be obtained thereunder, and the sooner this question is determined the better it will be for all parties.

2. No motion was made to dismiss the appeal; therefore, for all purposes of this case, it must be regarded as properly in the court below when the motion was determined. While this is true, it is exceedingly doubtful whether the right to appeal existed. It will be observed that the trustees found that the plaintiff was in no respect damaged by the construction of the drain over his premises, and the statute provides that the decision of the trustees shall be "final, except as to the amount of damages, if any, which shall be awarded." This contemplates that an appeal lies only in case damages are awarded. If this be the proper construction of the statute, it is in conflict with section 9, art. 1, Const., which provides that the "right of trial by jury shall remain inviolate, * * *" and "no person shall be deprived of life, liberty, or property, without due process of law." The assessment or non-assessment of damages by the trustees cannot be regarded as "due process of law," unless the right of appeal exists to a tribunal where such an assessment can be made by a constitutional jury. But as the main reliance of counsel for the appellee is based upon another provision of the constitution, it is perhaps better that our decision should be grounded on it.

3. It is agreed on all hands that private property, or the use thereof, cannot be taken or appropriated for private purposes without the consent of the owner; but it may be taken without the consent of the owner for public purposes if such owner is compensated therefor. The contention of counsel is whether the statute contemplates or authorizes the construction of drains for a public purpose, or for the private use and benefit of the applicant. Counsel for the appellant have called our attention to many adjudged cases, in which it is claimed questions like that in the case at bar have been determined. These cases have all been examined, and they consist of two classes. The first is where the erection of dams across streams of water are authorized by statute for the purpose of creating water-power to propel machinery in mills and manufactories; the effect of such dams being almost invariably to cause the water to flow back and submerge the lands of others. Such statutes have been sustained on the ground of public necessity. They were first enacted prior to the discovery or utilization of steam, and there was no power other than that of animal or water that was known, or at least which in those days could be economically used, for the purpose of procuring food and clothing. The establishment of mills and manufactories, therefore, was a public necessity, as well as a private benefit to the parties who constructed them, and so are railroads, which are now regarded as public necessities. This being so, the power to invoke the right of eminent domain existed, and, if any person was damaged by the erection of such dams who refused to accept a reasonable compensation for the damage suffered, he could properly be compelled to do so in case his damages were assessed by a jury. But if such statutes were enacted now for the first time, it is possible if not probable such statutes could not be sustained. Cooley, Const. Lim. 664.

The second class of cases to which counsel have called our attention is where swamp or overflowed lands have been drained by ditches or otherwise reclaimed, and in so doing drains or ditches have been constructed, under the

provisions of a statute, through the lands of others. These cases are not grounded on the right of eminent domain, but on the police power inherent in the state, which, broadly but not accurately (if this can be done) defined, is the power to do whatever may be regarded as being for the interest of all the people of the state. Such definition of the police power is sufficiently accurate for the purposes of the case. If lands are swamp, marsh, or wet, disease may be engendered, the public health may require that they should be drained, if necessary, and such drain may be constructed through the lands of others. Such a statute has been in force in this state for several years. Code, §§ 1217–1225, inclusive. It may be further conceded, for the purposes of this case, that if land is swamp, marsh, or wet, and the proper cultivation thereof so requires, it may be drained through the lands of others, provided compensation is made for the damages sustained. There are well-considered cases which hold that this may be constitutionally done when there are large tracts of such land, and possibly it is within the discretion of the legislature to determine the size or extent of the tracts that may be so drained, and that such determination is conclusive. We, however, have no occasion in this case to determine whether such a statute would be constitutional or not. This case is materially different from those we have been considering. It will be observed the statute in question does not contemplate lands which are swamp or wet, but that any person who may *desire* to do so may, by pursuing the statutory mode, be authorized to construct a drain through the land of another. He is not required to establish that what he desires is reasonable or proper, or that his lands are swamp or wet, and in this case the applicant simply stated to the trustees that he desired to construct a drain through the plaintiff's land. It is true, the trustees are required to determine, it may be assumed, whether the drain shall be constructed, but it does not in terms so provide. Conceding, however, the drain cannot be constructed without it is authorized by the trustees, if they do authorize it, their conclusion is a finality. The statute, therefore, provides that the trustees have the power to finally determine that one person may lawfully enter on the land of another, and dig up the soil, lay a drain, and perpetually maintain it, and, in this instance, cause the water passing through the drain to be discharged into a ditch on the plaintiff's land, which he must always maintain, for the reason the trustees ordered that the plaintiff "shall not in any manner obstruct the free passage of water through said ditch or the outlet into which it opens." It would seem, therefore, that the plaintiff has been deprived of the right to use his property as he deems best, and that a burden is cast upon him without a trial by jury, to which he is entitled under the constitution.

But it may be said that the finding of the trustees is final and conclusive, and therefore the statute is constitutional, because the trustees have found a ditch or drain is necessary and proper for the proper cultivation of such lands; that the permanent value will be increased thereby; and that it is necessary in order to drain said lands and adjacent lands. But it seems to us that the constitutionality of a statute does not depend upon the finding of the trustees in a particular case. If the statute is unconstitutional, it is void, and no valid act can be based thereon. But the trustees have not found that any of the lands are swamp or wet, and, as we understand, the primary thought in their finding is that the proper cultivation of the lands requires that the drain be constructed. The facts upon which their conclusion is based are not in the record. "It may be for the public benefit that all wild lands should be cultivated, all low lands drained, all unsightly places beautified, all dilapidated buildings replaced by new, because all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of the lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based on these considerations alone, and some further element must therefore be involved before

the appropriation can be sanctioned by our constitutions. The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use." Cooley, Const. Lim. 660. It is true that the statute does not contemplate a taking of property except for a drain; but this is immaterial, for it is nevertheless a taking, for one person's drain rests on the land of another. It is not our province to say whether the plaintiff has acted as a good neighbor should. This he has the right to determine for himself.

The foregoing views are in accord with and supported by *Bankhead* v. *Brown*, 25 Iowa, 540. For the reasons stated, we feel constrained to hold that the first section of chapter 188, Acts 20th Gen. Assem., is unconstitutional and void. Affirmed.

BECK, J. (*dissenting.*) 1. In my opinion, the statute referred to in the foregoing opinion, authorizing the construction of tile or other under-ground drains by a land-owner for draining his own land through the land of his neighbor, is not in conflict with any constitutional limitation, but was enacted in the exercise of competent legislative power. It cannot be denied that land cannot be taken from the owner for strictly private purposes; that is, no one for his own private use can take the land of another. But I insist that the statute involved in this case authorizes nothing of the kind; that it does not provide that one man may *take* another's land for private use. How can it be said, when the land-owner remains in the uninterrupted possession of land, and enjoys fully all its profits, when his title is not impaired or assailed, and when no injury is done to the land, but it is rather improved and made more valuable for cultivation by the construction of a tile drain through it, that the land is *taken* for any purpose, either public or private? In truth, the land is not *taken*. Every right and benefit which the law secures to the land-owner he retains to the fullest extent. He is burdened with no restriction upon his property rights. But one thing does the law forbid him to do, viz., to selfishly obstruct or destroy the drain constructed by his neighbor, which is below the surface of the ground, and is no detriment to the full and free use of the land for any purposes. The surface of the land may be disturbed, and the grass, if there be any, to some extent injured by digging a small ditch, two feet wide, more or less, which, after the tile is laid, is filled up. The statute provides for compensation for such injuries. But the possession of the land is not taken when the ditch is made, and the work occupies but a brief time, after which the land-owner finds it improved in productiveness and value.

2. The authority of the legislature to enact the statute in question is supported upon these considerations. The citizen holds all his own property, subject to the restriction that it shall not be used or so kept as to interfere with the fullest enjoyment by his neighbor of his property. He cannot compel his neighbor to maintain a marsh or incur great expense in draining it, when but a trifling outlay would be sufficient to construct a drain as provided by the statute in question. He is required to permit his own property to be occupied temporarily for the purpose of preventing loss to his neighbor. I need not refer to familiar instances wherever this dotrine is applied. It is the duty of all citizens to promote the general good of the people of the state, and it is the duty of the state to provide by law for the general welfare and prosperity. Public policy demands that the agricultural lands of the state shall be well farmed and drained, so that the utmost extent of their capability for the production of the fruits of the earth may be realized. The state, in the exercise of its police authority, may enforce such demand of public policy for the public good. See Cooley, Const. Lim. 707 *et seq.*

3. A rule of the common law forbids the owners of property, real or personal, to so use or hold it that it works injury to another. The foregoing decision of the majority of the court supports unthrifty and unneighborly land-

owners, who will not drain their own lands, nor permit their neighbors to drain theirs on the selfish ground that their rights of property will thereby be involved. I am sorry that this court has invoked wholesome doctrines and correct constitutional restrictions, which, in my opinion, are not applicable to the case, to establish a rule which will operate harshly upon the agricultural interests of the state by retarding the development of much of our best and most fertile lands, and will put it in the power of the selfish and unthrifty to throw insurmountable obstacles in the way of good farmers who desire to beautify and fertilize their farms by turning unsightly marshes or wet lands into productive fields.

4. But, should it be held that the land is *taken* by the person constructing a tile drain, in that this manner of improving lands develops the agricultural resources of the state, the great source and the wealth of our people, upon which depends, in a very great measure, our prosperity,—it is a public purpose for which private property may be appropriated. While but an individual in a single case may reap the benefits which come from the profits of the improvement of his land, the whole state is indirectly benefited thereby. And, in view of the fact that so many of our people and such large quantity of our lands may be beneficially affected by such improvements made by individuals, it becomes a public purpose, in the execution of which all the people of the state are interested and largely benefited. I am clear in the opinion that, if it may be said that the lands involved in this case may be *taken*, it is for a public purpose, which authorizes the exercise, on the part of the state, of the right of eminent domain. In support of these views see *Manufacturing Co.* v. *Fernald*, 47 N. H. 444. Other cases could be cited to the like effect.

5. The statute in question authorizes the construction of "tile and other under-ground drains." The language of the act, and the universally familiar acquaintance of our people with the uses of "tile and under-ground drains," justify the conclusion that the purpose of the statute enacted by law-makers familiar with this language and this purpose, is to authorize the drainage of *wet* lands. "Tile and other under-ground drains" are therefore not authorized by the law, except the land be wet, and it is not to be presumed that the trustees in this case authorized the construction of the drain except upon finding that the land was wet, and for that reason the drain was required by the person invoking the action of the trustees. It would not only be absurd, but contrary to presumptions which we are required to execute, to argue that this person may have desired to put in the tile, and the trustees may have authorized it, when the land was not wet in fact. The presumption arises that the trustees did find and adjudicate that the land was wet, and that the claim for authority to construct the drain was authorized by the facts.

6. If the trustees erroneously found that the land was wet, when in fact it was dry, and for that reason a drain was not authorized by the statute, the law provides a way for reviewing and correcting the erroneous decision. It may be that the trustees cannot acquire jurisdiction by findings contrary to the facts; but it is not alleged or claimed in this case that plaintiff's land which he desired to drain is not wet.

7. Wet lands not only retard cultivation, but are the certain source of malaria, the prolific parent of disease. This is a fact known to all men in all ages, which the law presumes without proof, and of which the courts will take judicial notice as a matter of common knowledge which nobody questions. It is not denied, but admitted, that the promotion of public health and the prevention of disease, is a public purpose, authorizing the exercise of the right of eminent domain. Drainage tends to remove disease and attendant evils. It is therefore a public purpose, and the legislature, in enacting the statute in question, so regarded it, and authorized the construction of "tile and other under-ground drains" as a public purpose. It was not deemed requisite that in each case, when it should be proposed to construct tile drains in wet

land, that it should be determined that the public health would be promoted thereby. This is a fact settled by universal knowledge and admission, and is recognized by the legislature and the courts without a claim therefor or proof thereof. When a railroad company or a mill-owner is seeking to enforce the right of eminent domain, no allegation is required or proof demanded to the effect that these works are demanded by the public wants and necessities. So in the case of drains; it is taken by the legislature and by the courts as a conclusive presumption that their construction is demanded for the promotion of the public health, and that, therefore, the right of eminent domain may be exercised in taking land for their construction. The whole world knows they are promotive of public health whenever they are demanded by the necessities of agriculture. This the legislature recognized in enacting the statute, and the courts cannot question it when called on to enforce the enactment.

In my opinion the foregoing decision is based upon the misapplication of familiar principles of the law, and the failure to recognize others equally familiar.

PERRINE v. WINTERS.

(*Supreme Court of Iowa.* December 21, 1887.)

1. LIBEL AND SLANDER—EVIDENCE—RELEVANCY.
   In an action for slander, plaintiff testified that at and for some time prior to the cause of action she was living with her sister, Mrs. P.; that she had been working out; but had to come and help her sister, as P.'s health had failed, and they could not get along without her; also, that defendant closed up a fence so they could not get a team in, and plaintiff had to spade up the garden, cabbage patch, etc. *Held*, that the evidence, so far as it showed the sickness of P., and dependence of his family on the services of plaintiff, and closing the fence and spading the garden, was irrelevant and incompetent, as tending to excite sympathy and increase the damages.
2. SAME—EVIDENCE—OCCUPATION OF PLAINTIFF—SOCIAL STATUS.
   In actions for slander, evidence may be introduced showing the occupation of plaintiff, and the rank and condition in life of either party, in aggravation or mitigation of damages, but not beyond this.
3. SAME—EVIDENCE—POVERTY OF PLAINTIFF—OF DEFENDANT.
   In actions for slander, plaintiff cannot prove his poverty in aggravation of damages; neither can defendant prove his poverty in mitigation of damages.

Appeal from district court, Washington county; W. R. LEWIS, Judge.

Action for slanderous words spoken by defendant, Enoch Winters, of and concerning plaintiff, Nancy Perrine, imputing a want of chastity in exceedingly vulgar language. Trial by jury, verdict for plaintiff for $800 damages, and judgment. Defendant appealed.

C. J. Wilson and *H. & W. Scofield*, for appellant. *J. F. Henderson* and *Dewey & Eicher*, for appellee.

SEEVERS, J. The defendant denied the allegations of the petition, and pleaded a counter-claim, and certain matters in mitigation of damages. The plaintiff was introduced as a witness in her own behalf, and the following questions were asked her, and she gave the evidence hereafter stated in reply thereto: (1) "You may state to the jury how you have been making your living for a year or two past, there or elsewhere. *Answer.* I have been working round taking care of the sick, and when not working out would go home with them." (2) "You may state whether you were working out a portion of the time if you remember. *Answer.* I had been working out, but had to come and help her, as his health had failed, and he came to be confined, so that she could not get along." (3) "You may state what you were engaged at, what was your business and duties there, during the time you were assisting her there at the time you have spoken of. *Answer.* I was helping her. He had closed up the fence so that we could not get a team in to

plow, and so we had to go to work and spade our garden and cabbage patch and everything ourselves." The foregoing questions were objected to, but the objections were overruled, the defendant also moved the court to exclude the latter part of the answer to the second question, and to exclude the answer to the third question, which motions were overruled.

1. The plaintiff and Mrs. Patrick were sisters, and the former was making her home with her sister and her husband at the time the slanderous words were spoken; and in the answer to the second question she states that Mr. Patrick's health had failed, and for this reason her sister could not get along, presumably, without the plaintiff's aid. This clearly was immaterial, incompetent, and, we think, prejudicial. The fact that Patrick was sick, and his family dependent on the labor of the plaintiff, was calculated to excite sympathy, and have a tendency to increase the damages. The answer to the third interrogatory is also incompetent, and should have been struck out. The fact that the defendant had closed the fence, and the plaintiff was compelled to spade up the garden, had no bearing on the issues, and was calculated to excite sympathy.

2. Counsel for the appellee insists that the questions asked were proper, and that evidence may be introduced in actions of this character showing the occupation of the plaintiff, and this we think is true; and they further contend that it is competent to show the rank and condition of life of either plaintiff or defendant, in aggravation or mitigation of damages, and counsel cite Field, Dam. § 694, where the author says: "So, in actions for libel or slander, it is proper to show the rank and condition of life in aggravation of damages, and the defendant may avail himself of such evidence as far as it is favorable therefor in mitigation." Conceding this to be the rule, it does not necessarily extend beyond showing one's occupation, or rank and condition in society; and this is the extent of the holding in *Larned* v. *Buffinton*, 3 Mass. 546. In *Karney* v. *Paisley*, 13 Iowa, 89, and other cases, it has been held that the plaintiff may show the "condition and pecuniary circumstances" of the defendant, upon the ground that slanderous words spoken by a person of wealth and influence ordinarily has a greater effect upon the minds of others than if the same words had been spoken by one who did not possess such wealth and influence. There are grave doubts whether this reasoning is correct, because it is not universally true that a man possessed of wealth has the confidence and respect of the community in which he lives. But, conceding the rule, it does not meet the necessities of this case. It has been held that the defendant cannot show his own property in mitigation of damages, (*Case* v. *Marks*, 20 Conn. 248;) and also that the plaintiff cannot prove, in aggravation of damages, that "he was a poor, hard-working, industrious man," (*Pool* v. *Devers*, 30 Ala. 672.) Our attention has not been called to, nor has our own search in the limited time at our command enabled us to find, any adjudged case which holds that the plaintiff may prove his own poverty in aggravation of damages, and upon principle we think such evidence is not admissible. The damages should be neither diminished nor enhanced because of the poverty of the plaintiff. Damages in actions of this character are ordinarily largely imaginary, and the sympathy of the jury should not be quickened by evidence showing the poverty of the plaintiff. The rule allowing evidence to be introduced showing the wealth of the defendant in aggravation of damages constitutes an exception in favor of the plaintiff in this class of cases, (*Hunt* v. *Railroad Co.*, 26 Iowa, 366,) and is ordinarily, we think, sufficient to fully protect the rights of the plaintiff. It will be conceded that it was competent for the plaintiff to show that she was a nurse, or washerwoman, or that a man may prove he is a teamster or laborer; but this, we think, is as far as he can go in this direction in making out the case in chief. It seems to us the plaintiff was allowed to do more than this, and that the object and intent of the questions asked was to show she was a

poor woman, and in this view we are confirmed by the course of argument adopted by counsel in addressing the jury; and that the jury were influenced by such evidence, we think, is reasonably certain, when the amount of the verdict under the evidence in this case is considered. Reversed.

BOUSCHER *v.* SMITH *et al.*

(*Supreme Court of Iowa.* December 20, 1887.)

HOMESTEAD — UNITED STATES PATENT — CONVEYANCE TO WIFE — EXEMPTION NOT DESTROYED.

Plaintiff, the owner of a homestead under a patent from the United States, conveyed the same by warranty deed to his wife, who executed back to him a mortgage, reciting that it was given to secure part of the purchase money. Both parties acted in the honest belief that such conveyance would render the homestead more secure to the wife and children. After some years, finding that they were mistaken, the wife reconveyed to plaintiff, who thereupon discharged the mortgage. There was no money consideration in any of the transactions. The land had been continuously and openly occupied by plaintiff and his family as a homestead during the entire period. *Held*, that the conveyance did not operate to extinguish the exemption, under Rev. St. U. S. § 2296, providing that no lands acquired under the provisions of the homestead act "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

Appeal from district court, Cherokee county; C. H. LEWIS, Judge.

Action by J. T. Bouscher to restrain defendants, R. J. Smith *et al.*, from selling 80 acres of land upon execution. A temporary injunction was allowed, which was made perpetual after a demurrer to a reply to defendants' answer was overruled. The defendants standing upon their reply, they now appeal.

J. D. F. Smith, for plaintiff. *Ernest S. Herrick*, for defendant.

BECK, J. 1. The plaintiff's petition shows that he is the owner of 80 acres of land, which he acquired under the statute of the United States securing homesteads to actual settlers on the public domain. One of the defendants obtained a judgment against him upon an indebtedness contracted before the patent for the land was issued to plaintiff by the United States government. An execution was issued upon the judgment, and was placed in the hands of another defendant, the sheriff of the county, who had levied upon the land, and advertised it for sale, and will sell it unless restrained by an injunction.

The defendants, in their answer, admit the allegations of the petition reciting the foregoing matters, but in avoidance thereof allege that, after the patent for the land was issued, the plaintiff conveyed by warranty deed one-half of it, described according to the government survey, to Johannah Bouscher, and afterwards conveyed the other half of the land in the same manner to the same persons, who, to secure a part of the purchase money, executed to plaintiff a mortgage upon all of the land. Afterwards plaintiff's grantee reconveyed the whole tract to him, and he entered satisfaction of the mortgage upon the record. Upon these facts, defendants claim that the exemption under the United States statute became extinguished, and the 40 acres of land not actually occupied as a homestead by plaintiff is subject to the judgment. They admit that the 40 acres so occupied are not subject to sale on the execution, and make no claim to the contrary.

To the answer, plaintiff filed a reply in the following language: "The plaintiff, for reply to defendants' answer, states that the conveyance of said land, copies of which are attached to defendants' answer, were made by plaintiff to Johannah Bouscher, but avers that the said Johannah Bouscher, named in said deed, is the wife of plaintiff, and has been such since the month of August, 1870; that plaintiff and said Johannah took possession of said land in the month of June, 1872, under the act of congress approved May 20, 1862, and entitled 'An act to secure homesteads to actual settlers on the public do-

main,' built a house thereon, and have had a continuous residence on the same from the month of June, 1872, and now reside on said land; that the said Johannah is a very nervous woman, and a person given to finding fault with plaintiff's management of his business affairs, and at various times prior to the execution of said instruments—copies of which are attached to the defendants' answer—insisted on plaintiff placing the title to said land in her name, that she and her children might not come to want; that the said Johannah's importunities were so constant, harassing, and annoying to plaintiff that plaintiff could not enjoy that peace and quiet at his home that he was entitled to, and, for the purpose of allaying the said Johannah's fears in that respect, did execute the instruments—copies of which are attached to defendants' answer—conveying said lands to said Johannah; that said instruments were all executed without any consideration whatever therefor; that there was no money paid by said Johannah in consideration of the execution of said deeds, and none received by plaintiff in consideration thereof; that the mortgage referred to in defendants' answer plaintiff exacted of said Johannah for the purpose of keeping said Johannah from incumbering or conveying away any portion of said land while said title to said land stood in said Johannah's name; that the note described in said mortgage was immediately destroyed by plaintiff, and no part of the same was ever paid; that said Johannah, about the month of December, 1885, concluded that all of her apprehensions of plaintiff's inability to properly manage his business, and control and take care of his property, were without foundation, and that it was her duty to reconvey said land to plaintiff, and, in pursuance thereof, did execute the deed of said land to plaintiff on the second day of January, 1886,—a copy of which is attached to defendants' answer; that no consideration whatever was paid by plaintiff to said Johannah for the reconveyance of said land from her to the plaintiff; that plaintiff's residence on said land has been continuous, open, and notorious since the month of June, 1872, up to and including the present time; that it is now his homestead, and always has been his homestead, under said act of congress above referred to in this reply."

To this reply defendants interpose a general demurrer, which was overruled, and, standing on their pleadings, a decree was rendered against them, granting the relief sought by the petition.

2. The statute of the United States secures to every person who is the head of a family, or is over 21 years of age, and is a citizen of the United States, or has declared his intention to become a citizen, the right to enter not more than 160 acres of the public land upon the payment of nothing more than certain fees prescribed by the act, and to receive a patent therefor, upon the condition of actual residence thereon, and cultivation thereof, for the period of five years. Upon the death of the person making the entry before the patent is issued, his widow, heirs, or devisees shall be entitled to receive the patent. It is provided that no lands acquired under the provisions of the act "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." See Rev. St. U. S. §§ 2289–2296. Counsel for defendant, in effect, admit that, if plaintiff had not conveyed the land to his wife, it would have been exempt from the judgment involved in the case, under the United States statute; but insists that the conveyance by her had the effect to remove the exemption provided by that statute, and subject the land, except that part exempt under the homestead laws of this state, to defendants' judgment. They base this position upon *Butler* v. *Nelson*, 32 N. W. Rep. 399, which holds that the conveyance of the homestead without consideration, and in fraud of creditors, and the reconveyance, remove the exemption in favor of the homestead provided by the statute of the state, and the land becomes subject to the execution for debts existing before the reconveyance. If our own statute is alone to be considered, the case is not applicable to the facts before us. In that case, the conveyance of the homstead

was to a stranger, to defraud creditors. In this case, the conveyance was not fraudulent; was made to the wife of plaintiff to preserve and protect the homestead, as she, and probably plaintiff, believed; and was reconveyed to plaintiff for the same purpose. The wife, as is shown by the reply, received the property to be held as a homestead. She, under our statute, could hold the title to the homestead as well as he, and it would still possess a homestead character, and be so exempt.

Nothing of the kind appeared in the other case; but defendants, in effect, admit that, under our statute, plaintiff, by the conveyance and the reconveyance, did not forfeit his homestead right to 40 acres occupied as a homestead, the quantity limiting a homestead under the laws of Iowa, for they expressly aver that they make no claim to or attempt to enforce the judgment against that part of the land. But they insist that the homestead right under the statute of the United States is defeated by the conveyance and reconveyance. In our opinion these acts have no such effect. If we are correct in this position,—of which we entertain no doubt,—the whole of the 80 acres is exempt. Our conclusion on this point is based upon these grounds: The statute of the United States which we have under consideration is intended to secure homesteads to the citizens. The title of the original act declares that purpose, and the lands acquired under it are designated as homesteads. See Rev. St. U. S. §§ 2288–2294. A homestead is "the home or seat of a family." An unmarried man may have a home and a homestead under this statute; but homes commonly are occupied by a family, consisting of at least a husband and wife. The purpose of the statute clearly is to secure the home to such a family; not, of course, exclusively, but such a family is surely within the contemplation of the statute. It is secured for the benefit of the wife as well as of the husband. It cannot be doubted that the wife may enter a homestead and receive a patent therefor. The provisions of the statute, which we have above stated, securing the homestead to the widow, heirs, and devisees of the person entering it, unmistakably show that the purpose of congress was by the enactment to secure to the husband, wife, children, and even devisees, of the citizen entering the land, the right to occupy it as a home. Now, the reply assailed by the demurrer shows that the conveyance and reconveyance of the land in question to and by the wife was to secure and retain the homestead to the wife and children of plaintiff. These acts were, in effect, in harmony with the United States homestead statutes. They were honest, though probably mistaken, efforts to that end. It would surely be illogical, if not absurd, to say that the acts would defeat the bounty of congress, when they are in accord with its purpose, and intended to secure that very bounty. It is, indeed, absurd to say that the act of congress speaks this language: "This land is given to the husband for the benefit of himself, wife, and family. It could have been given to the wife for the same purpose. It is to be occupied by the husband, wife, and family for a home, and shall be exempt from all debts contracted before the patent issues. But if, for the purpose of securing this object, the husband conveys it to the wife, after the patent issues, then it shall not be held for the benefit of the family, but shall be subject to all debts of the husband contracted before the patent issued." This is the position of defendants' counsel, and its statement is its best and most effective refutation. As we have said, counsel for defendant in effect conceded, what we have never heard doubted, that it is competent for congress to provide for the exemption of the homestead bestowed by its bounty from debts contracted before the patent issued. The question is not in the case, and we need not, therefore, consider it. Affirmed.

STATE v. BECK.

(Supreme Court of Iowa. December 20, 1887.)

1. CRIMINAL PRACTICE—TRIAL OF DEFENDANTS JOINTLY INDICTED—CONVICTION AFTER DISCHARGE OF CO-DEFENDANT.
   Defendant and C. were jointly indicted for assault with intent to rob, but were tried separately, and C. was convicted. On appeal the judgment was reversed, because the evidence was insufficient to identify C. as one of the assailants, and C. was set at liberty. On trial of defendant some additional witnesses gave testimony tending to prove admissions by defendant that he was concerned in the commission of the offense. The jury found him guilty. *Held*, that the additional testimony warranted the jury in convicting him, even though C. was discharged for want of identification.
2. SAME—ASSAULT TO ROB—EVIDENCE—IDENTITY.
   In a prosecution for assault with intent to rob, the man assaulted admitted on cross-examination that soon after the crime was committed he was shown a photograph of one W., and that he then expressed the opinion that W. was one of his assailants. Defendants offered evidence, which was excluded, that W. was in the neighborhood at about the time the crime was committed. *Held* no error.
3. SAME.
   In a prosecution for assault with intent to rob, it was proved that, on the morning after the commission of the crime, the man assaulted gave a description of one of the men engaged in it. Defendant offered evidence, which was excluded, that one W. answered the description. *Held*, that the evidence was properly excluded.
4. SAME—CHANGE OF VENUE—AFFIDAVITS—DISCRETION OF COURT.
   The exercise of its discretion by the trial court, in refusing to grant a change of venue, will not be interfered with, where the petition is supported by affidavits and testimony of inhabitants of the county to the effect that petitioner cannot have a fair trial there, while the petition is opposed by affidavits and testimony to the opposite effect, and there is no reason to attach greater weight to the testimony of either side.

Appeal from district court, Wright county.

The defendant, Phinley Beck, was convicted of the crime of assault with intent to rob, and sentenced to a term of imprisonment in the penitentiary.

D. C. Filkins and *J. F. Martin*, for defendant. *A. J. Baker*, Atty. Gen., for the State.

REED, J. 1. The defendant filed a petition for a change of venue, on the ground of the alleged prejudice of the judge of the district court, and of excitement and prejudice of the inhabitants of the county against him. But the petition was overruled. The application was supported by the affidavits of a large number of inhabitants of the county, and the district attorney filed the affidavits of a number of citizens in resistance. The affidavits in support of the application tended to show the existence of some degree of excitement with reference to the case among the people of the county, while those in resistance tended to prove that no prejudice existed which would prevent the defendant from having a fair trial in the county. The application was addressed to the discretion of the court, (*State* v. *Ostrander*, 18 Iowa, 435; *State* v. *Ross*, 21 Iowa, 467; *State* v. *Perigo*, 70 Iowa, 657, 28 N. W. Rep. 452,) and we cannot say that the district court abused the discretion with which it is clothed. Defendant's witnesses testified that in their opinion there did exist such prejudice and excitement in the county that he could not have a fair trial, while those for the state testified to a contrary opinion. No fact is proven from which we can conclude that the opinion of the witnesses for the defendant is entitled to any greater weight than that of those for the state. In such cases we will not disturb the finding of the trial court.

2. Defendant was jointly indicted with one Daniel Campbell; but the parties were tried separately. Campbell was tried at a former term, and convicted; but, on appeal to this court, we held that the evidence did not support the verdict, and when the cause was remanded, it was dismissed as to Camp-

bell on the motion of the district attorney. It is now insisted that the evidence which tends to connect the defendant with the commission of the offense is no stronger than was that against Campbell. It is true that the witness Myers (the person on whom the assault is alleged to have been committed) was no more certain on this trial as to the identity of the persons who committed the crime than he was on the trial of Campbell; and if the verdict rested alone on his testimony, it probably could not be sustained. But while he did not undertake to identify with certainty the defendant as one of the assailants, his evidence proved the commission of the crime, and the state introduced the evidence of other witnesses which tended to prove certain admissions by the defendant to the effect that he was concerned in the commission of the offense. The question as to the credit which should be given to the testimony of those witnesses was for the jury. If they were creditable, the jury was warranted in convicting the defendant on their testimony, and the verdict implies that they believed them to be credible. We cannot interfere with their finding.

3. The witness Myers admitted on cross-examination that soon after the crime was committed he was shown a photograph of one Perry Wolf, and that he then expressed the opinion that Wolf was one of the persons who assaulted him. He also admitted that he afterwards frequently expressed the same opinion. Defendant offered to prove by another witness that Wolf was in the neighborhood at about the time the crime was committed, but the evidence was excluded. Defendant clearly had the right to prove, if he could, that the crime was committed by another. But it would avail him nothing to prove merely that some other person might have committed it, and that was all the excluded evidence would have tended to prove. The persons who committed the crime were masked at the time, and Myers was not able to identify them. The belief afterwards expressed by him that Wolf was one of the party was not evidence of that fact, so that, if the excluded evidence had been admitted, the whole question would have rested on the fact that Wolf was in the neighborhood at the time. But that fact alone has no tendency to prove that he was concerned in the commission of the offense. That the evidence was rightly excluded there can be no question. It was also proven that Myers, the next morning after the crime was committed, gave a description of one of the men engaged in it, and defendant offered to prove that Wolf answered that description; but the evidence was excluded, and, as we think, rightly. The question was asked with reference to the description given by Myers the day after the occurrence. That description, however, was not evidence of the appearance of the men, but as to that fact it was mere hearsay, so that, if defendant had been permitted to ask it, the answer would not have proven any fact that would have been material. Complaint is made of some of the instructions; but, without setting them out, we deem it sufficient to say that they appear to us to be correct.

We find no error in the record, and the judgment must be affirmed.

STATE v. COURTNEY.

(*Supreme Court of Iowa.* December 20, 1887.)

1. INTOXICATING LIQUORS — PHARMACISTS — PROVISIONS OF CODE REPEALED BY ACT OF 1886.

   Acts Gen. Assem. Iowa 1886, c. 83, relating to sales of intoxicating liquors by pharmacists for medicine, is complete in itself, and contains all the law in relation to such sales, and the manner of obtaining permits to sell, and by implication repeals the provisions of Code Iowa, c. 6, so far as relates to pharmacists.

2. SAME — PHARMACISTS NOT REQUIRED TO GIVE BOND — DURATION OF PERMIT.

   Since the passage of Acts Gen. Assem. 1886, c. 83, relating to sales of intoxicating liquors by pharmacists for medicinal purposes, a pharmacist is not required to give bond to obtain a permit so to sell, and such permit is not limited to one year.

BECK, J., dissenting.

Appeal from district court, Dallas county; O. B. AYRES, Judge.

Action in equity to enjoin the defendant from keeping a place for the sale of intoxicating liquors contrary to law, on the ground that a nuisance was thereby created. A temporary injunction was granted, and both parties appealed.

D. Wooden, Co. Atty., *O. W. Jackson*, and *H. H. Cardell*, for plaintiff. *Shortley & Cardell*, for defendant.

SEEVERS, J. 1. The defendant pleaded that he is a pharmacist, and that he has been duly registered as such for several years, and that he has been conducting a pharmacy or drug-store on the premises described in the petition, and that his certificate of registration is in full force; but he admits he filed no bond with the auditor of the county. He admits that he sold intoxicating liquors, and the same were at all times kept for sale by him, and states that any and all sales thereof were made for the actual necessities of medicine, and in good faith, under the authority of a permit granted to him by the board of supervisors of Dallas county, on the third day of May, 1886. A copy of the permit is attached to and made a part of the petition. On its face, the permit shows that the defendant is a registered pharmacist, and that he was granted permission to sell intoxicating liquors for medical purposes only, as is provided in chapter 83, Laws 1886, without limit as to time. The plaintiff demurred in the answer, on the grounds—*First*, that no bond had been filed; and, *second*, that more than one year had expired since the permit was issued, and the board, under the statute, had no power to grant a permit for a longer period than one year. The court overruled the demurrer as to the first, and sustained it as to the second, ground.

2. Section 1526 of the Code provides that any citizen of the state, except hotel-keepers, keepers of saloons, eating-houses, grocery-keepers, and confectioners, can sell intoxicating liquors for medicinal, mechanical, culinary, and sacramental purposes, provided a permit is obtained from the board of supervisors. Before the permit can be granted, the applicant is required to produce a certificate, signed by a majority of the legal electors of the township, town, or ward, that he is a citizen of the state, that he is of good moral character, and that they believe him to be a proper person to buy and sell intoxicating liquors. Code, § 1527. Section 1528 provides that the applicant shall file a bond with certain specified conditions. It is further provided that a day shall be set for the hearing of the application, and that notice thereof shall be given by publication in a newspaper, and cause can be shown against the granting of such permit, and the board can refuse to grant it if from the wants of the locality, and the number of permits already granted, it would not be necessary and proper for the accommodation of the neighborhood to grant an additional permit. But, if granted, it cannot remain in effect for a longer period than one year. Code, §§ 1529, 1530. Such are the provisions of the law which were in force when chapter 75, Acts 18th Gen. Assem., regulating the sale of medicines and poisons, was enacted. This statute, it is sufficient to say, authorized registered pharmacists to sell intoxicating liquors for medical purposes only. Whether, under this statute, a pharmacist is required to obtain a permit, as under the Code, is at least doubtful. But the doubt was removed when chapter 143, Acts 20th Gen. Assem., was passed, as it is held in *State* v. *Bissell*, 67 Iowa, 616, 25 N. W. Rep. 831, that the provisions of said chapter 75 were repealed by implication by said chapter 143. The opinion in *State* v. *Bissell*, was filed in December, 1885, and the twenty-first general assembly convened in the following January, and during its session chapter 85 of the act of 1886 was passed. No reference is made in this act to chapter 143, construed by this court in the *Bissell Case*, in which it was held that section 8 of chapter 75 was repealed by implication; and chapter 83 formally repeals section 8 of chapter 75, and enacts a substitute therefor, which pro-

vides that registered pharmacists have the "sole right to keep and sell, under such regulations as have been or may be established * * * by the commissioners of pharmacy, * * * intoxicating liquors for the actual necessities of medicine only, but a permit must be obtained from the board of supervisors." "In order to secure such permit and a shipping permit," the pharmacist must present a petition signed by at least one-fourth of the free-holders in the township, town, or ward wherein the business is located, certifying that the pharmacist applying for the permit is a person of good moral character, is not a minor, and for six months last preceding has been conducting a pharmacy as proprietor in such township, town, or ward, and they believe him to be a proper person to buy and sell intoxicating liquors for the purposes of this act. The board being satisfied that "all the provisions of the law have been complied with," a permit shall be issued. The material question is, what is meant by "all the provisions of the law have been complied with?" Does this mean all the laws or statutes in the Code, or simply the provisions of law contained in chapter 83 and statutes amended thereby?

It is apparent that the provision that the board, before granting the permit, shall be satisfied that all the "provisions of the law have been complied with," does not refer to the Code, because it provides the bond shall be filed before the hearing takes place before the board, and there is no reference made to a bond in chapter 83; and this is true as to the petition or certificate that must be procured by the applicant, for the reason the Code requires such certificate to be signed by a majority of the electors of the township, town, or ward, and another and different provision is contained in chapter 83, as it is therein provided that the petition shall be signed by one-fourth of the free-holders having the qualification of electors in the township, town, or ward. Nor can such provision refer to the hearing before the board provided in the Code, for the reason that such provision is substantially re-enacted in chapter 83, except that the board is not authorized to take into consideration the want of the locality, and the number of permits granted; therefore the board cannot refuse the permit for such reason. So that it seems to us such chapter contains all the provisions of law in relation to pharmacists, and what they must do in order to obtain a permit; and that said chapter is full and complete, and was intended, in the respect mentioned, to take the place of the provisions of the Code, while chapter 83 does not in terms repeal any provisions of the Code, and repeals by implication are not favored; yet while there are two statutes on the same subject, and the last one contains all the provisions of the first, and also new provisions, one imposing different duties, rights, and penalties prescribed, the latter operates as a repeal of the first statute, although it contains no repealing clause, (*U. S.* v. *Tynen*, 11 Wall. 88;) and if two statutes are not in terms repugnant or inconsistent, if the latter statute is intended to prescribe the only rule which should govern the case, it will be construed as repealing the earlier act, (*State* v. *Mayor*, 40 N. J. Law, 257.) Now, it must be remembered that there is no provision of the Code which refers to pharmacists. The first act on this subject is chapter 75, Laws 1880, and whether, under its provisions and the Code combined, a pharmacist was compelled to obtain a permit in order to sell intoxicating liquors for medical purposes only, is, as we have said, doubtful. If, however, it did not, such provision was repealed by a subsequent act, as we have stated. The effect of the decision in the *Bissell Case* was that pharmacists under the laws then in force were compelled to obtain permits in the same manner, and were subject to the same penalties, as any other person who was authorized to obtain a permit.

It must be presumed that the enactment of chapter 83, 21st Gen. Assem., which makes independent, distinct, and different provisions in relation to pharmacists, was intended as a complete scheme of itself. It was intended and does make clear and well-defined distinctions, and properly so, between

pharmacists who can sell intoxicating liquors for medicine only, and other persons who may procure permits for other purposes. Of course, if the pharmacist sells such liquors for other purposes, the permit affords him no protection against the penalties provided in the Code and subsequent statutes. If it had been intended pharmacists should give a bond, it would have been so provided; and such is true as to the time the permit should continue if it was intended to limit it. The district court thought the statute made a distinction between the bond and the length of time the permit should continue, but we are unable to concur in this view. The latter statute, it seems to us, places both on the same plane, because, as to both, chapter 83 must be regarded as a complete scheme in and of itself.

Therefore, on the plaintiff's appeal, the judgment of the district court is affirmed, and, on the defendant's appeal, reversed.

BECK, J., (*dissenting.*) In my opinion, the law of the Code, *c.* 6, tit. 11, and *c.* 83, Acts 21st Gen. Assem., so far as they relate to permissions to be allowed by the boards of supervisors for the sale of intoxicating liquors, are *in pari materia*, and are to be interpreted and construed together. Code, § 1523, a part of the statute first referred to, forbids the sale of these liquors except under permission to be given by the boards of supervisors as therein prescribed. By this statute, the power to issue the permissions is conferred upon the board; and the proceedings to obtain them, and the time for which they may be held, are prescribed. A bond is to be given by the applicant for a permission which expires in one year. All persons entitled to secure permission stand on the same footing, and are subject to the same conditions and restrictions. Chapter 83, Acts 21st Gen. Assem., bestows upon pharmacists the exclusive right to sell intoxicating liquors for the purposes of medicine, and requires some different proceedings, or proceedings differing in detail, for procuring permits. But nothing in the statute, in express words, authorizes permits to issue without bonds, or to be of force for more than one year. It operates, in my opinion, as a modification of the prior statute, only in particulars expressly prescribed. It in no sense repeals any of the provisions of such statute, all of which remain in full force. No such repeal can be implied. The statutes being *in pari materia*, we are required to construe them together, and support all provisions in the first which are not expressly or by implication repealed, or which are not inconsistent or in conflict with the later statute. Now, there is no difficulty in giving full force to the last statute, and supporting the provisions of the other requiring bonds to be given, and the permit to expire in one year. I can conceive of no reason why dealers in liquors for lawful purposes should hold permits on different conditions. I do not understand why one should hold a permit without a bond for an indefinite term, and the other should give bond, and hold the permit for no longer time than one year. I do not believe the legislature intended any such thing. All difficulty in the case vanishes when we remember that these statutes are *in pari materia*, and apply the familiar rules of the law for the construction of statutes in such cases.

FOX *v.* DAVENPORT NAT. BANK.

(*Supreme Court of Iowa.* December 21, 1887.)

1. BANKS AND BANKING — NEGLIGENCE IN RETURNING ACCEPTED DRAFT — INSOLVENCY OF ACCEPTOR.

Plaintiff brought an action against defendant bank, alleging that defendant, after procuring the acceptance of a draft, negligently failed to collect it, or return it to plaintiff, until the acceptors had become insolvent. The court below refused to submit to the jury the question whether defendant was guilty of negligence in failing to present or collect the draft, but did submit the question whether defendant negligently failed to return it. *Held* not error.

2. SAME—EVIDENCE OF ACCEPTOR'S SOLVENCY.
The evidence showed that the draft was drawn and sent to defendant October 20th. It was accepted and made payable October 25th. It was not paid, and returned November 30th. The acceptors became insolvent December 1st. But it was not shown as a fact that the acceptors were solvent at all times between October 20th and December 1st, or that plaintiff could have collected the draft had it been returned. The court instructed the jury that "there is no question but that, under the conceded facts and undisputed evidence, the defendant is presumptively liable." *Held*, that the question of liability was for the jury, and the instruction was erroneous.

Appeal from district court, Scott county; A. J. LEFFINGWELL, Judge.

Action at law. Trial by jury. Verdict for plaintiff, Samuel Fox, and judgment. Defendant appealed.

Heinz & Hirschl, for appellant. *Murphy & Gould* for appellee.

SEEVERS, J. This cause was tried when the Hon. W. I. HAYES was the presiding judge, and a motion for a new trial was overruled by Hon. A. J. LEFFINGWELL, presiding judge at that time. The plaintiff drew a draft on Okane & Carroll on the twentieth day of October, 1885, and it was sent to the defendant for collection. The draft was accepted, and became payable on the twenty-fifth day of October, 1885. It was not paid, and it is stated in the petition that the defendant failed to return said draft, or collect the same, and that the said Okane & Carroll were solvent, and at all times able to pay their debts between the twentieth day of October and the first day of December, 1885; but they became insolvent on or about the day last named. That if the defendant had used due diligence in the matter of presenting said draft, the same could have been collected, or had it returned said draft to the plaintiff as it was required by the law to do, plaintiff could, by proper proceeding, have collected the same, but that, by reason of the negligence of the defendant as aforesaid, the balance due on said draft has been wholly lost to him. The foregoing, in substance, are the allegations of the first count in the petition. The allegations in the second count need not be stated. In substance, the answer denies that the defendant was negligent in failing to collect or return the draft; and denies that Okane & Carroll, at any time between the dates above stated, were solvent. The court properly, we think, declined to submit to the jury the question whether the defendant had been guilty of negligence in failing to present or collect the draft, but did submit to the jury whether the defendant had failed to return the draft, and in relation thereto said, in the fifth paragraph of the charge, that, "as a general proposition of law, it may be stated that, if the bank failed to return the draft when ordered, and the acceptors failed while it was so held, and consequently the amount of it was lost to the plaintiff, the bank would be liable;" and in the seventh paragraph of the charge the court said to the jury that "there is no question but that, under the conceded facts and undisputed evidence, the defendant is presumptively liable." The draft in fact was not returned to the plaintiff until the thirtieth day of November, 1885. As to this fact, it may be said there is no dispute. It will be observed that the court in the fifth paragraph of the charge made the defendant's liability depend on the fact that the plaintiff ordered the draft to be returned. As this portion of the charge was not excepted to, it must be regarded as the law of the case. Therefore it is immaterial whether the defendant was liable for a failure to return the draft, in the absence of any order from the plaintiff to do so. But conceding the defendant failed to return the draft when ordered to do so, and that Okane & Carroll became insolvent on the first day of December, 1885, does this make the defendant presumptively liable, unless, by reason of the defendant's failure to return the draft, "the amount of it was lost to the plaintiff," as stated in the fifth paragraph of the charge? We think not. The action, for the purposes of this opinion, must be conceded to be based on the negligence of

the defendant in failing to return the draft. In order to recover substantial damages, the plaintiff was required to show he had suffered such damages by the negligence of the defendant. The burden was on him. Now, the court, in substance, said he had done so, and as this was a question for the jury, the court erred in giving the seventh paragraph of the charge. It cannot be said that it was a conceded fact, or that the undisputed evidence showed, that Okane & Carroll were solvent at all times between October 20 and December 1, 1885, or whether, if they were, the defendant could by legal means have collected or secured the amount of the draft if it had been returned when ordered.

Other errors are assigned and argued by counsel. We are inclined to think none of them were prejudicial, if conceded to be erroneous, unless, possibly, the evidence which was introduced tending to show the draft was ordered to be returned after November 3, 1885. This is the only date mentioned in the petition, and possibly is the only negligence relied on therein. If so, it was incompetent to prove a fact which tends to show subsequent negligence. In view of a new trial, we deem it proper to say that, possibly, the letter written the defendant by the plaintiff on December 20, 1885, which was after the return of the draft, was prejudicial. The liability of the defendant was fixed, if at all, prior to that time, and it would therefore seem that it was immaterial. Reversed.

STEWART *v.* PICKERING *et al.*

(*Supreme Court of Iowa.* December 21, 1887.)

PRINCIPAL AND AGENT—APPOINTMENT TO SELL LANDS.

Defendants, real-estate brokers, wrote to plaintiff's attorney in fact: "Do you have charge of the lands * * * belonging to the estate of Hon. S? If so, are they for sale? * * * If the title is all right, we can possibly find a customer for the list this year. Let us hear from you as to prices, etc." The answer was: "I herewith inclose you a price-list of our lands. * * * My mother is the widow of Hon. S., and is the sole devisee. * * * I am executor of my father, and attorney in fact of my mother. The titles are all strictly clear and good." Attached to this letter was: "Western land for sale, Winnebago county, Iowa," with a list of land, terms, and prices, and "Apply to D. S. * * *" *Held*, that this correspondence, on its face, does not contain authority to sell the lands, binding on plaintiff, if the sale was made on the terms given.

Appeal from district court, Winnebago county; G. W. RUDDICK, Judge.

Action to recover money received by the defendants for lands sold by them for the plaintiff, and which they refused to pay over, because, as they claim, they sold certain other lands as the plaintiff's agent, and were therefore entitled to retain the money as compensation for making the last-named sales. Trial to the court, judgment for the plaintiff, Elizabeth Stewart, and defendants appeal.

John Cleggett and *Pickering & Hartley*, for appellants. *Geo. D. Peters* and *Ripley & Fisher*, for appellee.

SEEVERS, J. The plaintiff resides in Pennsylvania, and the defendants in Iowa. The latter are real-estate brokers, and wrote to a person in Falls City, in the former state, who was authorized to act for the plaintiff, a letter, which was as follows: "Do you have charge of the lands in this county belonging to the estate of Hon. A. Stewart? If so, are they for sale? * * * If the title is all right, we can possibly find a customer for the list this year. Let us hear from you as to price, etc." The reply thereto is as follows: "I herewith inclose you a price-list of our land in your county. * * * My mother is the widow of Hon. A. Stewart, deceased, and is the sole devisee by will, which was recorded in your county in 1879. I am executor of my father, and attorney in fact of my mother. The titles are all strictly clear and

good." Attached to the letter is the following: "Western land for sale, Winnebago county, Iowa." Here follows a list of the land, with the prices at which it is for sale. "Apply to D. Stewart, Falls City, Pa., or 1420 2d St., Washington, D. C. Terms ¼ down, balance in 4 equal annual payments, with five per cent. interest, or all together for $4.75 per acre."

The amount in controversy being less than $100, we are asked to determine whether the foregoing correspondence, on the face thereof, contains any authority to sell the lands which would bind the plaintiff, providing the sale was made on the terms therein mentioned. We think it does not. It amounts simply to an offer, with directions to apply to the person therein named. There is no authority given the defendants to sell the lands at the prices and on the terms named. If such authority was conferred, it was a continuing one until revoked, and this we do not believe was contemplated. At most, the offer to the defendants was: "You may sell the lands on the terms named, subject to my approval." The latter must be understood, because no authority to sell was given. It is due to the plaintiff to state that she claims to have sold the lands through another broker before she was notified of the sale made by the defendants. Affirmed.

STATE v. BROADWELL.

(*Supreme Court of Iowa.* December 21, 1887.)

APPEAL—PRESUMPTIONS—INSTRUCTIONS ABSTRACTLY CORRECT.

Where the record does not contain the testimony in the case, and the instructions complained of are correct, as abstract propositions of law, it will be presumed they were sustained by the evidence.

Appeal from district court, Pottawatamie county; C. F. LOAFBOUROW, Judge.

Defendant, S. A. Broadwell, was tried and convicted for obtaining money on false pretenses. He appeals.

A. J. Baker, Atty. Gen., for the State. No appearance for appellant.

SEEVERS, J. This cause was submitted on written transcript, and the record before us contains the indictment, charge of the court, and motion for a new trial, which sets up several grounds upon which a new trial was asked and overruled. In the absence of any other showing, we may well suppose the errors relied on are therein stated. We are unable to determine whether the first, second, third, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, sixteenth, and seventeenth grounds of the motion are well taken or not, for the reason the transcript fails to show that any such rulings were made as are complained of, and also because the evidence introduced at the trial is not contained therein. The remaining grounds on which a new trial was asked, all relate to the instructions which it is said are erroneous. As abstract propositions, it seems to us the instructions are correct, and the presumption obtains the court was justified in giving them under the evidence, and therefore we are unable to say the instructions are not correct in every particular. We are unable to find any error in the record, and therefore the judgment of the district court is affirmed.

MOBLEY v. MOBLEY *et al.*

(*Supreme Court of Iowa.* December 21, 1887.)

DESCENT AND DISTRIBUTION—HOMESTEAD—SHARE OF WIDOW—SETTING ASIDE—DEVISE.

The owner of certain lands, among them a homestead, died, leaving several lineal descendants and a widow. Action for partition was begun during the life of the widow, who had never had her share of the estate set apart to her, but who had leased the homestead to another for life. Before the decree of distribution, the

widow devised her share of the husband's estate, and died. *Held*, that she was entitled to no share in the distribution, as the devise did not amount to a setting apart of an interest to her in the estate; following *Darrah* v. *Cunningham*, 33 N. W. Rep. 445.

Appeal from district court, Madison county.

Action to obtain partition of real estate. The relief asked by one of the defendants was granted, and the plaintiff and other defendants appeal.

V. Wainright, for appellant. *A. W. C. Weeks*, for appellee.

SEEVERS, J. A finding of facts was made by the court, which we adopt. In our judgment it is correct, and sustained by the evidence, in every particular. The issue is clearly stated therein, and the question to be determined clearly indicated. It is as follows: "(1) Andrew J. Mobley, on or about the fifth day of July, A. D. 1886, died intestate, seized in fee-simple of the north-west quarter of the south-west quarter of 35, and south-east quarter of south-east quarter of 34, 74, 29, Madison county, Iowa. (2) That Mary Mobley was the widow, and Hezekiah Mobley, Willis Mobley, and Rebecca L. Hudson were the only surviving children, of said Andrew J. Mobley; and that the minors defendants, John Mobley, Effie May Mobley, and Edna Maud Mobley, were the children of a deceased son of said Andrew J. Mobley, who died before his father; and that there are no other heirs at law of said decedent, Andrew J. Mobley. (3) That at the time of his death, and for many years prior thereto, the said Andrew J. Mobley and his wife, Mary Mobley, occupied the said north-west quarter of the south-west quarter of section 35, township 74, range 29, as their homestead; and that, after the death of said Andrew J. Mobley, his widow, Mary Mobley, continued to reside on and occupy said land, up to the time of her death, which occurred on or about December 25, 1886; and that said Mary Mobley did not apply for nor have her distributive share in the lands of said Andrew J. Mobley set apart to her during her life; and that this action was commenced prior to her death. (4) That, prior to her death, said Mary Mobley orally leased the said homestead forty acres to Robert Hudson, the husband of Rebecca L. Hudson, for the term of the life of said Mary Mobley. (5) That, prior to her death, said Mary Mobley made her last will and testament, in and by which she devised unto Rebecca L. Hudson all the interest of said testatrix in and to the estate of A. J. Mobley, deceased. (6) The court finds that W. F. Walker is administrator of the estate of Andrew J. Mobley, deceased; that there is no personal property belonging to said estate; and that it will be necessary to use part of the proceeds of said real estate for the payment of the debts and charges against the said estate. (7) The court finds that said lands cannot be equitably divided into the requisite number of shares, and that a sale thereof is necessary, and that it will be to the interest of all the parties that such sale be at private sale. It is therefore considered, adjudged, and decreed by the court that the several shares of the parties hereto be established and confirmed as follows, to-wit: To the plaintiff, Hezekiah Mobley, one-sixth of said estate; to Rebecca L. Hudson, one-third of said estate, as devisee of Mary Mobley, deceased, and one-sixth of said real estate as heir at law of Andrew J. Mobley; and to Willis Mobley, one-sixth of said estate; to John Mobley, one-eighteenth of said estate; to Effie May Mobley, one-eighteenth of said estate; and to Edna Maud Mobley, one-eighteenth of said estate. That said real estate be sold at public or private sale. That so much of the proceeds of said sale as may be necessary, and as shall hereafter be ordered by the court for that purpose, be turned over to the administrator of Andrew J. Mobley's estate, and that the balance be held by the referees for further orders of this court; and the court appoints J. D. Love, Wesley Cochran, and Cass Pindle referees herein, and fixes their bond at three thousand dollars. The court also appoints W. W. McKnight, Thomas Greer, and John Herr as appraisers

of said lands. To all of which the plaintiff, Hezekiah Mobley, the defendant Rebecca L. Hudson, and S. G. Ruby, guardian *ad litem* for the minor defendants, except."

The single question to be determined is whether the widow of A. J. Mobley, under the facts stated, is entitled to a distributive share of the real estate of which her husband died seized. This question was directly presented, and determined adversely to the appellee, in *Darrah* v. *Cunningham*, 33 N. W. Rep. 445. It therefore follows that the court erred in rendering the judgment it did. It is said that the decisions of this court as to the question determined in the cited case are not harmonious, but this is a mistake. Some of the cases referred to were decided under statutes different from those now in force, and the apparent conflict is because of this fact. Reversed.

THOMAS v. THOMAS.

(*Supreme Court of Iowa.* December 21, 1887.)

1. DOWER—WIDOW MUST ELECT BETWEEN DOWER AND HOMESTEAD.
In Iowa, a widow cannot take both her dower and homestead, but must elect which she will take.

2. SAME—DOWER NOT SUBJECT TO DEBTS.
A widow's dower is not subject to her husband's debts, and it is to be set apart without reference thereto.

3. SAME—ELECTION—CONTINUED OCCUPANCY OF HOMESTEAD.
Continued occupancy of the homestead, in the absence of an election to take dower, will be deemed an election to take under the homestead right.

4. SAME—ASSIGNMENT OF—JURISDICTION IN EQUITY.
Courts of law and equity have concurrent jurisdiction in the assignment of dower, and therefore the proceedings for that purpose authorized by Code Iowa, §§ 2444–2451, are not exclusive.

5. SAME—PARTITION BEFORE PAYMENT OF DEBTS.
Partition among co-heirs will not be decreed, as against the widow, until all the debts against the estate are settled.

6. SAME—ELECTION—ASCERTAINMENT OF DEBTS.
A widow cannot be compelled to elect whether she will take her dower or homestead, until the indebtedness of the estate is determined.

7. SAME—AMOUNT OF DEBTS MUST BE JUDICIALLY ASCERTAINED.
An uncontroverted allegation that the personalty is sufficient to pay all the debts against the estate will not authorize a decree for partition. The extent of such indebtedness must be judicially ascertained.

8. APPEAL—SUPERSEDEAS—POWER OF TRIAL COURT AFTER.
In an action for partition of land, a decree was entered ordering the partition, and requiring the widow to elect between her dower and homestead right, and the widow took an appeal and *supersedeas*. *Held*, that the appeal and *supersedeas* forbid the court to require the widow to make the election.

SEEVERS, J., dissenting.

Appeal from district court, Madison county; J. H. HENDERSON and O. B. AYRES, Judges.

Action brought by Stephen Thomas against Isabelle Thomas and others, to partition certain real estate. A decree was entered confirming the interests of the parties in the action to the lands, and declaring that partition should be made, and further ordering that Isabelle Thomas, widow of the person who died seized of the lands, shall, within a time specified, elect whether she will take her distributive share of the lands, or her homestead right therein, and that, when such election is made, partition of the lands shall be decreed, and the case was continued for such election and the appointment of a referee. The widow appealed from this decree and order, and plaintiff appealed from a decision of the court in refusing to make a subsequent order requiring the widow, after her appeal, to make the election.

V. Wainwright, for plaintiff. *Wooden & Jackson*, for Isabelle Thomas.

BECK, J. 1. The petition alleges that plaintiff and certain of the defendants are heirs at law of Charles Thomas, who died intestate October 22, 1886, seized of lands therein described, and that defendant Isabelle Thomas is his widow. These allegations are not denied in the widow's answer. An amended petition avers that the personal estate of Charles Thomas is amply sufficient to pay all debts and claims against the estate, and that the widow has given notice that she will, upon a day named, present a petition to the proper court, asking for the admeasurement of her dower. The original petition prays for the partition of the lands, and the amendment prays that the widow be restrained from instituting proceedings for the admeasurement of her dower.

The widow answered the petition and amendment thereto, alleging, among other things, that letters of administration had been issued on the estate October 30, 1886, and that the administrator duly qualified on that day; that her dower had not been admeasured, and she had made no election whether she would take the homestead or her distributive share; that sufficient time had not elapsed since the death of her husband in which she can be fully advised of her rights, so that she can make the election; and that her interests and rights will be materially prejudiced if the action of partition be maintained. To this answer plaintiff filed a demurrer, which was submitted for determination with the decision of the case, after trial. The court decided upon the pleadings and evidence that plaintiff was entitled to have partition of the lands, and entered a decree settling the interests of the parties therein; but, finding that the widow's dower had not been admeasured, nor had she elected whether she would take her dower or her homestead rights in the land, it was ordered that she be required to elect at or before the next term of the court whether she will take dower or her homestead rights, and that the cause be continued for her election, and the appointment of the referees to make partition. This decree was rendered by the Honorable J. H. HENDERSON, one of the judges of the district court. At the next term, the widow having failed to make her election, the plaintiff asked that a decree be entered against her, to the effect that she had, by the possession and occupancy of the homestead, and other acts shown by the evidence, elected to hold under her homestead right. But though the court found she had failed to make the election, yet as it was found she had appealed from a prior decision, and superseded it by bond, the request of plaintiff was refused. This decision was made by the Honorable O. B. AYRES, another judge of the district court. From the decree the widow appeals; and from the decision last mentioned, plaintiff appeals.

2. *First.* The widow cannot take both dower and homestead, but must elect which she will take. *Butterfield* v. *Wicks*, 44 Iowa, 310; *Holbrook* v. *Perry*, 66 Iowa, 286, 23 N.W. Rep. 671. *Second.* The dower of the widow is not subject to the debts of her deceased husband, and is to be set apart without reference thereto. *Mork* v. *Watson*, 41 Iowa, 241. *Third.* The continued occupancy of the homestead, in the absence of an election to take dower, will be deemed an election, in effect, to take under the homestead rights. *Holbrook* v. *Perry*, 66 Iowa, 286, 23 N. W. Rep. 671.

3. Courts of equity have concurrent jurisdiction with courts of law in the assignment of dower. *Starry* v. *Starry*, 21 Iowa, 254; *Phares* v. *Walters*, 6 Iowa, 106; *McCraney* v. *McCraney*, 5 Iowa, 232; *Gano* v. *Gilruth*, 4 G. Greene, 453. It therefore follows that the proceedings authorized by Code, §§ 2444–2451, for the admeasurement of dower, are not exclusive; but it may be assigned and set off in a proceeding in chancery, the forum in which proceedings for partition are had under our statute. Code, § 3277. This cause was rightly commenced in chancery, and a partition of the lands may be made therein if the plaintiff has shown that the right to partition now exists. We proceed to inquire whether partition may be enforced in this action.

4. The heirs take lands subject to the debts of their ancestor, which are enforced by proceedings in the probate court, wherein the claims, except those entitled to preference under the laws of the United States and those for public taxes, are barred if not filed and proved within one year after the giving of the notice of the appointment of the administrator. It is plain that the interests of the heirs in the lands of the estate cannot be determined until the extent of the indebtedness of the estate be known, or rather it cannot be determined just what lands or what interest therein is subject to partition among the heirs until that time. The lands, or such part thereof as is necessary, may be sold by the administrator to pay debts. He would sell, not an interest in all the lands, if it is not necessary to sell all, but will sell all interest in such parts as may be necessary to realize a sum sufficient to pay debts. It is plain that the lands cannot be partitioned subject to the claims of creditors of the estate, for it cannot be determined just what lands, after the payment of debts, will be owned by the estate or will descend to the heirs. The creditors cannot be subjected to delays, or impeded in the enforcement of their claims against the lands of the estate. So the law will not permit the vain thing to be done of partitioning lands when it cannot be determined what interest the heirs have in them, nor just what lands are subject to partition.

5. And justice to the widow demands that the partition of land be not made until after the extent of the indebtedness of the estate is determined. It is true that her dower is not subject to the debts of her deceased husband; but, as we have seen, she is entitled to take under her homestead rights, or, rejecting the homestead, she may take her distributive interest,—her dower—in lands of the estate generally. She may exercise an election as to whether she will take under her homestead rights or her dower interest in the lands. It is plain that the condition and value of the homestead and of the other lands of the estate may be such that the widow cannot determine whether it would be better for her to take in one way or the other, until the extent of the indebtedness of the estate is determined. If the occupancy of the homestead for life be of more value than one-third of the real estate in fee-simple, to which she is entitled as dower, she would take the homestead. But if the values are different, she would make a different election. She ought not, therefore, to be compelled to make the election until the extent of the indebtedness of the estate is determined. We reach the conclusion that when this action was instituted, and the decision of the court was made, the time had not come for partition of the lands, or to require the widow to make her election as between her homestead and dower rights.

6. There was evidence tending to show that the personal estate of the intestate, worth $10,000 to $12,000, was sufficient to pay all debts, which amounted to $2,500. But these figures are mere estimates based upon present knowledge of the debts and the present condition of the property. There may be other debts not known now. The personalty may be destroyed. There are many contingencies impairing the confidence in the evidence upon which plaintiff bases his claim that the personalty will pay the debts, and that, therefore, the lands may be partitioned among the heirs. It cannot now be adjudicated that this claim is based upon facts, and surely chancery will not decree relief when it is uncertain that the parties asking it are entitled thereto, and when it may work injustice to some of the parties.

7. We do not hold that proceedings to admeasure dower can be delayed longer than is necessary to determine the extent of the indebtedness and the quantity of land required to be sold in order to pay debts. The condition of proceedings to settle the estate must be such that these matters may be adjudicated so that all concerned will be bound thereby, and the heirs may take the lands free from the claims of creditors of the estate, and the creditors may in no measure be delayed or impeded in enforcing their claims, and the widow may make her election upon full knowledge of proceedings and adjudications

which affect the quantity, and of course the value, of the real estate out of which the dower may be carved. This surely cannot be done before the time has expired which operates as a bar to filing claims, and no equitable reasons exist to permit any claims to be filed thereafter, and before the claims filed are paid. Indeed, we think proceedings for partition, and to require the widow to elect whether she will take dower or the homestead, should be delayed until the estate, as to the debts against it and legacies, may be found, upon adjudication, to be fully settled. Of course, there should be no unnecessary delay in settling the estate, and the heirs must be permitted to urge and enforce such speed in the proceedings to settle the estate as will not prejudice the rights of creditors and the widow.

8. We think the district court rightly held that the widow's appeal and *supersedeas* arrested proceedings in the case so far as to forbid the court to require the widow to make the election of dower or the homestead. We have shown in our discussion of the case that this could not have been done at that time for other reasons.

We reach the conclusion that plaintiff's petition ought to be dismissed. The decree and order of the district court is reversed on defendant's appeal and affirmed on plaintiff's appeal.

SEEVERS, J., (*dissenting.*) This case is determined, in my judgment, upon a point not made in the pleadings. In my judgment, there is no such issue, and therefore the case should not be reversed on the ground it is, and, in my opinion, the judgment should be affirmed.

STATE *v.* MCCLINTIC.

(*Supreme Court of Iowa.* December 21, 1887.)

1. SEDUCTION—EVIDENCE.
   Upon a trial for seduction, the evidence of the prosecuting witness was corroborated as to the visits to her by defendant, and that at such times he was alone with her until a late hour of the night. A witness testified that he had a conversation with defendant, in which he stated that he had fixed the girl up, as the report was, that he would not marry her, and was going away. *Held*, that the jury had a right to infer that the conversation with this witness referred to the prosecutrix, and the evidence was sufficient to warrant the verdict of guilty.
2. SAME—CORROBORATING EVIDENCE.
   Upon a trial for seduction, where there was no evidence that defendant used any seductive arts, or that the seduction was accomplished under a promise of marriage, *held*, that proof that the parties kept company together, and acted as lovers, was sufficient corroborating evidence tending to connect defendant with the crime.
3. SAME—TIME OF COMMITTING OFFENSE—INSTRUCTIONS.
   Upon a trial for seduction, the court instructed the jury that if they found that the crime was committed about or near the time named in the indictment, and fixed by the prosecutrix, it was sufficient. *Held* no error.
4. SAME—WITNESS NOT NAMED IN INDICTMENT—REBUTTAL.
   Defendant introduced evidence tending to show that he was not at the place where it was claimed the seduction occurred on the twenty-seventh of January, the time fixed by the prosecutrix. In rebuttal, the state proved by K. that the prosecutrix was at her house the latter part of January; that defendant was there. Witness saw him, talked to him, and that he visited with the prosecutrix at that time. *Held* proper evidence in rebuttal, and it was therefore not necessary that the name of the witness be written on the back of the indictment.
5. SAME—PREVIOUS CHASTITY OF PROSECUTRIX PRESUMED.
   In trials of indictment for seduction, the previous chaste character of the prosecutrix is presumed, and the state is not required to prove it.
6. WITNESS—IMPEACHMENT—INSTRUCTIONS.
   The court instructed the jury: "If a witness has testified whose general reputation for truth and veracity has been successfully impeached, you have a right, if you think proper, to disregard such testimony, or partially, as you think the necessities of the case may require or admit." *Held*, that the use of the words "the necessity of the case" was inappropriate, but not necessarily error.

Appeal from district court, Henry county; A. H. STUTSMAN, Judge.

Indictment for seduction. Trial by jury. Verdict guilty, and judgment. The defendant, William McClintic, appealed.

R. Ambler, for appellant. *A. J. Baker*, Atty. Gen., for the State.

SEEVERS, J. 1. The prosecuting witness testified that she was an unmarried woman, and that the defendant promised to marry her, and thereby accomplished her seduction; that the seduction took place on the twenty-seventh day of January, 1884, and as to this time she was quite positive. She also testified that defendant had visited and sought her company frequently, during a period of two years or more, at her father's house, and at her brother's and brother-in-law's; that on such occasions she and defendant were alone the greater part of the night. The evidence of the prosecuting witness was corroborated, to some extent, by her mother, father, brother, and brother-in-law, as to the visits, and as to the defendant being in her company as above stated. The seduction was accomplished at her brother's house, as the prosecuting witness testified, and that it was on Saturday night; and her brother testified that she met the defendant at his house Saturday, in the evening. W. R. Mason testified that he, in a conversation with the defendant in which he said he was going away, "asked him why he was going so sudden, and he said, 'Nothing in particular.' I said, 'You might as well come out with it; I have heard what is going through the neighborhood.' I asked him, then, 'Do you deny fixing the girl up the way the report was?' He said he did not deny it. I said, 'Why don't you go and marry her?' He said he never intended to. I said, 'Why didn't you let her alone, then?' He said, 'The old man would not let me come to the house now.' He says, 'I have got her fixed; he can take her, and go to hell with her.'"

It is contended by counsel for the defendant that there is no evidence which sufficiently corroborates the prosecutrix, and which tends to connect the defendant with the offense; but we think the evidence is clearly sufficient in this respect. The jury were fully warranted in finding what the defendant said to Mason had reference to the prosecuting witness, and that he had sexual intercourse with her. It is true, there is no corroborating evidence that he used any seductive arts, or that the seduction was accomplished under a promise of marriage. Such evidence cannot usually be obtained. Evidence of the use of seductive arts, other than that of the prosecutrix, cannot usually be obtained more easily and readily than the fact of sexual intercourse; and this is true in most cases as to a promise of marriage. For a time, at least, if the promise precedes the seduction, it is usually known to the parties only. The fact that the parties kept company together, and acted as lovers usually do, and other circumstances, are regarded as sufficient as corroborating evidence tending to connect the defendant with the offense. *State* v. *Wells*, 48 Iowa, 671.

It is also said that the prosecutrix is not corroborated as to the time when she states the seduction took place. But the exact time is never material, although the prosecutrix may be quite positive in this respect; she is not infallible, and may be mistaken, and it is not material that the seduction occurred on the particular day named by the prosecutrix. It is therefore not essential that she should be corroborated as to the exact day. In this connection, we deem it proper to say of the instructions of the court, that if the seduction was accomplished about or near the time named in the indictment, and fixed by the prosecutrix in her evidence, it was sufficient and correct. *State* v. *Bell*, 49 Iowa, 490.

2. Evidence was introduced by the defendant tending to show that he was not at the place where it is claimed the seduction took place on the night of the twenty-seventh of January, 1884. The state, in rebuttal, introduced Mary Kurtz and asked her whether or not the prosecutrix was at her house the

latter part of January, 1884. To this question the defendant objected, as "incompetent, immaterial, and not in rebuttal." The objection was overruled, and the witness answered: "Yes, she was." The witness was then asked: "State whether or not the defendant was at your house, if you saw him, and talked with him, and if he visited with her at that time." A similar objection to this question was overruled, and the witness answered: "He did." It is urged that the name of this witness was not indorsed on the back of the indictment, and therefore her evidence is not admissible; but this point is not well taken, if the evidence can properly be regarded as rebutting. It is also objected that it should have been introduced in chief; but the fact that evidence was admissible in chief does not establish it was not admissible in rebuttal. The defendant undertook to establish an *alibi*. This is a defense, and as to it the burden was on him. The state could not anticipate such a defense, but it had the right to introduce evidence in rebuttal which tended to contradict the evidence which tended to establish an *alibi*. Therefore the court did not err in admitting the evidence.

3. The charge to the jury contains 26 paragraphs or propositions of law, and we regard them generally as favorable to the defendant, and the charge fully presents the law of the case, and therefore the instructions asked by the defendant were properly refused. Several of the paragraphs and particular parts of the charge are said to be erroneous. Counsel have selected words and expressions, and isolated them from the context and body of the charge, and then claim that such particular words are erroneous. The rule, however, is well settled that the charge, as a whole, must be read and considered, and that prejudicial error cannot necessarily be based or found to exist because certain words are not the best possible words that could have been selected to convey the thought intended to be expressed. Having said this much in a general way, we will proceed, so far as may be regarded as necessary, to notice the particular objections made.

In the second paragraph, the court defined the crime with which the defendant was charged as follows: "The law provides that if any person seduce and debauch an unmarried woman of previously chaste character, he is guilty of a violation of the criminal law; and in this case it is charged the defendant seduced, debauched, and had carnal knowledge of the prosecutrix, which means that by seductive arts and influences the defendant induced the prosecutrix to yield her person to him for the purpose of sexual intercourse, which was accomplished and consummated as claimed." No objection is made to this paragraph. The third paragraph is as follows: "To warrant a conviction, the state must prove each and all of the allegations charged in the indictment beyond a reasonable doubt. The state must prove that the prosecutrix was an unmarried woman, and that he seduced and debauched her. * * * If these facts are established beyond a reasonable doubt, then you shall find the defendant guilty of the crime charged. * * *" This paragraph is objected to, because the court failed to say, in addition to what is said, that, to warrant a conviction, it must appear the prosecutrix was of chaste character. It will be observed that the court stated in the first place what the state was required to prove, and omitted to say anything about chaste character, for this is presumed, and no proof is required on the part of the state. It, however, constitutes a defense to be shown by the defendant, and that he introduced evidence so tending, and must be admitted. But, when the second and third paragraphs are read together, it will be seen that the court meant, and the jury must have understood, that the defendant could not be convicted if the prosecutrix was not of chaste character. But, if this be doubtful, such doubt is dissipated when the fourth, fifth, and sixth paragraphs of the charge are read and considered. In the fourth, the court said, in substance, that the jury must determine, from the evidence introduced, whether the prosecutrix was of chaste character; and in the fifth, the court said as fol-

lows: "To determine whether the crime charged against the defendant has been committed, the true character of the prosecutrix must be ascertained and determined." This is followed by a definition of what constitutes chaste character, which is clearly correct. It is not deemed necessary to quote any portion of the sixth paragraph. It will be observed that the court, in substance, and the jury, must have understood that the defendant could not be found guilty if she was of unchaste character. If she was, then no crime had been committed. It is urged that the court did not, in words, say, if she was of unchaste character, the defendant must be acquitted. The jury, if of ordinary intelligence, and this must be presumed, must, however, have so understood. The several paragraphs we have been considering, sufficiently, we think, and in clear and unmistakable terms, state fully the law applicable to the case; and therefore the omission to refer to the chaste character of the prosecutrix in the third paragraph cannot be regarded as prejudicial.

4. The nineteenth paragraph of the charge is as follows: "If a witness has testified whose general reputation for truth and veracity has been successfully impeached, your have a right, if you think proper, to disregard such testimony, or partially, as you think the necessity of the case may require or admit; but whether or not such witness has been successfully impeached you are to determine from all the facts in the case, and in determining whether or not the testimony of a witness has been successfully impeached, you must take all the testimony introduced to impeach and sustain the character of such witness, and from the evidence determine what weight, if any, you will give to the testimony of such witness." The use of the words "necessity of the case," as used in this instruction, is said to be erroneous. That there is some doubt as to what the court meant must be admitted. The words used do not seem appropriate, but we think it is clear the court did not mean the necessity either to convict or acquit. By the use of the word "case," the court meant evidence, or, rather, that the jury could wholly or partially reject or admit,—that is, give credit to,—as the necessity of the evidence required. After reading over the whole charge of the court, we feel constrained to say that the defendant could not possibly have been prejudiced by the giving of the instruction referred to. While we regret that the instructions in the form they are before us were given, in justice to the court we desire to say they are presented to us in type-writing; but that there are inaccuracies therein, apparent on the face of the record, we think cannot be doubted. Some other paragraphs of the charge are objected to which we have not specifically noticed, for the reason that the objections urged amount, as we think, to mere criticisms, and are without substantial merit.

It is urged the verdict is not sustained by the evidence, but we cannot disturb it on this ground. We have read the evidence, and think the jury could well find as they did. It is true, there is evidence tending to show the prosecutrix was not of chaste character. Its sufficiency, as well as the credit to be given to the witnesses who testified in relation thereto, was the province of the jury to determine. So, as to the time the seduction took place, and as to the *alibi*.

The judgment of the district court is affirmed.

PIERSON v. SPAULDING.

(*Supreme Court of Michigan.* January 5, 1888.)

1. SALE—DELIVERY TO PASS TITLE—STOCK OF GOODS—QUANTITY RESERVED.

Where a contract for the sale of a stock of hardware, tinners' tools, and fixtures in a store, is not of the whole quantity contained therein, but specifies that the vendor excepts and reserves from the stock whatever the same may inventory over and above the sum of $4,500, which excess the vendor is to take from the stock, and payment is to be made in land and money as soon as the inventory is completed,—the delivery of the goods, and payment in the mode specified in the contract, to be

simultaneous,—and the result of the inventory showed an excess in value over the $4,500, *held*, that there could be no delivery so as to pass the title until such vendor had taken out the goods excepted and reserved in excess of $4,500.

2. SAME—DELIVERY—EVIDENCE.

Where, under an arrangement that the store should be kept open for trade while the inventory was being made, and in contemplation that a sale would be consummated in accordance with the written agreement, the vendee made purchases, and assisted in selling goods from the stock, and did other acts in expectation that the purchase would be completed as provided for in the contract, and no actual delivery or acceptance was alleged by plaintiff to have occurred until the ninth day of June, *held*, that testimony as to what the vendee said and did prior to the ninth day of June, and while the inventory was being made, was not admissible for the purpose of showing delivery and acceptance of the goods upon the ninth.

(*Syllabus by the Court.*)

Error to circuit court, St. Joseph county.

The plaintiff, Newton Pierson, brought an action in *assumpsit*, in the circuit court of St. Joseph county, against defendant, James H. Spaulding, to recover the value of certain land, and $1,500, balance of purchase price of a stock of hardware. The cause was tried, and submitted to a jury, who found a verdict for the plaintiff, upon which judgment was entered accordingly. Defendant, James H. Spaulding, brings error.

S. M. Constantine, *Howard & Ross*, and *H. H. Riley*, for appellant. *B. E. Andrews* and *Howell, Carr & Barnard*, for appellee.

CHAMPLIN, J. Since this case was before us on a former occasion, (27 N. W. Rep. 865,) the declaration has been amended by filing two special counts, in the first of which it is averred that, in consideration of $4,500,—to be paid as follows: $1,500 in money, and the balance in conveying a farm of 63 acres,—the plaintiff agreed to sell, and did sell and deliver to defendant, his stock of hardware, tinners' tools, and store fixtures, excepting whatever said stock should inventory over and above $4,500, to be paid by defendant upon delivery thereof to him; which delivery the plaintiff avers was made on the ninth day of June, 1885. The breach alleged is the neglect and failure to pay the money and convey the farm, by reason whereof defendant became liable to pay the contract price of the land, to-wit, $3,000, together with the value of one-fourth of the hay and corn then growing, as well as the said sum of $1,500. The second count sets forth an executory contract entered into the twenty-fifth day of May, 1885, in writing, averring that, in consideration of $4,500,—agreed to be paid as follows: $3,000 by conveying by a good and sufficient warranty deed to plaintiff of defendant's farm of 63 acres, together with one-fourth of the hay and corn then growing thereon, and to pay said plaintiff $1,500 in cash in addition thereto, and make such conveyance and pay said money as soon as an inventory of the stock could be completed,—he (the plaintiff) agreed to sell, convey, and deliver to defendant his stock of hardware, tinners' tools, and store fixtures, excepting and reserving from said stock whatever the same might inventory over and above the sum of $4,500, which excess over and above $4,500 was to be taken from said stock by the plaintiff. It avers that afterwards, in compliance with the agreement upon his part, an inventory of said stock of tinners' tools and store fixtures was taken by him, (the plaintiff,) with the assistance and assent of defendant, and was duly completed on, to-wit, the ninth of June, 1885, and at which time plaintiff delivered to defendant the stock of hardware, tinners' tools, and store fixtures to the amount in value of $4,500, after deducting therefrom, by consent of defendant, whatever said stock inventoried over and above $4,500; and defendant then and there accepted such stock and tools and store fixtures, and took possession of the same. Alleges, as a breach of the contract, that the defendant did not, nor would, at the time of said delivery, or at any time afterwards, pay to plaintiff said sum of $1,500, and convey said farm of 63

acres, but has voluntarily conveyed said farm to one Clinton Arnold, and thus put it out of his power to perform said contract on his part, by means whereof he has become liable to pay said plaintiff such a sum in cash as said farm was actually worth, to-wit, $3,000, as well as $1,500 stipulated to be paid in said written agreement, and, in addition thereto, such sum as one-fourth of the hay and corn crop was reasonably worth, to-wit, $500. Under the testimony and charge of the court, the jury returned a verdict in favor of the plaintiff for $4,401.32. The defendant claims that there never was any delivery and acceptance of the property bargained for; and that on account of fraud in the inventory made, and representations of the character of the stock, he had a right to and did rescind the contract. He also claims that, as there was never any delivery and acceptance of the goods, the plaintiff cannot recover upon the counts of his declaration, which are based on delivery and acceptance, and there is no count based upon a failure or refusal to accept. The written contract entered into between the parties, and which the testimony shows Mr. Pierson procured to be draughted, was as follows:

"Know all men by these presents that I, Newton Pierson, of Three Rivers, Mich., of the first part, for and in consideration of the sum of four thousand and five hundred dollars, to be paid me as hereinafter expressed by James H. Spaulding, of St. Joseph, Mich., party of the second part, have bargained and sold, and by these presents do grant and convey, to the said party of the second part, my stock of hardware, tinners' tools, and store fixtures, now in the store occupied by me in Three Rivers, Michigan; excepting and reserving from said stock whatever the same may inventory over and above the sum of four thousand and five hundred. The excess of said inventory over the sum of $4,500 the said Newton Pierson is to take from said stock in hardware, if the party of the second part so agrees. And the said party of the second part, in consideration of the premises, hath agreed to purchase said stock of hardware, tinners' tools, and store fixtures above mentioned, of said first party, and agrees to pay for the same the sum of four thousand and five hundred dollars in manner following; that is to say, the sum of three thousand dollars by conveying to the first party his farm of sixty-three acres, situated and described as follows: South part of the east half of section twenty, in the township of Mottville, St. Joseph county, Mich. Said land is now particularly known as the farm bought by the second party of the estate of Henry Hass. The balance of said purchase money, to-wit, the sum of one thousand five hundred dollars, to be paid in cash. The conveyance of said land and payment of said money to be made as soon as inventory of said stock can be completed. It is understood and agreed between the parties hereto that the first party is to have one-fourth of the hay and corn now on the ground on said land to be conveyed; the remainder of said crops being reserved by second party. The land to be conveyed by warranty deed to first party, free and clear from all incumbrances. The said stock is to be inventoried and delivered to the second party on the first day of June, 1885; and the deed of the land to be conveyed to the first party is to be executed and delivered to the first party, June 1, 1885, and balance of purchase money to be paid first party at the same time stock is delivered.

"In witness whereof the parties hereunto have hereunto set their hands and seals, this twenty-fifth day of May, 1885.

"In presence of B. E. ANDREWS. NEWTON PIERSON,
"JAMES H. SPAULDING."

It will be noticed that, while the contract contemplates that the inventory shall be made, it nowhere states by whom it shall be made. It also contemplates that an appraisal of the goods inventoried shall be made, but it does not state by whom, or upon what basis, such appraisal or valuation shall be made. The parties understood that there were over $4,500 worth of goods in the stock, including the tinners' tools and fixtures; and the contract, in effect, is

an agreement to sell $4.500 worth of stock out of the stock of hardware then in the store. The excess of the appraised value, as inventoried, Pierson was to take out of the stock of hardware, if Spaulding so agrees; but, if Spaulding does not so agree, what then? There is no agreement that Spaulding shall pay for such excess in money, or in any other way, and none that Pierson shall donate them to Spaulding without consideration. From the whole instrument, it appears that the intention of the parties was that Pierson should sell to Spaulding goods to the value of $4,500, and no more, for the consideration expressed in the contract, and that all surplus was excepted from the sale. We must regard the words, "if the party of the second part so agrees," as surplusage, in the proper construction of the contract.

Now, as bearing upon the question of delivery, it is apparent that the parties intended that three things should be done before a delivery could be made: (1) An inventory should be made of all the goods in store, as well as of the tinners' tools and fixtures; (2) the goods so inventoried should be appraised or valued upon some agreed basis; (3) after this was done, Pierson should take from said stock of hardware the excess in hardware, so that the property left should be of the value of $4,500. When this was done, then delivery could be made, and the consideration to be paid by Spaulding was to be paid in the manner provided. The delivery of the property by plaintiff and the conveyance of the land and payment of $1,500 were to be simultaneous.

It will be readily seen that an important factor was omitted from the written contract; namely, by whom and upon what basis the several items in the inventory were to be priced or valued. This being a purchase of nearly the entire stock of goods, for the purpose of engaging in the sale of the same at retail, it is clear that the parties could not have intended that the purchase price should be the retail market value in that place, for it must be presumed that the purchaser was not buying merely for the sake of selling again at the same or less price, and that some margin of profit was contemplated in fixing upon the price as between these parties. Oral testimony was introduced to supply this defect in the written contract, and consisted exclusively of statements of the parties to the suit. The plaintiff testified as follows: "After this contract was made, we commenced taking an inventory on the twenty-eighth day of the same month. It was understood that we should commence on the 28th, and James H. Spaulding was to be there on the 28th with his brother Albert, who was to come with and assist him in inventorying. They both came on the morning of the 28th, and both went to work inventorying. In the first place, I gave each the cost-mark of the goods in the store, except the stoves, iron, and nails. All steel goods, furnaces, house and shelf goods, were marked with the cost-mark in characters which almost all merchants use. I gave the cost-mark on a piece of paper, and taught it to them, so that they could look at any article of goods, and compare the cost-mark with the list, and see if I was overcharging them or not. We commenced inventorying, and worked two or three hours, but did not make much headway, as people kept coming into the store. I suggested whether we had not better close up than to take the inventory in that sort of a way, and keep it closed until we should get through. James H. Spaulding rather objected to doing that, as he preferred to have the store kept open, on account of forming acquaintances, and not driving trade away. We kept on with the inventory until it was completed. We agreed, as a basis on which to make the inventory, that the goods purchased within a year—that is, goods that had not been in the store a great while—should be inventoried at what it cost to put them there. These were what you might term new goods. Goods that had been in the store quite a length of time, perhaps some of them rather old, I was to discount, and make the price less than they had cost. When we came to this class of goods, I called Mr. Spaulding's and his brother's attention to them, and I showed him how much I was discounting them, and there were not any

goods that went onto the inventory of that kind that he offered any objection to the price during the whole inventory." On cross-examination he further testified: "After we had agreed upon the trade, I got my attorney to draw up the contract. I don't know why I did not have my attorney put into the contract the basis on which the inventory was to be taken. I did not think of it, I suppose. I told him to draw up a contract in accordance with the agreement we had made. There was a verbal agreement between defendant and myself as to how the inventory was to be taken, and I agreed to stay and assist him. The agreement between Mr. Spaulding and I, in regard to the inventory, was that the best stock was to be inventoried at what it cost within a year, at a reasonable time, and the balance of the stock was to be inventoried at what it was worth, as near as we could get at it. I had been in the hardware business about twenty-five years in Three Rivers." The defendant testified that the agreement was that Pierson should put the stock of goods in the trade a great deal better than wholesale prices; that he stated that there were not more than $150 to $200 worth of stale goods, and the rest were new; that the principal business of his life had been farming, and he knew nothing about the hardware business; that, in a day or two after the contract was drawn, Mr. Pierson commenced to take the inventory; that he did not assist in making the inventory; that his brother was there part of the time, and assisted by setting goods back; that Pierson gave him his cost-mark, but he did not understand it; that an arrangement was made about selling goods while the inventory was being taken; that Pierson said he would keep the store open, and sell goods right along, and he would make a memorandum, and take it from the inventory after it was completed, and he took the money that was taken during the inventory; that the inventory was taken by Pierson, examining the goods, counting the articles, making a memorandum of them, and in the evening he would extend the items; that he did not consult witness about the manner of making it, the prices, or anything of the kind. He went on in this way until the inventory was completed.

From the foregoing testimony, it appears that, by the tacit understanding of both parties, the plaintiff was to and did make out the inventory under the agreement. The parties disagree as to the basis of valuation which he should place upon the articles inventoried. The plaintiff testifies that defendant assented to the values or prices affixed to the several articles as they went along; the defendant testifies that he did not assent to the prices affixed, but reserved his approval until the inventory should be completed, and he had an opportunity of submitting it to some disinterested person acquainted with the business. Upon the plaintiff's claim, he was called upon, under the circumstances, to exercise entire good faith towards defendant in the listing and valuation of the goods. The testimony in support of the respective claims was left by the court to the jury, with proper instructions, as well as the claim of the defendant that he had been fraudulently imposed upon by the plaintiff in making the inventory. Both parties agree that the inventory was not completed until the eleventh of June, and the plaintiff testifies that it footed up to $4,768; that he asked defendant if he could sell the surplus to him, and he said, "No; that he did not want it;" that witness then said, of course he would take it himself; "and we made a memorandum of what he would take, and showed it to defendant that day, and took it out of the stock." Plaintiff further testified that when he got the inventory completed, on the eleventh day of June, he showed it to defendant, and asked him to close up the trade. He said he would like to have a hardware man come and look it over. That at first witness objected, but finally consented; and Mr. Spaulding got a Mr. Jones, a hardware man from Marcellus, to come and look over the stock. As a result of this examination, defendant refused to carry out the agreement, and plaintiff immediately commenced this suit by attachment upon the stock of goods, tools, and fixtures mentioned in the agreement.

The right of plaintiff to maintain his action depends upon whether the goods were delivered so as to pass the title of the property to defendant. A mere offer to deliver, without acceptance, would not pass the title to defendant. Both counts of plaintiff's declaration aver that defendant accepted the goods, and entered into and took possession of the same. Several of the errors assigned relate to the admission of testimony, against defendant's objection, which plaintiff was permitted to introduce to prove delivery and acceptance. Plaintiff claims that he delivered possession upon the evening of the eighth of June. He testified: "We got the inventory completed on the evening of the eighth of June, and I had a conversation with the Spauldings that evening, and told them that I had the inventory completed; that is, I had all the goods on paper, and that, if I continued to run the store in my name, we would have to keep an account of everything sold. That would be quite a little bother, and, if they saw fit, they could take the store in the morning, and run it themselves. They consulted together, and concluded to do so. They said they would take the store in the morning. They took possession of the store in the morning. James H. Spaulding did." The objections to the testimony bearing upon the question of delivery and acceptance will be considered with reference to the ninth of June, when plaintiff claims a delivery and acceptance to have taken place. The plaintiff was permitted to introduce evidence showing that between the twenty-eighth of May and June 9th, while the inventory was being made, the defendant waited upon customers, sold goods from the stock, said that he had purchased the stock, that there was a new firm of Spaulding Bros.; that on the third or fourth of June he gave an order to a traveling salesman for some wire fence, and had it billed to Spaulding & B o.; that he bought some goods of the Michigan Stove Company, and of Lockwood, Taylor & Co., of Cleveland, Ohio, on the third or fourth of June; that about the first of June he sold a stove to Mr. Andrews, and took a note for $10; that he sold some wire fence to another Mr. Andrews, who paid him for it,—and other like testimony. Upon plaintiff's theory and testimony that the goods were not delivered until the morning of the ninth of June, this testimony should have been excluded. All these transactions were had under the arrangement that the store should be kept open for trade, and in contemplation that a sale would be consummated in accordance with the written agreement. It had no bearing upon the actual fact whether there was a delivery and acceptance on the ninth of June. Its reception could not be otherwise than to have a damaging effect upon the jury. Its direct tendency was to confuse and mislead them. The defendant denies that there was any delivery or acceptance at any time, and denies that he even took possession of the goods. Indeed, it is difficult to reconcile the plaintiff's theory, that there was a delivery and acceptance on the ninth, with the terms of the written contract, which he does not claim was modified, which provides only for a sale of $4,500 worth of goods; the surplus being excepted and reserved from such sale, and which he was to select out from the stock of hardware before a delivery could be made. He testified that the inventory was not complete, and the valuations extended, until the 11th, when he could for the first time ascertain the extent of the surplus, and when he says he in fact did select out goods to the amount of such surplus. Manifestly, the title had not passed before this. If it had, it would have required a repurchase, instead of a selection of the articles not sold.

Pierson also testifies that on the evening of the eighth of June he told his tinner, who had one key of the store, and he (Pierson) had another, to hand his key to Spaulding; and the tinner testified that he offered the key to Spaulding the next morning, and Spaulding told him to keep it, and open up the store. This was in the store after it was opened. Pierson testified that the safe was included in the sale to defendant; that he did not instruct Spaulding in the combination; that he continued to use the safe himself, and the store,

under an agreement with Spaulding, and held one key of the store until the commencement of this suit, when the sheriff attached, when both keys of the store were delivered to the sheriff. In view of the terms of the written contract, which were not modified, or claimed to have been, it appears to me that, if any possession was given on the ninth of June, it was a qualified possession simply, for convenience, subject to the completion of the contract, and in expectation that it would be consummated in good faith by the parties; and, when the surplus was ascertained, the selection would be made by plaintiff, and then delivery would be made in accordance with the terms of the written agreement. But this was not the theory of the plaintiff's claim, which was that the delivery and acceptance were consummated on the ninth day of June, so that the title to the goods passed to defendant at that time. If the sale had been of the entire stock, so that nothing remained to be done to identify the goods sold from those not sold, there might have been a delivery before the completion of the inventory by the agreement of the parties, and actually carried into effect; or if there was a conditional delivery in this case, and actual possession given of the entire stock, subject to the completion of the inventory, the ascertainment of the excess of value over $4,500, and the selection of goods to the amount of such excess, then, upon completion of the inventory, and the selection and removal of the goods equal to the excess, the delivery would be complete, and acceptance would be presumed, if the defendant continued to hold or retain possession after such selection and removal, unless he had been defrauded by the plaintiff in the transaction, and such fraud had not yet been discovered by him. There was testimony introduced which tended to prove this hypothesis; but the cause was not submitted to the jury upon this theory, but upon the theory of an absolute delivery and acceptance on the ninth of June, which, under the contract, it was impossible to make at that time. The testimony as to what was done by the parties after the eighth of June, tending to show that defendant had possession, was admissible to prove a qualified delivery, and which might be construed into an acceptance if retained after plaintiff had made his selection, and removed his goods from the stock.

It is not necessary to pass upon the exceptions to the charge of the court, nor to point out some errors which we discover therein, as upon another trial they will not be likely to recur.

The judgment is reversed, and a new trial awarded.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

PONTIAC, O. & P. A. R. CO. v. KING.

(*Supreme Court of Michigan.* January 5, 1888.)

CONTRACTS — NOTE PAYABLE "WHEN CARS SHALL RUN" TO STATED PLACE — CONSTRUCTION TRAINS.

Defendant made a note payable to plaintiff 10 days after its cars should run to a stated place, if that should be in 18 months; otherwise to be null and void. The track was laid from one terminus to the point within the time, and daily construction trains ran; but it was not open to freights or passengers for some months after the time. In an action on the note plaintiff asked for the following instructions, in effect: (1) If plaintiff's cars ran to the place in the time, it could recover. (2) That it was not necessary that the road be completed through in the time. (3) That cars run its entire length. (4) If the track was laid from one terminus to the place in the time so that construction trains could run, plaintiff could recover. These the court refused, and instructed in substance, that a fair construction of the contract was that the road was to be open to freights and passengers in the time; and it being admitted it was not, they would find for defendant. *Held*, that the instruction given was erroneous; and the instructions asked for should have been given, and the case given to the jury.

Error to circuit court, Tuscola county; BEACH, Judge.

Assumpsit upon a promissory note. Trial by jury. Verdict and judgment for defendant, Robert H. King. Plaintiff brings error.

Aug. C. Baldwin, for appellant. *Black & Corcoran*, for appellee.

SHERWOOD, J. The plaintiff declares in *assumpsit* upon a note of which the following is a copy:

"$150.00. NEWBERRY, October 8, 1881.

"For value received, and to aid the Pontiac, Oxford & Port Austin Railroad Co. to construct its road, I hereby promise and agree to pay to the order of the said company the sum of one hundred and fifty dollars, within ten days after the cars shall run upon said road to within one-third of a mile of Newberry, provided the same is done within 18 months from date; otherwise to be null and void. ROBERT KING."

The common counts are also added. Plea general issue.

This cause was tried in the Tuscola circuit by jury before Judge BEACH. On the trial the plaintiff, beside offering the note in evidence, gave testimony tending to show that, in the fall and winter of 1881 and 1882, the company proceeded to construct its road, beginning at Caseville, the northern terminus, and working south towards Newberry, (now Kingston,) until the road was graded, tied, and ironed through Kingston to Clifford several miles south, and about 46 miles south of Caseville. The track ran and was laid within 50 rods of the principal business street in Kingston on the first day of April, 1883, and was continued south, and completed to Pontiac in the month of July thereafter. The testimony further tended to show that construction trains began to run daily, passing and repassing over the road through Kingston, before April 5, 1883, but the road was not ballasted nor completed through Kingston until after the fifteenth of April. Plaintiff also gave evidence of the incorporation of the company, and it was also conceded that the road was not in fit condition for use, and freight and passenger trains did not begin to run until October 1, 1883. By the amended articles of incorporation, it appeared that the northern termination of the road had been changed from Fort Austin to Caseville, in the county of Huron. The defendant also gave testimony tending to show that during the summer of 1883, and until October 1st, the plaintiff was a merchant, and had to haul his freight into Kingston, by wagon. The foregoing is the substance of all the testimony given upon the points raised in the case.

Counsel for the plaintiff asked the court to charge the jury: "*First.* By the terms of the note in this case, if the cars on plaintiff's road were running within the time prescribed, April 11, 1883, to within one-third of a mile of Newberry, the plaintiff would be entitled to recover. *Second.* That it was not necessary that the plaintiff's road should be completed its entire length, or, *third*, that cars should be running its entire length. *Fourth.* If the railroad track was laid from one of its *termini* within the time and within the distance of Newberry, and construction trains were passing over it from Caseville, the northern terminus to Newberry, and beyond the place southerly, within 18 months from October 8, 1881, then the plaintiff would be entitled to recover the amount due upon the note, and interest, even if the road was not ballasted and completed." These requests were all refused, and the refusals severally excepted to, and the circuit judge thereupon charged the jury as follows: "On the part of the plaintiff it is admitted that the road was not in such condition eighteen months from date that regular traffic had taken place upon it, or could be done upon the road. The plaintiff insists, as a matter of law, that the simple running of construction trains over the road was a compliance with the contract. And he also says that the question is purely a question of law as to whether it was a compliance with the contract or not. There were no passenger or freight cars run upon the road, and the road was not open for general traffic. I charge you, as a matter of law, as the con-

struction of this contract is for the court, that a reasonable and fair construction of this contract is that eighteen months from the date of the note the road was to be in such a condition that it was open for passenger and freight traffic, and it is admitted by the plaintiff that it was not in such a condition; consequently I charge you to render a verdict of no cause of action, without leaving your seats." The verdict was taken, and judgment entered thereon, as directed by the court.

The exceptions to the refusal of the court to give the plaintiff's request to charge, and the direction given in the charge, are relied upon here for a reversal. We think the circuit judge erred in his rulings in the construction he gave to the contract between the parties. The promise of the plaintiff was not to build and perfect its road-bed and track, or its rolling stock and equipments, within the 18 months, to the point named, but to construct within that time its road-bed and stock, and so far perfect the same that cars could be run over the road, and actually make such run within the time stated. This it did, and the subsequent completion of the road is evidence undisputed of the good faith with which it was done. If anything more was contemplated or required by the defendant when he gave his note, he failed to have it stated in his contract with the plaintiff. It is a matter of common knowledge that much usually remains to be done in completing a railroad track, and in making it safe for regular freight and passenger business, long after the cars have commenced running upon it. It was to aid in its construction that this note was in part given. The road was a continuous one, and to secure its construction to Kingston within a certain time was the principal object the defendant had in view at the time he gave the note. Once there, he knew it would not remain long unfit for use. With a track so far completed as to admit of cars passing over for a distance of 40 miles, no company would fail to use it in its regular business at the earliest possible moment. We think the company, after receiving this note, in its subsequent action, did all that either party could have reasonably expected or intended at the time it was made, and we should not, in giving construction to the contract, add any new conditions to be performed by either party; and this it seems quite clear we should do were we to adopt the construction asked for by the defendant's counsel. The requests of counsel for the plaintiff should have been given, and the cause submitted to the jury. *Swartwout* v. *Railroad Co.*, 24 Mich. 389; *Railroad Co.* v. *Bacon*, 33 Mich. 466; *Tower* v. *Railroad Co.*, 34 Mich. 328; *Stowell* v. *Stowell*, 45 Mich. 364, 8 N. W. Rep. 70.

The judgment must be reversed, and a new trial granted.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

FRENCH v. FITCH.

(*Supreme Court of Michigan.* January 5, 1888.)

APPEAL—TRANSCRIPT—REFUSAL OF JUDGE TO SETTLE BILL—COSTS.

Under How. St. Mich. § 6515, where the judge refuses to make an order requiring the official stenographer to make and file a copy of the testimony and proceedings in the case, and yet refuses to settle a bill of exceptions without such transcript, the party appealing who is obliged to obtain and pay for it, is entitled, in case he prevails in the higher court, to have the amount so paid taxed as a legitimate expenditure in the case; following *Bradford* v. *Vinton*, 27 N. W. Rep. 2.

Error to circuit court, Kent county.

Motion for retaxation of costs.

Birney Hoyt, for the motion. *H. B. Fallass, contra.*

PER CURIAM. The item of costs in dispute is a claim of $62 for copy of stenographer's minutes used in settling bill of exceptions. The facts as to

the use of this copy are similar to those in *Bradford* v. *Vinton*, 27 N. W. Rep. 2, and that case must govern. The defendants counsel requested the circuit judge in the present case to make an order requiring the stenographer to file a copy of the testimony in the cause, but the court refused to do so. The counsel then procured, at the expense of $62, certain portions of the testimony, showing that the same was necessary to the settlement of the bill. This testimony was also used by the counsel for plaintiff in preparing amendments to the bill, and the circuit judge certifies that such testimony was used before him, and was necessary to the settlement of the bill of exceptions in the case. It only differs from *Bradford* v. *Vinton* in that there is no showing that the court refused to settle the bill without a copy of the testimony; but the certificate of the circuit judge shows the necessity of the expenditure for this testimony.

The item was correctly taxed by the clerk of this court, and the motion for retaxation is denied.

ILLICK *v.* FLINT & P. M. R. Co.

(*Supreme Court of Michigan.* January 5, 1888.)

1. MASTER AND SERVANT—RISKS INCIDENT TO EMPLOYMENT—INJURY TO BRAKEMAN.
A brakeman on a freight train was standing on a flat car, and, while the train was approaching a bridge, the engineer signaled for brakes, and, in response thereto, the brakeman immediately sprang, and caught the round of the ladder on the side of a box car, and, swinging himself around to ascend, his body came so far out as to come in contact with the trusses of the bridge with such force that he was thrown from the ladder, run over by the train, and killed. *Held*, that his death "was one of the accidents incident to his employment," and there could be no recovery.[1]

2. RAILROAD COMPANIES—NEGLIGENCE—DEFECTIVE BRIDGE—INJURY TO BRAKEMAN.
On the trial of an action for damages for the negligent killing of a brakeman, by reason of a defective and improperly constructed bridge, it was shown that the bridge was 13 feet and 4 inches wide between the trusses, which were 10 feet high; that it had been in use a number of years; that it was sound, and safe for the passage of trains, and without defect, and in good repair, at the time of the accident. *Held*, there was no negligence on the part of the company.

Error to circuit court, Wayne county.

The plaintiff, Henry S. Illick, administrator of the estate of Frederick J. Illick, deceased, brought this action against the defendants, the Flint & Pere Marquette Railroad Company, for the negligent killing of his deceased. The circuit judge instructed the jury to render a verdict for defendant. Plaintiff brings error.

F. A. Baker, for appellant. *Wisner & Draper* and *H. M. Campbell*, for appellee.

SHERWOOD, J. The plaintiff's intestate was a brakeman on the defendant's cars, and, as plaintiff claims, was killed through the negligence of the company in constructing and maintaining an improper and dangerous railroad bridge on the line of its road near Chippewa station, in the county of Osceola. It is for the killing of young Illick, by reason of such negligence on the part of the defendant, this suit is brought, and sought to be maintained. The only wrong counted upon in the plaintiff's declaration is that the defendant was negligent in maintaining an improperly constructed bridge. The only defect claimed in this construction is that the bridge should have

[1] Respecting the risks of employment assumed by an employe, see Needham v. Railroad Co., (Ky.) 3 S. W. Rep. 797; Bogenschutz v. Smith, Id. 800; Scott v. Railway & Nav. Co., (Or.) 13 Pac. Rep. 98; Hickey v. Taaffe, (N. Y.) 12 N. E. Rep. 286; Hatt v. Nay, (Mass.) 10 N. E. Rep. 807; Railroad Co. v. Frawley, (Ind.) 9 N. E. Rep. 594, and note; Knapp v. Railroad Co., (Iowa,) 32 N. W. Rep. 18; Kuhns v. Railroad Co., (Iowa,) 31 N. W. Rep. 868; Schultz v. Railroad Co., (Wis.) Id. 321, and note; Railroad Co. v. Gower, (Tenn.) 3 S. W. Rep. 824.

been made wider than it was; that ordinary care and good railroading required this; that the bridge was but 13 feet and 4 inches wide between the trusses, which were 10 feet high, whereas it should have been at least 14 feet between them. The case was tried in the Wayne circuit court by jury, and at the close of the trial the circuit judge instructed the jury that the peril which overtook the plaintiff, and caused his death, "was one of the accidents incident to his employment," and directed the verdict for the defendant. The plaintiff asks a review of the case in this court.

The main facts in the case were undisputed. The bridge at Chippewa station was built about nine years ago, and there is no question but that it was well and strongly built, and at the time of the accident was sound and in good repair, and that no accident of the kind had ever occurred there before; that the track of the road was in the center of the bridge; that the car upon which the deceased was riding and was injured was a box freight car; that at the time of the accident he was climbing up the side of the car upon a ladder, for the purpose of setting the brakes, which were worked from the top of the car; that the train was approaching the bridge at the time the conductor signaled for brakes; that the plaintiff, who was standing upon a platform car next to the box car at the time, immediately sprang for the brakes, caught the round of the ladder on the side, and near the end of the box car, and while swinging himself around the corner of which to go up the ladder, and in his effort to reach the ladder, he threw his body out so far as to come in contact with the bridge as the car reached it, and he was struck with such force as to throw him from the ladder to the track, where he was run over and killed. The testimony also shows that, at the time the brakeman started for the ladder, the conductor of the train stood near him, and as the brakeman grabbed the ladder upon the side of the box car, and was swinging himself around to go up, the conductor made an effort to stop him, and "hallooed to him to look out for the bridge." The brakeman apparently did not hear the conductor, or, if he did, the warning was not heeded. The ladders on the defendant's box cars are on the side, and near the end of them. The ends are provided with a handle, which the brakeman, on leaving a flat car to go up on the box car, lays hold of, and then, by swinging himself around the corner of the car, is able to reach the ladder with his foot. The ladder consists of iron bars extending out from the side from three to four inches; upon the roof, when reached, is a handle to assist the brakeman in ascending and descending. At the time of the accident the brakeman had been in the employ of the company about four months, and, when he was injured, he had been braking for the defendant over 100 days; passing over the bridge twice a day during that time. The bridge is about 35 rods east of the station, and in sight from the same. Benjamin Douglass, a bridge engineer, and an expert in the business, was sworn and examined on the part of the plaintiff, and testified that he had been employed in the Detroit Bridge & Iron Works; that he is now in the employ of the Michigan Central Railroad Company, in the chief engineer's office, and is engaged in getting up plans and specifications, and examining plans; that the standard width of railroad bridges which have trusses at the sides is, at the present time, on the Michigan Central, fourteen feet in the clear between the trusses; that "fourteen feet is almost universal. You will find narrower bridges. A great many roads have narrower bridges,—a few narrower ones; but they are older bridges;" that the Michigan has three narrower than fourteen feet, but he does not know of any built narrower in the present state of the art; that his knowledge of the standard width of bridges in Michigan has been acquired within the last four years, and he cannot say what the width was of the Howe truss railroad bridge in Michigan five or seven years ago; that there are seven bridges crossing the Michigan Central between Detroit and Grand Trunk Junction. Five of them have been built five years. Five are supported by posts, and two not. That the narrowest one between the posts is

12 feet, and another 12 feet 4 inches. Mr. Walhaufter, who was in the engineering department of the Detroit, Grand Haven & Milwaukee Railroad, testified that he had been in the employment of that company over seven years, and that they make the truss bridges on that road about fourteen and a half feet wide, but that there are bridges on the road narrower than that; that the one at Greenville is but thirteen feet and three inches at the end. Mr. Colburn, who is secretary and treasurer of the Detroit Bridge & Iron Works, and has been connected with the company since 1883, testified that the usual width of iron bridges in the clear, to-day, is fourteen feet or more; that, where there is a truss on each side of the bridge, "railroad companies fix their own dimensions, in their specifications that we are called upon to build;" and further testified: "I don't know anything about the wooden structures; we never built them. * * * We deal altogether in iron and combination bridges." It further appeared that young Illick was about 25 years of age when he was killed; was temperate, and intelligent and prompt in the performance of all his duties; and the conductor who saw him when he struck the bridge testified that, in the position the brakeman placed himself at the time he struck the bridge, he would have hit it if it had been 16 feet wide. The foregoing contains substantially all the facts in the case, except the testimony relating to damages, and they are undisputed.

I think the circuit judge was correct in the direction he gave to the jury. The space between the side of the bridge and the ladder upon the car, where the brakeman was injured, as shown by the record, was two feet and three inches wide. The danger in going up the ladder at that place was before him, and was as plain to his observation as to any person connected with the train, or whose duty it was to run upon the road. It was not his duty, on the signal for brakes, to go up the ladder when the service was fraught with such danger. There was no special request from any person in charge of or controlling the train for him to make the perilous ascent; and, when he did so, it was at his own peril. The duties of his employment did not require him to go upon the box car until he had passed the bridge. It did, however, require him to observe and take knowledge of the danger, if any, in crossing the bridge, if such knowledge could be obtained by his own observation. He had crossed the bridge 200 times before he was injured; and each time he crossed furnished him with an opportunity of observing the very danger which overtook him and caused his death. The bridge was sound, and safe for the passage of trains, without defect, and in good repair. Whether it was 14 or 24 feet wide was a matter of no concern of the brakeman, so long as he was not required to occupy a place of danger in the discharge of his duties while passing over it, and this he was not required to do. A railroad company cannot be required to condemn and remove a bridge, which is without fault in its plan or defect in its structure, while it is in good repair, and safe for the passage of trains, simply because some engineer shall pronounce it not as good or convenient as some other kind. Railroad companies must be allowed to use their own discretion as to the kind of bridges they will use, and when and under what circumstances they will remove or replace them, while they are safe. Any other rule would be both unjust and oppressive. As between the employers and employed, it is unquestionably the duty of a railroad company to provide a track and equipments which shall be reasonably safe; but this does not oblige the company to make use of the latest improvements, or to change the structures upon its road so as to conform to the most recent or advanced improvements and ideas upon such subjects; neither does good railroading require any such thing. Cooley, Torts, 151, 152; *Wonder* v. *Railroad Co.*, 32 Md. 411; *Coombs* v. *Cord Co.*, 102 Mass. 572; *Railroad Co.* v. *Gildersleeve*, 33 Mich. 133; *McGinnis* v. *Bridge Co.*, 49 Mich. 466, 13 N. W. Rep. 819; *Batterson* v. *Railroad Co.*, 49 Mich. 184, 13 N. W. Rep. 508; *Railroad Co.* v. *Huntly*, 38 Mich. 537; *Smith* v. *Potter*, 46

Mich. 258, 264, 9 N. W. Rep. 273; *Hathaway* v. *Railroad Co.*, 51 Mich. 253, 262, 16 N. W. Rep. 634; *Hewitt* v. *Railroad Co.*, 34 N. W. Rep. 659, (decided at the last term of this court.) While it is the duty of the company to furnish sufficient and safe material, machinery, and other means by which the work of the employed is to be performed, and keep the same in order and repair, and his contract implies that, in regard to these matters, the employer will make adequate provision against negligence on the part of the company, and that no danger shall ensue to him therefrom, it is well settled that the employed assumes all the risks and perils usually incident to the employment, and that included in such risks and perils are those which it is a part of the duty of the employed to take knowledge of by observation. 2 Thomp. Neg. 983; Cooley, Torts, 551; *Railroad Co.* v. *Austin*, 40 Mich. 247; *Swoboda* v. *Ward*, Id. 422; *Henry* v. *Railway*, 49 Mich. 498, 13 N. W. Rep. 832; *Batterson* v. *Railway Co.*, 53 Mich. 128, 18 N. W. Rep. 584; *Brewer* v. *Railroad Co.*, 56 Mich. 620, 23 N. W. Rep. 440; *Hewitt* v. *Railroad Co.*, *supra*; *Davis* v. *Railroad Co.*, 20 Mich. 126; *Gardner* v. *Railroad Co.*, 26 N. W. Rep. 301; *Gibson* v. *Railway Co.*, 63 N. Y. 450; *Owen* v. *Railroad Co.*, 1 Lans. 108; *Ladd* v. *Railroad Co.*, 119 Mass. 412; *Lovejoy* v. *Railroad*, 125 Mass. 79.

The conductor of the train says, in his testimony, in speaking of young Illick, that "the rear end of the train which we had that night would have stopped about twenty car-lengths west—between eighteen and twenty car-lengths west—of the bridge. During his connection with that train, Mr. Illick had occasion to do more or less switching at Chippewa station. Coming east, he was middle brakeman. We carried three brakemen. He had to be switchman at that bridge. Sometimes he would do one part, and sometimes another. Sometimes he would pull the pin, and sometimes would give the signals, and sometimes do the switching; and in doing that work he could not help but see the bridge. He should have known where the bridge was; he had been there times enough. I had never had any particular talk with him about the danger of swinging out when passing through the bridge,—that is, regarding that particular bridge; but I had cautioned him, when he first commenced braking with me, regarding all bridges. I had told him to look out for them, and keep out of the way." I do not think the record discloses any fault or negligence on the part of the defendant. It was not only the duty of the brakeman to know of the dangers at this bridge, but it appears from the conductor's testimony that he had previously had warning to be careful, and not come in contact with any of the bridges on the road. I think the negligence of the deceased was such, in this case, as to preclude a recovery by his administrator, and the judgment must therefore be affirmed.

CHAMPLIN, J., concurred.

MORSE, J. I agree with Mr. Justice SHERWOOD that there was no evidence in this case tending to show any negligence on the part of the defendant. As this disposes of the case, I prefer not to express any opinion as to the negligence of plaintiff's intestate.

CAMPBELL, C. J., did not sit.

DEVINE *v.* LEWIS and another.

(*Supreme Court of Minnesota.* December 19, 1887.)

COVENANT—OF WARRANTY—BREACH—DAMAGES—ACTUAL CONSIDERATION—INTEREST.

Upon the breach of the covenant of warranty in a deed the grantee is entitled to recover as damages the full amount of consideration paid, and interest thereon from the date of such payment; and where payments have been made under an antece-

dent contract in pursuance of which the deed was executed, the grantee is not concluded as respects the amount of damages by the execution of the deed, or the recital of the consideration therein; but the actual consideration paid may be recovered, including previous payments of principal or interest under the contract.
(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; LOCHREN, Judge.

Woods, Hahn & Kingman, for Lewis and another, appellants. *Grimes & McDowell*, for Devine, respondent.

VANDERBURGH, J. The plaintiff alleges that on or about the second day of August, 1880, plaintiff agreed to purchase lot 10, in block 129, in the city of Minneapolis, agreeing to pay therefor the sum of $1,500, on or before five years, with interest according to the terms of her promissory note of the same date, and to pay the taxes thereon, and entered into possession under the contract; that she paid to the defendants several installments of interest, and afterwards, on the seventh day of October, 1882, she paid the purchase price in full, and received of the defendant Kelley (who had acquired the interest of the defendant Lewis) a deed, with warranty and full covenants, duly executed and delivered by him, of the same lot, in fulfillment of the contract. Plaintiff, however, acquired no title by the deed, and she was subsequently obliged to surrender possession to the owner of the paramount title upon suit brought by him.

The question here presented is whether the plaintiff is entitled to recover interest on the purchase price from the date of the sale evidenced by the contract, or from the date of the deed; the contention of the defendants being that the damages for the breach of the covenants of seizin and warranty in the deed were the price of the lot, and interest from the date of the deed, while the plaintiff insists that interest is to be included from the date of the sale. The latter is, we think, the proper measure of damages. For the purposes of this action, she is entitled to show the real nature of the transaction, and to recover the actual and entire sum paid, including interest, irrespective of the date of the deed of or the recital of the consideration therein.

The defendants, however, claim that the inquiry should not be extended back of the execution of the deed to the executory agreement, on the ground that the rights of the parties are to be determined by the deed, and not by the agreement. But this rule does not apply to the consideration. The deed is substituted for the contract, it is true, but the substitution does not conclude further inquiry as to the consideration, since, while the deed is the only lawful evidence of the executed contract in respect to rights vested or relinquished, the receipt or acknowledgment therein, reciting the consideration, is open to explanation as much as an independent receipt, which may be explained or contradicted, because it is simply *evidence* of the fact of payment. *Gully* v. *Grubbs*, 1 J. J. Marsh. 388. To secure full indemnity under the rule of damages applicable in such cases, it is obvious that payments made under a prior contract must be included, with interest, and that neither the execution of the deed, nor any recitals therein touching the consideration, constitute any bar to inquiry as to the nature or amount of such payments, or the recovery thereof. Order affirmed.

STATE *v.* JAMESON.

(*Supreme Court of Minnesota.* December 19, 1887.)

1. ABDUCTION—INDICTMENT.

In an indictment for abduction, under the first clause of subdivision 1, § 240, Pen. Code, it is not necessary to allege that the taking was without the consent of the parent or guardian, but it is proper to state from whose custody the female was taken.

2. SAME—TAKING NEED NOT BE BY FORCE—ILLICIT PURPOSE.
In order to constitute a "taking," within the meaning of this section, it is not necessary that it should appear that force or violence was used. It may be accomplished by persuasion, enticement, or device. But it must not only appear that the female was taken away or induced to leave through the active influence or persuasion of the accused, but it must also appear that it was done for the illicit purpose forbidden by the statute.

3. SAME—SUFFICIENCY OF EVIDENCE.
Evidence in this case considered, and held insufficient to show a "taking" for the unlawful purpose alleged.

(*Syllabus by the Court.*)

Appeal from district court, McLeod county; EDSON, Judge.

Moses E. Clapp, Atty. Gen., *P. M. Nelson*, and *R. H. McClelland*, for the State, respondent. *A. P. Fitch* and *H. J. Peck*, for Jameson, appellant.

VANDERBURGH, J. The indictment in this case is for abduction, under subd. 1, § 240, Pen. Code. It charges that "the defendant, at the village of Glencoe, in the county of McLeod, did willfully, unlawfully, and feloniously take a certain unmarried female, named Emma Urbach, out of the possession of Henrietta Urbach, her mother and guardian, for the purposes of sexual intercourse, she, the said Emma Urbach, being then and there an unmarried girl under the age of sixteen years, to-wit, of the age of fifteen years; contrary," etc. The statute provides as follows, (subdivision 1:) "A person who takes a female, under the age of sixteen years, for the purpose of prostitution or sexual intercourse, or without the consent of her father, mother, guardian, or other person having legal charge of her person, for the purpose of marriage, * * * or, (4) being parent, guardian, or other person having legal charge of the person of a female under the age of sixteen years, consents to her taking or detaining by any person for the purpose of prostitution or sexual intercourse, is guilty of abduction." It will be observed that these provisions are materially different from the New York statute on the same subject.

1. To constitute this crime under subdivision 1, the section referred to, it is not necessary to allege or prove that the "taking" was without the consent of the parent or guardian, though evidence on this question may be material in ascertaining the circumstances of an alleged abduction. A distinct and essential element of the offense under this statute is the unlawful purpose for which the taking is had. In this case it is alleged, in respect to the taking, simply that the female in question was taken from the possession of her mother. This refers to the custody of the person having charge of her or with whom she lived, and was proper. The indictment is sufficient.

2. To constitute a "taking," within the meaning of this section, it is not necessary that force or violence be used. It may be accomplished by persuasion, enticement, or device. But it must not only appear that the female was taken away or induced to leave through the active influence or persuasion of the accused, but it must also appear that it was done for the illicit purpose defined, and without such proof the prosecution must fail. And this is the material question in this case. There is no doubt that the defendant induced the young girl, Emma Urbach, to leave the house of her mother, with whom she was living; but defendant's counsel insist that the state has wholly failed to prove that he took her away for such unlawful purpose. There is evidence in the case tending to show that the parties had already been criminally intimate, and that he intended to send her to his mother's house, in St. Paul; and it was understood that she was to go there or to her sister's in Minneapolis, and that he did in fact send her to St. Paul, where she remained until the following April, where she died from sickness following childbirth. It might, of course, also be shown, if such was the fact, that he took her away for the further unlawful purpose charged. To establish such criminal object

it was shown that, instead of putting her upon the train at Glencoe, he took her in a buggy to the village of Plato, where they remained all night at a hotel, and in the morning he sent her to St. Paul on the cars, and he returned to Glencoe. If, under the circumstances, there was evidence sufficient to warrant the jury in finding that there was criminal intercourse between the parties at Plato, we think the verdict in this case should be sustained. But notwithstanding the presence of some suspicious circumstances, in addition to facts mentioned, we think the evidence altogether too slender to establish the guilt of the defendant. Whatever the truth may be, we think the state failed to sustain this charge by adequate proof; and it is sufficiently clear that the chief and ultimate purpose of the defendant was to send the girl to St. Paul to his mother's house on account of past wrongs.

The evidence in this case shows great moral depravity on the part of the defendant, but was insufficient, as we think, to establish the particular offense charged, and there must be a new trial. New trial granted.

HOLCOMBE *v.* RICHARDS *et al.*

(*Supreme Court of Minnesota.* December 23, 1887.)

1. MORTGAGES — POWER OF SALE — EXERCISE OF BY ADMINISTRATOR OF NON-RESIDENT MORTGAGEE.
   Where a mortgage of lands in this state, given to secure a debt due to the mortgagee residing in another state, contained a power to the mortgagee, *his executors, administrators*, or assigns, in case of default of the conditions of the mortgage, to sell and convey the premises according to the statute in such case made and provided, the power of sale might be exercised by the administrator appointed by the probate court in the state where the mortgagee resided, even prior to the enactment of chapter 41, Gen. Laws 1876, (Gen. St. 1878, c. 81, § 25.)
2. SAME—POWER ARISES FROM CONTRACT.
   The exercise of such power rested upon the convention of the parties, as expressed in the mortgage, and not upon the authority of the probate court of the other state.
3. SAME—STATUTE REGULATING THE EXERCISE OF POWER.
   The statute referred to was not a grant of authority, but a mere regulation as to the manner of its exercise.
4. DEED—DELIVERY TO BENEFICIARY.
   A delivery of a deed to the real beneficiary of the grant, or the person to whose benefit it will inure, is good, without any delivery to the person named as grantee in the deed.
5. SAME.
   Hence, when a deed to A. will inure to the benefit of B., by reason of covenants of title or particular recitals in a former deed from A. to B. of the same premises, the delivery to B. of a curative deed running to A., as grantee, will be good without any delivery to A.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county; WILKIN, Judge.

H. L. Williams, for Holcombe, appellant. *W. D. Cornish*, for Richards *et al.*, respondents.

MITCHELL, J. Action to determine adverse claims to real property. Both parties claim under Edwin V. Holcombe as their common source of title. The history of the title, as far as here important, is as follows: September 9, 1859, Edwin V. Holcombe and wife, to secure the payment of a note for $5,000, executed a mortgage upon 40 acres of land in Ramsey county, in this state, to one John Maltby, a citizen of Penobscot county, and state of Maine. This mortgage contained a power of sale, authorizing Maltby, "his heirs, *executors, administrators*, and assigns," in case of default in the conditions of the mortgage, to sell the mortgaged premises at public sale, and convey the same to the purchaser. Maltby died at his residence in Maine in May, 1860; the note and mortgage referred to being then in his possession in that state. After his death, proceedings for the due administration of his estate were had

in the probate court of Penobscot county, in which letters of administration were duly issued to his widow, who subsequently resigned, and one Reuben A. Prescott was by the same court appointed administrator *de bonis non* in May, 1861. Default having been made in the conditions of the mortgage, Prescott, as such administrator, proceeded to foreclose by advertisement under the power of sale, and the premises were sold at public auction by the sheriff of Ramsey county, on March 22, 1862, to Charles Hayward for the sum of $3,500, and the usual certificate of sale issued to him, dated the twenty-fourth of the same month. The premises not having been redeemed, a sheriff's deed was executed to Hayward after the expiration of the time of redemption.

In October, 1863, Hayward and wife, by deed, "sold, remised, released, and forever quitclaimed" the premises to William C. Stiles, his heirs and assigns, forever. This deed contained, immediately following the description of the land, the following recitals and covenant of non-claim: "Being the same premises conveyed in the mortgage by Edwin V. Holcombe and wife to John Maltby, bearing date the ninth of September, 1859, and recorded, [giving date and place of record;] *the same having been sold for foreclosure by the sheriff of said county* on the twenty-second of March, 1862, as per certificate by the sheriff, bearing date the twenty-fourth of said March, and recorded, [giving date and place of record;] *the said Hayward being the purchaser at said sale, and the said premises having since been conveyed to him in pursuance thereof.*" "To have and to hold the premises, with all the privileges and appurtenances thereof, to him, the said William C. Stiles, his heirs and assigns, forever, *so that neither we, the said Hayward and wife, or either of us, nor any person claiming from, by, through, or under us, or either of us, shall have or claim any right or title to said premises, or any part thereof.*"

By deeds from Stiles and various mesne conveyances under him the land was conveyed in different parcels to numerous persons, (having been laid out and platted into town lots,) among whom were the defendant and one Bryant. Some of these owners having been advised by men learned in the law that there was some doubt as to the validity of the foreclosure of the Holcombe mortgage, they applied to the plaintiff to obtain for them from Edwin V. Holcombe (his father) a curative deed quitclaiming to their common remote grantor, Charles Hayward, all interest in the land. They prepared and furnished plaintiff a deed of that purport, which he sent to his father. The father executed it, and returned it to his son, who, at the request and with the consent of his father, delivered it to Bryant in January, 1884, who for the benefit of all the owners had it recorded, but not until July, 1885. Hayward, however, had no personal knowledge of the deed until August, 1885, soon after which he executed to Stiles a deed, for the purpose of vesting in him all the interest in the land conveyed by this curative deed from Edwin V. Holcombe. Intervening between the delivery to Bryant of the curative deed to Hayward and the actual acceptance of it by Hayward, Edwin V. Holcombe, in June, 1885, executed to his son, the plaintiff, quitclaim deeds of the same premises, which are the conveyances under which he now claims. The court finds (and the evidence amply supports him) that plaintiff paid no consideration for these deeds, and that at the time he received them he had full notice and knowledge of all the conveyances and proceedings affecting the title to this land, and particularly of the curative deed executed by his father to Hayward, already referred to, and of the reason of its execution and delivery.

Passing by a point made as to the regularity of Prescott's appointment as administrator of the estate of Maltby, and another as to the validity of the title acquired by Hayward at the mortgage sale, by reason of his being described in the certificate of sale as trustee, etc., (neither of which, in our opinion, are well taken,) plaintiff's grounds of attack on defendants' title are two: *First*, that the foreclosure of the Holcombe mortgage by Prescott, un-

der the power of sale, was void, for the reason that a foreign administrator had no such authority in this state prior to the passage of chapter 41, Gen. Laws 1876, (Gen. St. 1878, *c.* 81, § 25;) *second*, that the curative deed from Edwin V. Holcombe to Hayward, as grantee, could not take effect as a conveyance until its acceptance by him; that until such acceptance, the title remained in and was subject to disposition by the grantor, and hence that the intervening conveyance from Edwin V. Holcombe to plaintiff took precedence. We shall consider these in their order.

1. It is true, as contended by appellant, that our courts take no notice of a foreign administration, and will not recognize a foreign administrator or executor in his representative capacity until clothed with authority under our laws. But the exercise of the power of sale by Prescott rested upon the convention of the parties, and not upon the authority of the probate court in Maine. It was a matter of contract, and not of jurisdiction. The mortgage authorized the exercise of the power of sale by the mortgagee, or his *executors or administrators*. This description of the persons who might exercise this power fully covers personal representatives appointed at the domicile of the mortgagee, and where the principal administration of his estate must be had. The note and mortgage were *bona notabilia* in the state where the mortgagee resided, and were the proper subject of administration in that state, although the mortgaged premises were situated in this state. Neither did he hold by assignment, within the meaning of Gen. St. 1878, *c.* 81, § 2, and hence the provision of the statute requiring all assignments to be recorded has no application. The act of 1876 is therefore not a grant of authority to a foreign executor or administrator to exercise the power of sale in a mortgage, but merely regulates its exercise by requiring, for manifestly wise reasons, as a condition precedent, that evidence of the fact of his appointment should be first made a matter of record in this state. *Doolittle* v. *Lewis*, 7 Johns. Ch. 45; *Hayes* v. *Frye*, 54 Wis. 503, 11 N. W. Rep. 695.

The foreclosure was therefore, in our judgment, valid, and upon that ground alone the order of the court below might be affirmed.

2. It is also sustainable upon the effect of the curative deed from Edwin V. Holcombe to Hayward. Counsel on both sides have discussed at considerable length the question as to whether a deed delivered by the grantor, without the grantee's knowledge, to a third person not authorized by the grantee to receive it, takes effect as a grant from the date of such delivery, or only upon its acceptance by the grantee. In England, ever since the doctrine maintained by Justice VENTRIS in *Thompson* v. *Leach*, 2 Vent. 198, was established by the decision of the house of lords, the law seems to be settled there that an unconditional delivery of a deed to a third person, for the use of the person named as grantee, although the latter has no knowledge of it, and has given such third person no actual authority to receive it, takes effect and vests title the instant it is so delivered, and that the subsequent rejection of it by the grantee reinvests the title in the grantor, or, as Lord COKE puts it, "if A. makes an obligation to the use of B., and delivers it to C., it is the deed of A. presently; but if C. offers it to B., then B. may refuse it *in pais*, and thereby the obligation will lose its force. The same law of a gift of goods and chattels: if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently before *notice or agreement*, but the donee may make refusal *in pais*, and by that the property will be divested." *Butler* v. *Baker's Case*, 2 Coke, 68; *Garnons* v. *Knight*, 8 Dowl. & R. 348.

In this country there is much conflict of opinion upon the question; some of the authorities adopting the above rule, or, if admitting that an acceptance by the grantee is necessary, holding that such acceptance will be presumed from the beneficial nature of the grant, and that this is not a presumption of evidence that may be rebutted by merely showing that the grantee never in fact knew of the deed, but a presumption of law that cannot be overthrown

except by affirmative proof that he did know of it, and rejected it. On the other hand, many cases combat this doctrine very earnestly, holding that an actual acceptance is essential to a delivery, and that the deed only takes effect as a grant from the date of such acceptance, until which the estate remains in the grantor, and is subject to his disposal; that while, when the deed is finally accepted, it may, in some cases, in order to uphold it, be deemed, as between the parties, to have taken effect, by relation, as of the date of the first delivery; yet this can never be done where the rights of third parties have intervened. Among numerous cases upon this question, the subject will be found quite exhaustively discussed in the following: *Hulick* v. *Scovil*, 4 Gilman, 159; *Mitchell* v. *Ryan*, 3 Ohio St. 377; *Welch* v. *Sackett*, 12 Wis. 243; *Hibberd* v. *Smith*, 67 Cal. 547, 4 Pac. Rep. 473, and 8 Pac. Rep. 46. The question has never been decided in this state; what is said on the subject in *Comer* v. *Baldwin*, 16 Minn. 172, (Gil. 151,) being really *obiter*, as the delivery in that case was merely for *examination*.

It is not necessary to decide here the effect of a delivery to a third person, who is a stranger to the property conveyed by the deed. The delivery of this curative deed to Bryant was good, upon the ground that a delivery of a deed to the real beneficiary of the grant, or to the person to whose benefit it will inure, is sufficient, without any delivery to the person named as grantee in the instrument. It is held that a delivery to a *cestui qui trust* is sufficient without any delivery to the trustee; the possession of the deed by the former being in legal effect the possession of the latter. *Souverbye* v. *Arden*, 1 Johns. Ch. 240; *Jacques* v. *Methodist Church*, 17 Johns. 577; *Morrison* v. *Kelly*, 22 Ill. 610. Upon principle, the same rule must apply when a deed to A. will inure to the benefit of B., upon the ground of estoppel by reason of covenants of title or particular recitals in a prior deed of the same premises from the former to the latter.

The deed from Hayward to Stiles contains a covenant of non-claim of the form in common use in New England. According to the weight of authority, this would estop Haywood from asserting against Stiles or his grantees any claim to the premises under the curative deed from Holcombe. *Kimball* v. *Blaisdell*, 5 N. H. 533; *Trull* v. *Eastman*, 3 Metc. 121; *Newcomb* v. *Presbrey*, 8 Metc. 406; *Gibbs* v. *Thayer*, 6 Cush. 31; *Holbrook* v. *Debo*, 99 Ill. 372; *Gee* v. *Moore*, 14 Cal. 472. In Maine, however, it is held that a covenant of non-claim does not estop the party from asserting subsequently acquired title, unless by doing so he would be denying or contradicting some fact alleged in his former deed. *Pike* v. *Galvin*, 29 Me. 183. But whatever might be the effect of this covenant standing alone, there can be no doubt on that point when it is taken in connection with recitals in the deed. A party may be as effectually estopped by particular recitals in his deed as by covenants of title, where the facts recited are material to and of the essence of the contract; that is, when, unless the facts existed, it is to be presumed that the contract would not have been made; the matter recited being presumably taken as the basis of the action of the parties. Bigelow, Estop. *c.* 10; Herm. Estop. *c.* 9.

The deed from Hayward to Stiles conveyed the premises, and not merely the grantor's then present interest in them. After reciting that the premises conveyed were the same that were mortgaged by Holcombe to Maltby, it further recites as facts that *the same had been sold on foreclosure of the mortgage; that Hayward was the purchaser at the sale; and that the premises were subsequently conveyed to him in pursuance thereof*; thus stating how his title was acquired, and reciting certain things as facts in reference to the manner of acquiring it, which, within the rule already referred to, he would be estopped from denying. But if Hayward were to assert title under this curative deed from Holcombe, he would not only be claiming the very estate which he had assumed to convey to Stiles, but, in effect, denying the recitals in his own deed; for only upon the hypothesis that this sale or foreclosure,

and the purchase by him, and conveyance thereunder, had not occurred or were illegal, could he have acquired any interest in the premises under the curative deed. This he is estopped from doing, and consequently any interest in the premises acquired by him under this curative deed would inure wholly to the benefit of Stiles, and those holding under him. Hence, upon the principle already referred to, delivery of the deed to them, or either of them, was a good delivery, and it became the deed of the grantor presently, although Hayward, the person named as grantee, had no knowledge of it. Had he known of it, he would have had neither the power nor legal right to refuse to accept, because it merely accomplished what was his legal duty to do, viz.: to perfect the title which he had assumed to convey to Stiles. When a defect is discovered in the common source of title of a tract of land, which has passed by mesne conveyances into the hands of various parties, and where title subsequently acquired by their common grantor would, under the covenants or recitals in his deed, inure to their benefit, it is a very common and convenient practice for them to perfect their title by procuring a curative deed to their common grantor, without his having any knowledge of it. Upon both principle and considerations of public policy the delivery of such a deed to any of the parties interested in the property, and to whose benefit it inures, should be held a good delivery. Hence, upon either or both grounds, the decision of the court below was right. Order affirmed.

YOERG *v.* HOLCOMBE *et al.*

(*Supreme Court of Minnesota.* December 23, 1887.)

Appeal from district court, Ramsey county; WILKIN, Judge.

John W. Willis, for Yoerg, respondent. *H. L. Williams*, for Holcombe *et al.*, appellants.

MITCHELL, J. This case involved the same questions as *Holcombe* v. *Richards*, *ante*, 714, and the result is controlled by that decision. Order affirmed.

ARTHUR *et al. v.* ST. PAUL & D. RY. CO.

(*Supreme Court of Minnesota.* December 28, 1887.)

1. CARRIERS—OF GOODS—DELIVERY OF GRAIN TO PUBLIC WAREHOUSE—CUSTOM.
The general custom of doing business in Duluth (known and acquiesced in by both parties) is for railroad companies to deliver grain for and in behalf of the consignee to any one of the public warehouses or elevators in that city immediately upon inspection by the public inspector.

2. SAME—FREIGHT CHARGES—WEIGH-MASTER'S WEIGHT—WAREHOUSE RECEIPT.
The amount of freight charges to which the railroad company is entitled is determined by the weight of the state weigh-master who weighs it into the elevator. Upon the weight being reported to the elevator company by the weigh-master, the elevator company reports it to the railroad company and to the consignee. Thereupon the railroad company makes out its freight bill, which is then presented to the consignee, and, upon its payment, gives him a receipt, and also gives the elevator company a statement that the freight-bill has been paid, whereupon, and not before, the elevator company issues a warehouse receipt to the consignee.

3. SAME—DESTRUCTION OF GRAIN IN WAREHOUSE AFTER NOTICE TO CONSIGNEE.
In this case the grain which had arrived over defendant's road consigned to plaintiffs at Duluth, was inspected in part on the twenty-fifth, and in part on the twenty-sixth, of November, 1886, and weighed by the state weigh-master, and stored by defendant on November 26th in a public warehouse fit for such purposes, for and on behalf of plaintiffs, subject to a general instruction given by the railway companies to all the elevator companies not to issue any warehouse receipts until the paid freight-bills were presented. On the afternoon of November 27th, (Saturday,) between 4 and 5 o'clock, the elevator company gave plaintiffs written notice that the wheat had been placed to their credit, accompanied with a report of the weight and grade. The defendant did not present its freight bill to plaintiffs until November 29th, (Monday.) The wheat was accidentally destroyed by fire in

the elevator on the night of November 27th, without any fault of either party. *Held*, that defendant's liability as carrier had terminated before the destruction of the property.

4. SAME—DIRECTIONS TO WAREHOUSEMAN.

Also, that the instruction not to issue warehouse receipts to consignees until the paid freight-bills were presented, imposed no condition or restriction upon their issue not imposed by the public warehouse act, (Gen. Laws 1885, c. 144, § 6.)

(*Syllabus by the Court.*)

Appeal from district court, St. Louis county; STEARNS, Judge.

White, Shannon, & Reynolds, for Arthur *et al.*, respondents. *Ensign, Cash & Williams*, for St. Paul & D. Ry. Co., appellant.

MITCHELL, J. In order to a full understanding of the facts it is necessary, first, to refer to some of the provisions of chapter 144, Laws 1885, commonly known as the "Public Warehouse Act." This act declares all elevators or warehouses in Duluth, in which grain is stored in bulk, and in which the grain of different owners is mixed, and doing business for compensation, to be public warehouses, and places them under the general supervision of the board of railroad and warehouse commissioners. The owner is required to obtain a license from this board, and give to the state bonds, with approved sureties, for the faithful performances of his duties as a public warehouseman. He is required to receive for store any grain fit for storage that may be tendered him, without discrimination of persons.

The board appoints a chief inspector of grain, who, with their approval, may appoint deputies. These inspectors are required to take an oath of office, and to give bonds for the faithful discharge of their duties. All grain received in store must be first inspected by one of these inspectors, and his decision as to grade is final and binding on all parties in interest, subject to the right of appeal to the board. If, however, the owner is dissatisfied with the inspection, he may notify the carrier to withhold the grain from store in a public warehouse, and to deliver it to him elsewhere. The charges for inspection are to be paid by the warehouseman, and added to his charges for storage.

The board also appoints a weigh-master and necessary assistants, who give bonds for the faithful discharge of their duties, and have supervision and exclusive control of the weighing of all grain, and their certificates of weight are conclusive upon all parties in interest. Scales for the weighing of grain are at all times subject to examination and test by a duly-authorized inspector or weigh-master. Upon application of the owner or consignee, accompanied with evidence that all *transportation and other charges which may be a lien on the grain, including charges for inspection and weighing, have been paid*, the warehouseman is required to issue him a warehouse receipt, stating, among other things, the amount and grade of the grain, and that it is deliverable upon the return of the receipt, properly indorsed by the person to whom it is issued. Any person owning or interested in any grain in any warehouse has a right at all times during business hours to examine all grain in the warehouse.

The agreed facts in the case are substantially these: About November 24, 1886, the defendant, as a common carrier, received from the Manitoba Railroad at Hinkley three cars laden with wheat shipped at Fergus Falls and consigned to the plaintiffs at Duluth. Two of the cars arrived at Duluth November 25th, and the third November 26th. Upon the arrival of the cars, the defendant recorded their numbers, and the names of the plaintiffs, as consignees, in a book kept for the purpose in its public office in Duluth, and open to the inspection of all consignees, and usually resorted to by their private inspectors to learn of the arrival of cars. The seals of two of the cars were broken, and the wheat inspected and graded by the public inspector on November 25th, and the third in like manner on November 26th. The pri-

vate inspector of plaintiffs, whose duty it was to watch for the arrival of cars consigned to them, and to see that the grain was properly inspected by the public inspector, knew of the arrival of these cars upon their arrivals respectively, and examined the grain after it had been inspected, and was satisfied with its grading, and plaintiffs made no request to defendant to withhold it from store in a public warehouse.

After such inspection the grain was weighed by the state weigh-master, and stored by defendant in one of the public warehouses in Duluth, suitable for such purposes, on the afternoon of November 26th, "*for and on behalf of plaintiffs*," subject to the effect of the notice hereinafter set forth. On the afternoon of November 27th, between 4 and 5 o'clock, the warehouseman gave written notice to the plaintiffs that the wheat had been received by him, *and placed to their credit*, accompanied by a report giving the number of the cars, whence shipped, and the weight and grade of the grain. The wheat was accidentally destroyed by fire while thus in store on the night of November 27th, without any fault of either party.

The notice above referred to, and which had been previously given by the defendant and other roads to all the elevators in Duluth, and under the directions of which they were all acting at this time, was as follows, (after reciting that some question had arisen as to the manner in which "wheat collections" were made at Duluth:) "Cars containing wheat received at Duluth and destined to the several elevators will be sent to such elevators as promptly as possible, and, as soon as weights are received, expense bills will be made out accordingly. We shall make no collections from the elevator companies, but it must be understood and agreed between the owners and operators of the several elevators in Duluth, *that "warehouse receipts are not to be issued by them to the consignees or owners of the grain until our paid bills are presented*, and if they deliver any grain so held by them before the presentation of the expense bill, it is done on their own responsibility, and in such cases, if any trouble as to collection arises, we shall insist on the elevators paying the bills."

The amount of freight charges which the railroad company is entitled to is determined by the weight of the weigh-master upon weighing the grain into the elevator. This has been so ever since the establishment of public warehouses under the act referred to. Upon the weight being reported to the elevator company by the weigh-master, the elevator company gives notice of the weight to the railroad company, and also to the consignee, and thereupon the railroad company makes out its freight bill, which is presented to the consignee, and, upon its payment, the railroad gives him a receipt, and also gives the elevator company a statement that the freight-bill has been paid, whereupon, and not before, the elevator company issues a warehouse receipt to the consignee.

In this case the railroad company presented the freight-bill to the plaintiffs on November 29th, (the 28th was Sunday,) and plaintiffs refused to pay it. Neither the plaintiffs nor defendant had any warehouse in Duluth for the storage of grain; all the elevators there being public warehouses under the act of 1885. Neither had defendant any specific instructions from plaintiffs at what warehouse or elevator to deliver grain consigned to them, but the invariable custom had been, in the absence of the particular instructions as to any particular consignment of grain, for the railroad companies to deliver grain to any one of the elevators that was most convenient to them, immediately upon the inspection of the state inspector. It is further agreed "that all the acts of all parties with reference to the wheat in question were in all respects in accordance with the uniform custom or usage in Duluth ever since the establishment of the public warehouse system by said act of 1885, and *that said custom was well known to and acquiesced in by both parties hereto.*"

The sole question presented is whether, upon this state of facts, defendant's

liability as common carrier had terminated before the loss of the grain on the night of November 27th. In order to intelligently and correctly determine this question, it is important to consider—*First*, the grounds upon which this stringent liability is made to rest, and then, *second*, whether these had, under the facts of this case, ceased to exist so that there was no longer any just occasion, within the reason of the rule, for holding the defendant to that liability. The reason of the rule, in the language of BEST, C. J., in *Riley* v. *Horne*, 5 Bing. 217, is that, "when goods are delivered to a carrier, they are usually no longer under the eye of the owner. He seldom follows or sends any servant with them to their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." Chancellor KENT, expressing the same idea more tersely, says the rule is founded on broad principles of public policy and convenience, and was introduced to prevent the necessity of going into circumstances impossible to be unraveled.

A general answer to the question, when does this liability terminate? is obvious, viz.: Whenever the care and custody of the property has passed from the carrier to the owner, or some bailee of his own choosing, or whenever the owner has, after its arrival at its destination, had a reasonable opportunity of taking the property into his own charge. The crucial test is whether, having proper regard to the principles upon which the carrier's liability rests, the property has so far passed out of the care and custody of the carrier or his servants, into that of the owner, that there is no longer any occasion, within the reason of the rule, for further holding the carrier to this strict liability. So long as the reasons continue the liability should also continue; when they cease it should cease.

It is upon precisely this principle that this court, in common with the majority of the courts of the country, has held that, where goods, as usually handled after their arrival at their destination, are placed in the depot or warehouse of the carrier in the custody of its servants, the liability of the carrier, as such, continues until the consignee has had a reasonable time within which to take them away. The reason is manifest. In such case the owner has not yet got sight of them, or had any opportunity to examine them, in order to ascertain in what condition they arrived, nor to take them into his own custody. In case of loss or injury, he would still be at the mercy of the statements of the carrier's servants as to where and how it occurred. He might not desire to leave his property in the hands of the carrier under the more limited liability of warehousemen, but might wish to take it into his own charge or place in that of a custodian of his own choosing. But as he could not know when the goods would arrive, and hence could not be expected to be on hand the exact moment of their arrival, he could not do this until he had a reasonable opportunity to come and examine them, and take them away. If, after such opportunity, he still left them with the carrier, he would be deemed to have assented that it might hold them under the more limited liability of warehousemen. Under the state of facts referred to, the same reasons of public policy upon which the carrier's liability rests during actual transportation are equally applicable, and hence the liability continues. And it is upon these grounds that what is called the "New Hampshire Rule" rests, which is invoked with so much confidence in this case by the plaintiffs. *Moses* v. *Railroad Co.*, 32 N. H. 523. But the facts are not all analogous to the case supposed. A new method of doing business in the matter of handling bulk grain has arisen under this public warehouse system and the business usages of Duluth. It is one of the great excellences of the common law that it does not consist of inflexible statutory rules adapted to particular cir-

cumstances, which might become obsolete, but of certain comprehensive principles, founded on reason and natural justice, and adapted to the circumstances of all cases which fall within them. When new modes of doing business and new combinations of facts arise, these same principles will apply; but they must be adapted to the new situation by considerations of fitness and reason which grow out of these circumstances.

The consideration of the facts of this case, in the light of what has been said, logically and necessarily leads, as we think, to the conclusion that defendant's liability as carrier had terminated before this grain was destroyed. The condition of the property upon its arrival had been conclusively determined by the inspection and weight of the officers of the state, whose decisions were final as to both parties, and the correctness of which, as to grade at least, plaintiffs had assented. The grain had gone out of the custody of the carrier's servants into that of a public warehouseman, to whom plaintiffs had authorized defendant to deliver it; for, under the custom of doing business, the case stands precisely as if they had expressly designated this particular elevator. The delivery of the grain, as a physical act, was completed. The carrier had done the last act with reference to the property itself which his duty required. It had been stored in the elevator "for and in behalf of the plaintiffs," and they had been notified by the warehouseman that he had placed it to their credit.

It is true that it had been delivered to the warehouseman for the plaintiffs, subject to the instruction that a warehouse receipt should not be issued to them until evidence was presented that the transportation charges had been paid, and that, by reason of the freight-bills not having been yet presented to them, they had not had an opportunity to obtain this written evidence of their title. But it does not seem to us that this fact at all affects or bears upon anything connected with the situation or custody of the property which goes to the considerations of public policy upon which the strict liability of the carrier rests. The custody of the property had completely passed from the carrier into that of the public warehouseman. All control over or right to it on part of defendant had ceased, except the right to resort to it to enforce collection of its freight charges, in case plaintiffs, after demand, should refuse to pay them. Defendant's instructions to the warehouseman, that no warehouse receipts should be issued until the paid freight-bills were presented, imposed no condition upon their issue which is not imposed by clear implication by the statute itself, which provides for the issue of such receipts only upon application of the consignee, accompanied by proof that all *transportation* or other charges, which may be a lien upon the grain, including charges for inspection and weighing, have been paid. This clearly contemplates that the carrier may make delivery of grain for the consignee with the freight charges following it as a lien, which must be paid before a warehouse receipt shall be issued. In fact, business could not be well done in any other way, unless the carrier is to surrender all lien for his freight, because the amount of these transportation charges can only be determined after the grain is weighed into the elevator.

The policy of the law is that all legitimate charges connected with the transportation and handling of the property should follow it into the public warehouse, and be paid before a warehouse receipt, transferable in the market, shall be issued. The inspector's and weigh-master's fees thus follow the property, and why not the carriers? It is true, the statute provides that the inspector's fees shall be paid by the warehouseman, and added to his charges for storage; but, so far as the weigh-master's fees are concerned, we do not see why they do not stand on the same footing as charges for transportation. Subject to this claim for freight, this property had passed from the custody of the carrier into that of the warehouseman, as bailee of the plaintiffs. Every conceivable consideration of public policy upon which a carrier's liability is

founded had ceased, and hence, upon every principle of reason and justice, the liability itself must be held to have also ceased.

Judgment reversed, and cause remanded, with directions to the court below, upon the agreed facts, to render judgment for defendant.

MALONEY v. FINNEGAN *et al.*

(*Supreme Court of Minnesota.* December 27, 1887.)

1. QUIETING TITLE—WHEN MAINTAINABLE.
   Former decisions followed, to the effect that an action to remove a cloud upon title is not maintainable where the alleged invalidity of the instrument complained of is apparent upon its face. MITCHELL, J., dissenting.
2. SAME—VOID JUDGMENT.
   The plaintiff asserting title by mortgage foreclosure is not entitled, in such an action, to relief as to a void judgment recovered against the mortgagor subsequent to the recording of the mortgage; the time for enforcing the judgment by redeeming from the foreclosure sale having expired, and no apparently valid redemption having been made.
3. SAME—INJUNCTION—PLEADING.
   A complaint does not show a case for an injunction to prevent a cloud upon title, if it appears only by inference, and not by averment, that acts are threatened or contemplated which will impose a cloud.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; REA, Judge.

Thomas Canty, for Maloney, respondent. *Arthur D. Smith*, for Finnegan and others, appellants.

DICKINSON, J. Demurrer to the complaint. The plaintiff shows title to the land in question derived by purchase at a mortgage foreclosure sale in December, 1885. It also appears that the defendant Andrew J. Finnegan is the assignee of a judgment recovered in a justice's court against the mortgagor, subsequent to the recording of the mortgage, and subsequently docketed in the office of the clerk of the district court; that such judgment was in fact rendered without any jurisdiction having been acquired over the person of the judgment debtor, no summons having been served, and no return of any service having been made; that the judgment debtor had tendered full payment of the same, which had been refused; that Finnegan, having filed notice of his intention to redeem from the foreclosure sale, within the proper time for making such redemption, fraudulently produced to the sheriff a certified copy of the docket of the judgment, paid to the sheriff the sum of money necessary to make redemption, and procured from the sheriff, and caused to be recorded, a certificate of such payment, and of the fact that Finnegan claimed "title to said premises in fee-simple under said redemption, and has exhibited to said sheriff satisfactory evidence of his title thereto, and of his right to redeem the same;" the certificate, however, setting forth no other facts. It is further alleged that no affidavit was ever made nor produced to the sheriff showing the amount due, or claimed to be due, upon the judgment, and that Finnegan never had or claimed any right to redeem, except under that judgment. The prayer of the complaint is that the pretended redemption be adjudged void; that the defendant be barred from claiming any title or interest; and for general relief.

The action is in the nature of a suit in equity to remove a cloud upon title, and not one under the statute to determine adverse claims, and the question whether, upon the allegations of the complaint, the action can be maintained, must be determined upon the principles applicable to such suits. The certificate of redemption to remove which, as a cloud upon the title, is the principal object of the action, is claimed to have been invalid because it did not state, as required by statute, upon what claims such redemption was made, nor the

amount claimed to be due upon the lien under which the redemption was in fact attempted to be made. These defects, however, are apparent on the face of the certificate itself, and there is no other instrument evidencing the attempted redemption. For that reason, unless we are to now depart from the rule which has hitherto prevailed in this state and generally in the American courts, such an instrument will be deemed not to be a cloud upon the title, and, in general, such an action as this will not lie to remove it. *Weller* v. *City of St. Paul*, 5 Minn. 95, (Gil. 70;) *Scribner* v. *Allen*, 12 Minn. 148, (Gil. 85;) *Conkey* v. *Dike*, 17 Minn. 457, 463, (Gil. 434;) *Baldwin* v. *Canfield*, 26 Minn. 43, 1 N. W. Rep. 261; *Gilman* v. *Van Brunt*, 29 Minn. 271, 13 N. W. Rep. 125. It is, perhaps, questionable whether the better reason is not in favor of a different or modified rule; but however this may be, the law is so well established by the great weight of authority, and the statutory action to determine adverse claims is so available a remedy in such cases, (whenever the action of ejectment will not lie,) that there seems to be no sufficient reason why we should not adhere to the rule which has been long settled by the decisions of this court, and in accordance with the generally prevailing doctrine.

It is further urged that the action is maintainable to set aside the judgment as a cloud upon the plaintiff's title. But the judgment, being junior to the recording of the mortgage, was subject to it. The property having been sold upon the mortgage foreclosure, the judgment was available to affect this land only as it gave the judgment creditor a right to redeem from the foreclosure sale. The time within which that could be done had passed when this action was commenced; and, unless it appears that a redemption effectual to cloud the title had been made, there could be no reason for this plaintiff to ask relief with respect to the judgment. Of course, if the redemption certificate was void for reasons appearing upon its face, the fact that it might also be avoided for other defects, which could be shown only by extraneous evidence, would not affect the result of the prevailing rule of equity to which we have referred.

It is further urged that a remedy in the nature of an injunction to prevent a cloud upon the title may be had under the complaint. An action for such a purpose may be entertained; but it must appear that proceedings are contemplated or threatened on the part of the defendant which will cloud the title. It is not enough that the complaint show that such a course *may* be pursued. *Sanders* v. *Village of Yonkers*, 63 N. Y. 489. This complaint was probably not framed with a view to such relief, and it is wanting in averments showing a necessity for the preventive interference of the court. There is perhaps reason to infer from what has been done that further steps may be taken to cloud the title, but the complaint contains no averments upon the subject.

The order overruling the demurrer is reversed.

MITCHELL, J., (*dissenting.*) I am unable to concur in the doctrine that an action to remove a cloud from title will not lie merely because the instrument constituting the alleged cloud is void for defects appearing on its face. I am aware that it is supported by a long line of venerable authorities which this court has followed in several cases. The old reason assigned for the rule was that, if the defects appear on the face of the instrument, no reason existed for equitable interference, because it could not be said that any cloud whatever is cast upon the title. Whatever technical reason for such a rule might have existed when law and equity jurisdictions were separate, no reason now exists for its continuance. The rule is based wholly on what Mr. Pomeroy calls verbal logic, and not upon any principle of justice or common sense. Every business man knows that an instrument may be so serious a cloud that no lawyer would pass the title, and no man buy the property, and yet a court, after grave deliberation, might hold that the instrument was void

on its face, and then, perhaps, it would be void only because the court said so. To allow a defendant to commit legal suicide by urging that the instrument under which he claims is void, and for the court to hold on that ground that the plaintiff needs no relief, although his title is seriously clouded in fact, is neither just nor reasonable. The doctrine is seriously criticised by some of the best text writers, and has been repudiated by some respectable authorities. It serves no good purpose, but, on the contrary, often results in a denial of justice. Under these circumstances, it not being a rule of property, but merely one of practice, I think the sooner we emancipate ourselves from it the better it will be for the credit of the court, and for the proper administration of justice.

Waiving this question, however, I still think that the complaint, although not a model of good pleading, states a cause of action. It seems to me that the opinion of the court proceeds upon the erroneous assumption that this is an action merely to set aside this certificate of redemption. On the contrary, I construe it as one to set aside and have declared void an illegal *redemption*, which has been in fact made, and under which defendants claim title. A certificate is merely evidence of a redemption, and if the one already issued is defective in form, there is nothing to prevent the issuing of another. The real cloud on plaintiff's title, and the one which he asks to have set aside, is the redemption itself, which is void because of the invalidity of the judgment under which it was made, for a cause not apparent from the transcript filed in the district court. I do not see why the complaint does not state a cause of action on that ground.

In view of all the facts alleged, and particularly that the defendant Finnegan has made a redemption by paying his money to the sheriff, and has taken the certificate, and that he and his grantees *are now claiming title under such redemption*, it seems to me rather strained to say that the complaint is insufficient because it does not state in so many words that defendants will continue to assert title, and that, if this certificate be held void, they will procure another one, and therefore they may abandon their claim.

MINNESOTA CENT. R. CO. *v.* DONALDSON, County Auditor, *et al.*

(*Supreme Court of Minnesota.* January 4, 1888.)

RAILROAD COMPANIES — FORFEITURE OF CHARTER — LANDS EXEMPT FROM TAXATION FOR THREE YEARS.

By the judgment of this court in *State* v. *Railway Co.*, 30 N. W. Rep. 816, entered March 23, 1887, the charter of said company was declared forfeited and annulled. Section 416, *c.* 34, Gen. St. 1878, continued such corporations for three years for certain purposes, such as disposing of their property, etc. *Held*, that lands acquired by said company under the land grant act of 1857, and legislation subsequent thereto, are exempt from taxation during said period of three years, unless leased, or sold, or contracted to be sold, within that time.

(*Syllabus by the Court.*)

Appeal from district court, Rice county; BUCKHAM, Judge.

Cole, Bramhall & Morris, for Minnesota Cent. R. Co., respondent. *M. H. Kelly*, Co. Atty., and *Moses E. Clapp*, Atty. Gen., for Donaldson *et al.*, appellants.

COLLINS, J. The complaint herein alleges ownership in the plaintiff of a certain tract of land situated in Rice county, which ownership is derived through an act of congress known as the "Land Grant Act of 1857," and subsequent territorial and state legislation. It contains a full history of said legislation, and among other things states that proceedings of *quo warranto* were instituted in the year 1886 to forfeit plaintiff's charter, upon the ground that it had sold its road, and did not own nor operate any railroad, which proceedings resulted in a judgment forfeiting and annulling said charter, in

March, 1887; that the land in question was and is exempt from taxation, by reason of the aforesaid legislation; and that defendants, as auditor and treasurer of said county, are about to place the same upon the tax duplicate, and to levy and assess taxes thereon for the year 1887. The relief demanded is an injunction, and, objections to the form of action having been waived, defendants served a general demurrer, which was overruled, and an appeal taken.

The act of congress referred to, and the legislation which followed, are familiar to all, and need not be detailed. A comprehensive statement thereof may be found in *Railway* v. *Melvin*, 21 Minn. 340, in which were involved lands held by plaintiff by the same tenure as the tract in dispute here. The trial of that case disclosed the fact (admitted in the complaint now being considered) that in the year 1867 plaintiff sold to another corporation its said road and appurtenances,—all of its property, in fact, except such of its granted lands as had not been previously conveyed. It no longer pursued, in any manner, the business of railroading, and had completely abandoned the object for which it was incorporated. Thereupon its charter was adjudged forfeited, as before stated. See *State* v. *Railway Co.*, 30 N. W. Rep. 816.

It is urged by the defendants that the exemption granted to plaintiff ceased when its charter was annulled; while the plaintiff contends that this exemption continues during the three years given by statute (paragraph 416, *c.* 34, Gen. St. 1878) within which it must close up its affairs. It needs but little discussion to dispose of this question in plaintiff's favor. The statutes (paragraph 9, *subc.* 3, *c.* 1, Laws Ex. Sess. 1857; paragraph 6, *c.* 17, Sp. Laws, 1862; paragraph 1, *c.* 5, Sp. Laws 1865) exempt, in unequivocal terms, the granted lands from all taxation until they are leased, or sold, or contracted to be sold; and it was remarked by the court in *Railway Co.* v. *Melvin*, *supra*, that abandonment and dissolution of the plaintiff corporation had "no tendency to show sale, conveyance, or contract of sale of the lands" in litigation. Since that decision, plaintiff's default has been judicially determined, and judgment entered forfeiting its charter. But the *status* of its land has not been affected; it still belongs to plaintiff,—a corporation forbidden in March, 1887, to continue the business for which it was organized, but in full life for certain powers enumerated in paragraph 416, *c.* 34, *supra*.

The defendants insist that as the exemption did not attach to particular lands, but to the lands of a particular company, that, as the charter of this company has been annulled by its own act of abandonment, the right of exemption, which has its existence solely by said charter, must necessarily have been lost. Such a result does not follow, for the corporate franchise and that only, the power to further transact the kind of business for which corporate rights were composed, is the thing taken away. The law-makers, realizing the necessity of such a provision, expressly continued the body corporate for three years for certain specified purposes incident to a gradual settlement of its affairs, including a disposal of its property, and the division of its capital stock. No restrictions are placed upon this privilege, and no burden of any kind attached to it.

The order overruling the demurrer is affirmed.

In re Will of BROWN.

BROWN *et al. v.* HALL *et al.*

(*Supreme Court of Minnesota.* January 4, 1888.)

1. WILL—MENTAL CAPACITY—EVIDENCE.

In proceedings to probate a will, the mental capacity of the testator being in controversy, it is error to refuse to allow a contestant to testify as to the verbal acts of the deceased prior to the date of the will, and to state what he said when angry and violent.

2. WITNESS—EXAMINATION OF ADVERSARY.
In such proceedings, one of the proponents was examined as a witness for the contestants. *Held*, that under the provision of section 1, c. 193, Gen. Laws 1885, he could be interrogated by contestants concerning statements said to have been made by him to others concerning the mental capacity of the deceased.
(*Syllabus by the Court.*)

Appeal from district court, Le Sueur county; EDSON, Judge.

B. S. Lewis, *Cadwell & Parker*, and *M. R. Everett*, for Brown and others, proponents and respondents. *E. Southworth*, for Hall and others, contestants and appellants.

COLLINS, J. John S. Brown made the will in dispute June 22, 1874, and died in April, 1883. Upon an attempt to probate the will in Le Sueur county, it was contested upon the ground of alleged mental incapacity of the deceased, and of undue influence exercised by one of the legatees named in the will. On trial the court found for the contestant upon both grounds, and refused to admit the will to probate. Upon appeal to the district court, the decree of the probate court was reversed and set aside, and said will allowed and admitted to probate as the last will and testament of said deceased. From the judgment entered in district court contestants appeal, claiming and assigning 38 errors. If it were necessary to discuss all these, they might be very much reduced in numbers, by classification; but, as we look at the case, it can be disposed of by a consideration of one ruling in the court below.

Upon the examination of the witness Ida Brown, one of the contestants, she was asked how her father (the deceased) acted, and what he said upon certain occasions, prior to the making of the will. As the main issue was the sanity of the testator, the object of this question was to show the condition of his mind by his verbal as well as his physical acts. To the repetition, by one of the contestants, of the words of the deceased, objection was made by the proponents, upon the ground that it was inadmissible under section 8, c. 73, Gen. St. 1878, and the objection sustained by the court. Obviously, this was error. A party to an action cannot give evidence of a *conversation* with a deceased person relative to any matter *at issue* between the parties, but this statute must be strictly construed. *Chadwick* v. *Cornish*, 26 Minn. 28, 1 N. W. Rep. 55. The questions did not tend to draw out any *conversation* between the witness and deceased relative to the will, but to present to the court his angry and violent exclamations,—what he said, as well as what he did,—and thus indicate the state of his mind. His verbal acts were, equally with his physical acts, competent for the purpose of proving the mental condition of the testator. Because such testimony was excluded, a new trial must be had.

Ordinarily, we ought not to anticipate rulings which may be made upon another trial; but as the deposition of one of the proponents, George W. Brown, will again be used in all probability, we deem it advisable to advert to a few of the rulings of the trial court upon interrogatories found in said deposition, and to which attention is called in contestants' sixth, seventh, and eighth assignments of error.

Upon being questioned, the witness stated that he remembered that, when a boy, the testator was kicked in the head by a horse. This incident in the life of the deceased is of no moment unless it affected him mentally. If it did, it becomes material, and perhaps very important, when connected and considered with his later actions. The answer to the next question, which was as to the testator's mental condition after the injury, should have been received. It was also erroneous to sustain proponents' objections to questions put to the witness concerning statements made by him to others relative to the alleged injury, and its effect upon the mind of the testator. While these questions were predicated somewhat upon the supposition that the witness would deny that the injury mentioned in any way disturbed the mind of the

one who received it, and neither denial or admission were permitted by the court, it is evident from the testimony of George W. Brown that he claimed the deceased to have always been right mentally. The objection urged, and the one sustained by the court, was, as we understand it, that this witness, who was a party to the proceeding, called by his opponents, could not be impeached by those who called him, and hence it was quite immaterial to lay the foundation for impeachment. Without deciding what might be done had the witness denied making the statements attributed to him, or discussing the law upon the subject as it existed prior to the passage of chapter 193, Gen. Laws 1885, we hold that, by the terms of that act, the objections were improperly sustained. By section 1 thereof, a party to the record, or one for whose benefit a proceeding is prosecuted or defended, is compelled to testify as if under cross-examination. The object of the statute is to authorize an adversary to be examined, unprotected by the well-known rules of evidence. The effect is to compel him to undergo examination as well as cross-examination at the hands of the opposition if it so desires. It follows that any question which could properly have been asked the witness, were he undergoing the ordinary cross-examination, was legitimate.

The judgment is set aside, and a new trial granted.

GAFFENY *v.* ST. PAUL, M. & M. RY. CO.

(*Supreme Court of Minnesota.* January 4, 1888.)

1. PLEADING—ADMISSIONS IN REPLY—DENIAL.
   The admissions in a reply *held* to control a denial therein, and thus to confess the defense interposed by a supplemental answer.
2. SAME—FAILURE TO AVOID DEFENSIVE MATTER.
   Held, further, that said reply failed to avoid the defensive matter, and that, upon the pleadings, defendant was entitled to judgment.

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; YOUNG, Judge.

Welch, Botkin & Welch, for Gaffney, appellant. *Benton & Roberts*, for St. Paul, M. & M. Ry. Co., respondent.

COLLINS, J. The plaintiff appeals from a judgment of the district court for Hennepin county, made and entered pursuant to an order granting defendant's motion for judgment upon the pleadings. After the issues in the action were fully made, the defendant, by leave of court, served a supplemental answer, setting forth, among other things, that upon a certain day (subsequent to the service of the last pleading) it had settled and adjusted with plaintiff all claims involved in this litigation, had paid him a certain sum of money therefor, and that said plaintiff had made, executed, and delivered his receipt in full settlement of the action. To this plaintiff replied, denying a settlement and adjustment of "all his claim" against defendant, and averring that "save and except in the manner, and under the circumstances, herein set forth," he had not executed and delivered his receipt for the sum named, in full settlement of the action. Further replying, the plaintiff sets forth at length the circumstances under which he made the settlement, received the sum of money, specified and executed and delivered the receipt mentioned in the supplemental answer, evidently attempting to plead fraud and deceit on the part of defendant in procuring such alleged settlement, and in obtaining said receipt. If we can treat the first part of this reply as a denial,—and that is doubtful, because of its peculiar phraseology,—the subsequent admission controls and determines the real issue. *Derby* v. *Gallup*, 5 Minn. 119, (Gil. 85.) See, also, *Henry* v. *Hinman*, 21 Minn. 378. The plea is confession, and an effort to avoid, wherein it fails; for nearly all elements essential in pleading fraud and deceit are omitted, while some of the allegations in the re-

ply are inconsistent with such a defense to defendant's averments of settlement and receipting. It is well settled that all matters in confession and avoidance must be affirmatively and specially pleaded. *Livingston* v. *Ives*, 35 Minn. 55, 27 N. W. Rep. 74. And where a plea confesses, but does not sufficiently avoid, judgment must be given upon the confession, even after verdict. *Lough* v. *Bragg*, 18 Minn. 121, (Gil. 106.)

Judgment affirmed.

SMALLEY v. CITY OF APPLETON.

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. MUNICIPAL CORPORATIONS—ACTIONS AGAINST—ANSWER VERIFIED BY MAYOR—DENIAL ON INFORMATION.
   In an action against a city for injuries caused by a defective sidewalk, an answer verified by the mayor, and denying any knowledge or information sufficient to form a belief touching the matters alleged in the complaint, is sufficient to raise the issues for trial.

2. SAME—DEFECTIVE SIDEWALK—ACTION FOR INJURIES—EVIDENCE.
   In an action against a city for injuries caused by a defective sidewalk, defendant was allowed to show that plaintiff had said, in effect, that, with the money she expected to get from the city, she intended to furnish her house, get a horse and carriage, etc. *Held*, that this testimony was irrelevant and immaterial, and presumably prejudicial to plaintiff, and should not have been referred to in the charge to the jury.

3. SAME—EVIDENCE—OPINION OF WITNESS—CONDITION OF HEALTH.
   Plaintiff offered to show by lay witnesses that she had been in good health prior to the injury. *Held*, that this testimony as to whether she appeared to be in good or bad health does not call for such an opinion as requires especial skill to determine, and it should have been admitted.

4. SAME—MISLEADING INSTRUCTIONS.
   The court charged the jury that if plaintiff was injured on the street by being pressed in a crowd of people, or by horses or carriages running against her, or in any way other than by a defect in the sidewalk, she could not recover. *Held* that, in the absence of any testimony tending to show that the injury complained of was received in any way other than by a defective sidewalk, the instruction was erroneous, as tending to mislead the jury.

5. SAME—SPECIAL FINDINGS.
   It appeared that the defect complained of consisted of an opening left for a cellar window close to the building, and covered by a board; that plaintiff stepped onto the board at night, and it broke, causing her to fall into the opening. The jury was asked to give a special verdict on the question whether the sidewalk was in a safe condition of repair for ordinary travel. *Held*, that the question should not have been asked, as tending to mislead the jury.

Appeal from circuit court, Outagamie county; GEORGE H. MYERS, Judge.

This is an action to recover damages alleged to have been sustained by the plaintiff, Mary J. Smalley, on the evening of October 16, 1884, by reason of her stepping into a hole described in the sidewalk of the city of Appleton. A demurrer to the answer having been overruled, the cause was tried, and the jury returned a special verdict to the effect (1) that the plaintiff was not injured by a fall occasioned by her stepping into such hole in said sidewalk at or about the time and place named in the complaint; (2) that one of the aldermen of the city had personal notice of the accident and injury complained of, from the plaintiff, within five days from the time of the happening thereof; (3) that said sidewalk was at the time complained of in a safe condition of repair for ordinary travel; (5) that the plaintiff, at the time and place complained of, was exercising ordinary care to avoid accidents and injuries. From the judgment entered thereon in favor of the defendant, dismissing the complaint, with costs, the plaintiff brings this appeal.

John Goodland and *H. D. Ryan*, for appellant. *Samuel Boyd* and *H. Pierce*, for respondent.

CASSODAY, J., (*after stating the facts.*) We think the answer, verified by the mayor of the city, denying any "knowledge or information sufficient to form a belief" "as to the matters and things in the plaintiff's complaint alleged and set forth," sufficiently raised the issues for trial which were tried; but, upon a careful consideration of the whole record, we are forced to the conclusion that there has been a mistrial. The real controversy was involved in the first and third questions submitted to the jury; which were, in effect—*First*, whether the sidewalk was defective at the time and place in question; and, *secondly*, whether the plaintiff was injured by it. The sidewalk in question was about 10 feet wide, and upon the south side of College avenue, which ran east and west; and the building at that point ran up close to the sidewalk. There appears to have been steps leading from the sidewalk up into the front door of the building, and covering about two and a half feet of the walk. Close by the steps on the west side was a window opening, three feet and nine inches long and fourteen inches wide, from the building. On the evening in question, there was a large crowd of people in the vicinity of the *locus in quo*, and the plaintiff was among them. A horse dashed by, and the people on the sidewalk at that point stepped back. The plaintiff testified, in effect, that she stepped, supposing she was on the sidewalk, and something broke under her feet, and she went right down in the hole, and was injured. The evidence is pretty conclusive that, either there or elsewhere on that evening, she was bruised more or less severely on her limb between the knee and the hip. The evidence relied upon to disprove such injury was purely circumstantial and inferential. One class of such evidence consisted of medical testimony tending to prove that her internal troubles were the result of disease, and not of violence. These explanations are sufficient to enable us to consider intelligently some of the rulings of the court.

1. The defendant was allowed to prove by two of its witnesses, against objections, certain declarations said to have been made by the plaintiff to the effect that, with the money she expected to get from the city by reason of such injury, she was going to finish and furnish their house, get silk dresses, and dress better than they had before, get a piano, and a horse and carriage, and give the friends who went for her in this suit a ride, and those who did not she would give no ride. This testimony was referred to in the charge as of particular significance, and exception thereto was taken by the plaintiff. We must hold this class of testimony to have been immaterial and irrelevant to any of the issues on trial, and presumably prejudicial to the plaintiff.

2. The court excluded the testimony of a witness well acquainted with the plaintiff, and who had often seen her before the accident, and during the summer of 1884, as to her being healthy or otherwise during that time, on the ground that it called for the opinion of a witness who was not an expert. Her physical condition—whether she appeared to be in good or bad health, sick or well, suffering from disease, or enjoying health—may have involved, to some extent, the opinion of the witness, but it was nevertheless a fact requiring no especial skill to determine, and to which any intelligent witness might testify. This seems to be well settled by the authorities. Lawson, Exp. Ev. 470-473, and cases there cited.

3. Exception is taken because the court, in effect, charged the jury that if the plaintiff "was injured on the street * * * by her getting pressed in a crowd of people, or by horses or carriages running against her, or in any other way except by stepping into a hole, or on a board covering such hole that broke under her, letting her into the hole, and causing her injury, such an accident or injury would not" authorize a recovery in the action. The difficulty with at least the larger portion of this extract is the want of any such evidence upon which to base it, and its direct tendency to draw the minds of the jury away from the real issue on trial.

4. In view of the issues on trial, we have some doubts as to the admissi-

bility of some of the hypothetical questions put to medical experts, but, as they will probably be so adjusted as to more accurately fit the case on the next trial, we deem it unnecessary to consider them further.

5. The third question submitted to the jury was well calculated to mislead them, and should therefore be modified.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

In re Last Will and Testament of WARD.

(*Supreme Court of Wisconsin.* December 13, 1887.)

WILL—BY MARRIED WOMAN—NOT REVOKED BY SUBSEQUENT MARRIAGE—SEPARATE PROPERTY.

Testatrix, while living with her second husband, by whom she had no children, made a will bequeathing her property to her children by her first husband. Her second husband dying, she married a third time. She had no children by this marriage, and died leaving the husband surviving. *Held*, that under the provisions of Rev. St. Wis. §§ 2277, 2281, giving a married woman absolute control over her separate property, the will of testatrix was not revoked by her subsequent marriage, but remained in full force and effect.[1]

Appeal from circuit court, Sauk county; ALVA STEWART, Judge.

This action was tried before the county court, and, upon a judgment setting aside the will, the executor, Hiram Lee, appealed to the circuit court. It is, in effect, found by the circuit court that several years prior to 1870 the deceased, Ann Ward, married one Thomas Lee, and by him had seven children, all of whom are now living and of full age; that in 1870 said Thomas Lee died, leaving said Ann him surviving; that the estate of which the said Ann was possessed at the time of her death came to her through the last will and testament of the said Thomas Lee; that thereupon the said Ann married one John Spaulding; that June 23, 1877, and during such coverture, the said Ann, in the name of "Ann Lee Spaulding," duly executed the paper writing here propounded as her last will and testament, in the presence of three attesting witnesses, each of whom, at her request, and in her presence, and in the presence of each other, subscribed the same as such witnesses; that two of her sons were nominated and appointed as executors therein, and her property was therein given to all of her children, except one; that said John Spaulding died in 1880, leaving said Ann him surviving; that in 1882 said Ann married one Charles Ward; that in 1885 the said Ann died in Racine county, where she was domiciled at the time, leaving her surviving the said Charles Ward; that said Ann never had any children or child by either the said Spaulding or Ward; that said Drinkwater, mentioned in the order and judgment of the county court, was never related to the said Ann. As conclusions of law, it was found by said circuit court that said will was not revoked by said subsequent marriage to said Charles Ward, (as ordered and adjudged by the county court,) and that said Ann Ward died testate, and that Hiram Lee, executor of said last will and testament, is entitled to judgment; that said order and judgment of the county court be reversed, with costs. From the judgment entered upon, and in accordance with, such findings and conclusions, this appeal is brought.

John Barker, for appellants. *Hand & Flett*, for respondent.

CASSODAY, J., (*after stating the facts.*) The testatrix made her will while she was the wife of Spaulding. By it she gave her property to six of her children by a former marriage. After his death she married Ward. She never had any children by either of them. Did such marriage to Ward revoke her will

[1] Respecting the constructive revocation of a will by marriage or the birth of a child, see McAnulty v. McAnulty, (Ill.) 11 N. E. Rep. 397, and note.

thus made? This is the only question presented which it is necessary to consider. The county court held that it did. The circuit court held that it did not, and reversed the judgment. After prohibiting the revocation of any will otherwise than by burning, tearing, canceling, or obliterating the same, or by some other writing, executed as prescribed, substantially as required by section 6, *c.* 3, 29 Car. II., (3 Eng. St. at Large, 385,) our statute adds: "Excepting only that nothing contained in this section shall prevent the revocation *implied by law* from subsequent *changes in the condition or circumstances* of the testator." Section 2290, Rev. St. This section, with the above exception, first appeared in section 10, *c.* 66, Rev. St. 1849, which went into effect January 1, 1850. According to the revisors, this exception was "added to declare a right that would doubtless be inferred;" but that it was "safer to express it, especially as relates to minor married women." Revisors' Notes, p. 165. "The revocation implied by law," thus excepted out from the operation of the prohibitory clause of the section by reason of such precaution, manifestly means such as had previously been implied at common law. At common law the marriage of a woman was a revocation of her will previously made. *Forse's Case*, 2 Coke, 439: *Hodsden* v. *Lloyd*, 2 Brown, Ch. 534; *Doe* v. *Staple*, 2 Term R. 695. This was put upon the grounds of the husband's marital rights, the ambulatory character of a will, and the disability of the wife. Thus Lord Chancellor THURLOW, after considering the rights of the husband over the property of his wife, said: "It is extremely clear that no such will made by a *femé covert* can bind after the marriage, because it is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix; and as by marriage she disables herself from making any other will *the instrument ceases to be of that sort*, and must be void." *Hodsden* v. *Lloyd*, *supra*.

But the common-law rule that marriage of a woman revoked her will previously made was not without exceptions. Thus, where her power of disposing of her separate property after marriage was preserved by an antenuptial agreement, her will previously made was not revoked by such marriage. 1 Sugd. Powers, 182–190; *Wright* v. *Englefield*, 2 Amb. 468; *Rippon* v. *Dawding*, 2 Amb. 565; *Rich* v. *Beaumont*, 6 Browne, C. P. 152; *Churchill* v. *Dibben*, 2 Keny. pt. 2, p. 82; *Logan* v. *Bell*, 50 E. C. L. (1 Man., G. & S.) 872; *Doe* v. *Bird*, 2 Nev. & M. 679; *Downes* v. *Timperson*, 4 Russ. 334; *Dillon* v. *Grace*, 2 Schoales & L. 456; *Bradish* v. *Gibbs*, 3 Johns. Ch. 523; *Barnes* v. *Irwin*, 2 Dall. 199, 1 Yeates, 221. The power which at common law might thus be preserved to a married woman by marriage settlement to dispose of her property during coverture, has been expressly preserved to married women in this state ever since February 1, 1850. Chapter 44, Laws 1850, §§ 1–3; chapter 95, Rev. St. 1858; sections 2340–2343, Rev. St. This must be qualified to the extent of saying that she could not dispose of her property by last will and testament, without the consent of her husband, until March 23, 1859. Section 1, *c.* 66, Rev. St. 1849; section 1, *c.* 97, Rev. St. 1858; section 2, *c.* 91, Laws 1859. But since that time she has had the absolute power of disposing of her property in that way without his consent, and even against his wish. Sections 2277, 2281, Rev. St. The rights and powers thus secured to married women by the statutes remove every reason upon which the common-law rule of revocation by such subsequent marriage was based, and hence such rule by implication is removed by the same statutes. The reason for the rule having ceased to exist, the rule itself also ceased. This is in accordance with a well-settled maxim of the law. Regardless of that principle, it has been held in Massachusetts that the marriage of a woman revoked her will previously made, notwithstanding such statutes. *Swan* v. *Hammond*, 138 Mass. 45, 52 Amer. Rep. 255; *Blodgett* v. *Moore*, 141 Mass. 75, 5 N. E. Rep. 470. Such ruling was based, apparently, upon the fact that the statute there, as here, prescribes the modes of revoking wills, and recognizes revoca-

tion implied by law. But the old English statute cited also prescribed such modes of revoking wills, without such express recognition. It is true, nevertheless, such revocations were implied notwithstanding, among other reasons, for those stated above. As observed, the statutes of this state thus removing the reasons, to that extent removed the rule. The fact that such rule at common law was based upon the husband's marital rights, the ambulatory character of the will, and the disability of the wife, seems to be recognized in a later case in Massachusetts, wherein it is, in effect, held that revocation of a woman's prior will by marriage was prevented by an attempted agreement barring such rights and removing such disability and preserving such powers. *Osgood* v. *Bliss*, 141 Mass. 474, 6 N. E. Rep. 527. To hold that marriage of itself revoked a former will of the wife, under the circumstances here presented, as above stated, when the next day after the marriage she had power to reinstate the same writing as her last will and testament, would seem to be absurd. The conclusions we have reached are supported by the great weight of authority of our sister states under similar statutes. *In re Tuller's Will*, 79 Ill. 99; *Noyes* v. *Southworth*, 55 Mich. 173, 20 N. W. Rep. 891; *Webb* v. *Jones*, 36 N. J. Eq. 163; *Fellows* v. *Allen*, 60 N. H. 439, 49 Amer. Rep. 329; *Hoitt* v. *Hoitt*, 63 N. H. 475, 3 Atl. Rep. 604; *Morton* v. *Onion*, 45 Vt. 145; *In re Carey's Estate*, 49 Vt. 236. Whether, in view of our statutes, making husband and wife heir to each other in the absence of children, marriage of itself would revoke a former will in favor of a stranger, as seems to have been held in an early Illinois case qualified in the above citation from that state, we are not here called upon by the facts to consider. We must hold that the common-law rule mentioned, when applied to the facts of this case, has, by implication, been abrogated by our statutes.

The judgment of the circuit is affirmed.

CHICAGO COFFIN CO. *v.* HARRIS *et al.* (MAXWELL, Garnishee.)

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—MORTGAGE.
In consideration of an extension of time to pay certain notes, defendants executed a mortgage in trust for creditors, whose claims were in the hands of the trustee for collection, retaining possession, and afterwards sold the property, but turned the proceeds over to discharge the claims. Plaintiff contended that this mortgage was in fact an assignment, with unlawful preferences. *Held* that, to make a preference of creditors unlawful, under Laws Wis. 1883, c. 349, it must be by assignment, or within 60 days prior to it, and not by common mortgage.[1]

2. FRAUDULENT CONVEYANCES—MORTGAGE OF EXEMPT PROPERTY.
A mortgage upon property exempt by law, executed by insolvent debtors, *held* not in fraud of creditors.

Appeal from circuit court, Columbia county; ALVA STEWART, Judge.

This action was brought by the Chicago Coffin Company against John S. Maxwell, as garnishee of J. M. and E. H. Harris, defendants, to recover from the garnishee the amount of a judgment against defendants.

E. V. Briesen and *F. W. Hall*, for appellant. *C. L. Derring*, (and *J. S. Maxwell, in pro. per.*,) for respondent.

ORTON, J. The action was commenced before a justice, and a garnishee summons served upon said respondent. The respondent, as such garnishee,

[1] In *South Carolina*, it was held, under a statute prohibiting preferences in assignments for the benefit of creditors, that where a mortgage is actually a lien upon the property of the mortgagor, an assignment for the benefit of creditors afterwards made by the mortgagor in which recognition is made of the prior lien of the mortgage is not a violation of the statute. Loan & Trust Co. v. McPherson, (S. C.) 2 S. E. Rep. 267. As to the rights of mortgagees where a general assignment for the benefit of creditors is made by the mortgagor, see Field v. Fisher, (Mich.) 32 N. W. Rep. 838, and note; Allen v. Danielson, (R. I.) 8 Atl. Rep. 705.

answered that he held certain property of the defendants as mortgagee, in trust for certain creditors, and issue having been joined on said answer, and upon the trial thereof, judgment was rendered in the original action against said defendants, and in favor of said respondent as such garnishee. On appeal, in the circuit court, the said respondent, as such garnishee, testified that he held certain property of the defendants by a chattel mortgage, in trust for certain creditors of said defendants named therein, to secure the payment of a note drawn to him by the defendants, embracing all of said claims, but extending the time of payment thereof for six months from the date of said mortgage. Afterwards two mortgages were given by said defendants upon an undivided half of some of said property to secure one of said creditors and another creditor, but that is immaterial to this case. The evidence tended to show that the mortgage to said garnishee did not cover all of the property of the defendants, and also tended to show, and the circuit court found, that the defendants were insolvent when said mortgage was given, but that it was "a matter of some doubt whether they fully understood their situation, and that they expected, by procuring the extension that they did, upon the debts, which the said chattel mortgage was given to secure, to be able to continue business," and also that the respondent did not know that said defendants were insolvent or owed other debts. It was further found, and so proved, that the respondent did not take possession of the property, but joined in a sale of it with the defendants for the sum of $325, and received the same, and applied it upon said mortgage. It appears that the property of the defendants not embraced in the mortgage was of no great value, but that which was mortgaged was of less value than the defendants would have been entitled to claim in their exemptions, so that it was not a very great matter any way. The accounts outstanding were only about $25, and the other debts were few and of small amounts, and the plaintiff's claim, was within the jurisdiction of a justice of the peace. The circuit court found, as conclusions of law, that the respondent was not indebted to the defendants, or had any property in his possession or under his control belonging to them, or, in short, that said chattel mortgage was valid, and that is the main question on this appeal. The preliminary exceptions to the refusal to admit evidence, as to what the respondent did with the money received by him on the sale of the property, are not much insisted upon, and the evidence would seem to be immaterial to the main questions in the case, involving the validity of the mortgage. It is sufficient to such end that the respondent received the money. He must be presumed to have discharged his trust and paid it over to the creditors, whom he represented as trustee in the mortgage, and if he did not, then such creditors cannot be presumed to have assented to his withholding it, or paying it back to the mortgagors, and there was no proof of such assent. On the main question, it is claimed—*First*, that the chattel mortgage was in fact and in contemplation of law a voluntary assignment, with unlawful preference of creditors, and not made according to the statute on voluntary assignments; *second*, that said mortgage was made with intent to hinder, delay, or defraud creditors.

1. To be an assignment within the meaning of the statute, this transaction must have the essential elements of an assignment to distinguish it from a common mortgage, or transfer simply in preference of creditors, both of which are as lawful now as if no assignment law existed. Chapter 349 of the Laws of 1883, forbidding a preference of creditors, applies only to cases in which an assignment is to be and has been made. The preference must be, by assignment, or within 60 days prior to an assignment, to be unlawful within the meaning of that statute. Other preferences are as lawful as they ever were. *Wachter* v. *Famachon*, 62 Wis. 123, 22 N. W. Rep. 160; *Anstedt* v. *Bentley*, 61 Wis. 629, 21 N. W. Rep. 807. In this case there was no regular assignment, even in form, and therefore this transaction, so far as it makes a preference of

creditors, does not fall within the prohibition of the statute on that account. In what respect, then, does this transaction differ from a common mortgage? The mortgage was filed, and there was no change of possession. There was no *insolvency* so far as the parties themselves understood. The mortgagors were to continue in possession of the property until the new note should become due, except in extraordinary contingencies, and continue business. The respondent never took possession of the property, and the mortgagors sold it to a stranger for an ample consideration, and paid the money over to the mortgagee like honest men. The mortgage did not cover all of the property of the defendants, and was not intended to do so. There was six months' extension of the time of payment, in consideration of the mortgage, during which time the defendants evidently hoped to be able to pay their debts out of their business and other possible resources. These facts the evidence tended to prove, and the circuit court was warranted in finding. Similar cases have been so recently decided by this court that an extended argument in this case, and the examination of authorities outside of the state, are unnecessary. This case is much like that of *Carter* v. *Rewey*, 62 Wis. 552, 22 N. W. Rep. 129. That was a mortgage to the attorney at law, *in trust*, to pay claims against the defendant, in his hands, or which might come to him for collection. It was held not amenable to the prohibition of the statute. The same principles were applied in the recent case of *Ingram* v. *Osborn*, *ante*, 304, (on the present calendar,) and the distinctions are pointed out between such cases and the case of *Winner* v. *Hoyt*, 66 Wis. 227, 28 N. W. Rep. 380. It is certainly not difficult to see a very broad distinction between this and other similar cases, and the case of *Winner* v. *Hoyt*, *supra*, in which the transaction was held to be an assignment and in violation of the statute. This transaction, therefore, was not an assignment, and made no unlawful preference of creditors.

2. Was the mortgage made with intent to hinder, delay, or defraud creditors? We fail to find any evidence whatever of any intention to defraud the other creditors of the defendants in the giving or receiving of this mortgage. The subsequent mortgages to secure the same claim or other claims, if any, on portions of the same property, have to be most cruelly *tortured* to cast a suspicion upon the transaction of giving this mortgage to the respondent in trust, to secure claims in his hands for collection. The defendants certainly had the right to claim the whole of the property as exempt, if they had chosen to do so. That they did not do so, and gave this mortgage, are no concern of the other creditors. *Carhart* v. *Harshaw*, 45 Wis. 340. If the defendants had been in failing circumstances, and saw fit to give their mortgage to secure certain of their creditors, it would not conclusively show a fraudulent intent. *Allen* v. *Kennedy*, 49 Wis. 549, 5 N. W. Rep. 906. In any respect in which the evidence presents this transaction, there does not appear to be any intent to defraud any one. The findings of the circuit court were clearly warranted by the evidence.

The judgment of the circuit court is affirmed.

BAILEY v. STEVE.

(*Supreme Court of Wisconsin.* December 13, 1887.)

HOMESTEAD—EXEMPTION OF PROCEEDS.

Rev. St. Wis. § 2983, provides that proceeds of the sale of a homestead, held with intent to procure another, shall be exempt for two years. Defendant having sold his homestead, took notes in part payment, and borrowed money upon them as security, and bought a homestead, intending to use his interest in the notes to pay his debts, and improve the same. *Held*, that his interest in the notes was exempt.

Appeal from circuit court, Outagamie county.

It appears from the record that December 26, 1885, John Steve, the defendant, owned and occupied, with his wife and children, as a homestead, 40 acres of land, about 8 miles from Appleton; that on that day he sold it for $1,800, of which he received $400 down, and a mortgage back to secure the payment of $1,400 in 14 annual payments of $100, evidenced by so many notes; that, soon after, he with his family moved to Appleton, bought a vacant lot in that city of nearly half an acre, with the intention of making the same a homestead, and built a home thereon, and moved into it, and made other improvements thereon; that September 13, 1886, D. B. Bailey, the plaintiff, recovered a judgment against the defendant in justice's court for $171.26; that September 20, 1886, a transcript of that judgment was filed in the office of the clerk of the circuit court; that October 11, 1886, an execution was issued thereon, and the same was returned wholly unsatisfied; that thereupon the defendant was brought before a court commissioner on supplementary proceedings; and from his examination, and the testimony taken therein, it appeared, in effect, that he had borrowed $800, and pledged said notes and mortgage as collateral security therefor; that he had no property left, except his homestead, and his interest in said notes and mortgage; that he put all the money he thus borrowed into the homestead; that he still owed $200 on the lot and $45 on the house; that he intended to use his said interest in the notes and mortgage to pay off his debts and improve his homestead; that the house was not yet completed; that the lot was not yet fenced or drained; that no sidewalk had been constructed, or trees set out thereon; that to complete the homestead in a proper and healthy condition, and pay off the debts already incurred thereon, would necessitate a large amount over and above the defendant's interest in said notes and mortgage. November 19, 1886, the commissioner held, in effect, that the defendant's interest in the notes and mortgage was not exempt, and ordered the plaintiff's debt to be satisfied from the same, and for that purpose a receiver was appointed, etc. Upon affidavits and the record, the circuit court ordered the plaintiff to show cause why such order of the commissioner should not be set aside. That upon the hearing thereof, January 4, 1887, the circuit court ordered that said order of the commissioner be, and the same was thereby, vacated and set aside, with $10 costs to the defendant. From that order the plaintiff brings this appeal.

W. J. Allen, for appellant. *F. E. Harriman*, for appellee.

CASSODAY, J., (*after stating the facts.*) The only question presented is whether the defendant's interest in the notes and mortgage, which were "proceeds derived from" the sale of his homestead, was exempt for the period of "two years," as provided by section 2983, Rev. St. It certainly was exempt if "held with the intention to procure another homestead therewith," during that period. Id. The same is true if intended to be used during that time in completing or improving such new homestead. We think the circuit court was justified in finding that such interest was held with such intent. The case comes squarely within the spirit and reasons of the repeated decisions of this court, which need not be again repeated. *Hewitt* v. *Allen*, 54 Wis. 583, 12 N. W. Rep. 45; *Scofield* v. *Hopkins*, 61 Wis. 370, 21 N. W. Rep. 259; *Binzel* v. *Grogan*, 67 Wis. 147, 29 N. W. Rep. 895.

The order of the circuit court is affirmed.

PATTEN PAPER CO. *et al.* *v.* KAUKAUNA WATER-POWER CO. *et al.*

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. EQUITY—JURISDICTION—RIGHTS OF PARTIES IN WATER-POWER.
A court of equity has jurisdiction to regulate the respective rights of parties in and to a water-power, and where no question appears as to the unsettled or unascertained rights of the several parties, the jurisdiction will be exercised.
2. SAME—SUIT TO ASCERTAIN RIGHTS—DIVERSION OF WATER—PLEADING.
A complaint for equitable relief, which shows that a river in its natural condition would flow in certain channels, and that defendant has turned the water which naturally ran to plaintiff's dam away from it, and threatens to continue so to do, to the destruction of plaintiff's rights, states a cause of action.
3. SAME—PARTIES.
Where the object of an action is to determine what are the respective rights of parties to water in a stream, and facts are shown which entitle the plaintiff to have this determined, all parties interested in the waters of the stream are proper parties to the action.
4. PARTIES—JOINDER AND MISJOINDER—PLEADING.
Allegations against one defendant, when several are joined, which, if proved, would not show a cause of action against that defendant, do not make a complaint demurrable as joining several distinct causes of action.

Appeal from circuit court, Outagamie county.

Action in equity by the respondents, the Patten Paper Company, Limited, Union Pulp Company, and Fox River Pulp & Paper Company, against the Kaukauna Water-Power Company, Milwaukee, Lake Shore & Western Railway Company, Michael Hunt, Anna Hunt, and others, appellants.

A. L. Cary and *D. S. Ordway*, for appellants. *Moses Hooper*, for respondents.

TAYLOR, J. This action was brought by the respondents, for the purpose of settling their rights in and to a certain water-power on the Fox river, and to restrain some of the appellants from diverting the water of said river from their said power. The material facts alleged in the complaint are the following, viz.: That the Fox river is a public river, and at the place in question flows in nearly an easterly course through township No. 21 N., of range 18 E., of the fourth principal meridian, in Outagamie county, Wisconsin, and between sections 21 and 22, south of the river, and section 24, and private claims Nos. 1 and 35, north of the river; that the volume of water which naturally flows in the river at that place is about 300,000 cubic feet per minute in the ordinary stage of water; that where the river flows between sections 21 and 22, and section 24 and said private claims, it is divided into several separate channels by four islands numbered 1, 2, 3, and 4; that said islands were surveyed by the United States government, and sold as other public lands to private persons; that island No. 1 contains 6.72 acres, No. 2 contains 2.2 acres, No. 3, 10.20 acres, and No. 4, 22.53 acres; that island No. 4 is about 135 rods long, with the stream, and lies next the south shore of the river, and extends about 70 rods up stream above the head of island No. 3; that island No. 3 lies partly between island No. 4 and the north bank of the river, is about 115 rods long, with the stream, and extends about 50 rods below the foot of island No. 4; that island No. 2 lies south of the lower end of No. 3, and island No. 1 lies south of island No. 2 and the foot of island No. 4, and between the foot of said island No. 4 and the south shore; that islands Nos. 3 and 4 divide the stream into three channels above islands Nos. 3, 2, and 1, and islands Nos. 3, 2, and 1 divide the stream into four channels below island No. 4; that between the south shore of island No. 1 runs a part of the water of the south channel, and between islands Nos. 1 and 2 runs part of the water of the south channel and a part of the water of the middle channel, and between islands Nos. 2 and 3 runs part of the water of the middle channel. In the complaint the channel between the south shore and island No. 4 is designated as the south channel;

the channel between island No. 4 and island No. 3 as the middle channel; and the channel between island No. 3 and the north shore as the north channel.

The complaint then alleges that, in a state of nature, and before there was any interruption or diversion of the waters of the stream, about five-sixths of the waters of the stream flowed through the channel north of island No. 4, and about one-sixth, through the channel south of said island; that about one-third of the waters of the river ran and passed through the channel between islands Nos. 4 and 3, and about one-half of the water of the river flowed through the channel north of said island No. 3 and the north shore of the river; that no improvements for hydraulic purposes have been made on islands Nos. 1 and 2, and that the plaintiffs do not know what volume of water passes between the south shore and island No. 1, or between islands 1 and 2, or between islands 2 and 3, in their natural state; and the plaintiffs allege that they do not know whether it is practicable or not to make any use of hydraulic power on either of the islands Nos. 1 or 2, and that they have made the owners of these islands parties to this action that they might be in court to present any claim they, or either of them, may have as to the amount of water flowing in the south or middle channel of said river.

The plaintiffs then allege that in 1879 and 1880 Mathew Mead and M. J. Edwards were the owners of islands Nos. 4 and 3, and that they then built a dam and made a mill-pond between islands Nos. 4 and 3, which mill-pond received the water of the said middle channel, and raised a head of about 15 feet, which is called the "Mead & Edwards Water-Power." They then allege that the Patten Paper Company acquired from said Mead & Edwards the right to use 25,000 cubic feet per minute, from the hydraulic power created by said dam and pond, and have constructed very valuable mills and works for the use of said power, particularly describing the property owned by said company. They also allege the ownership of a part of said hydraulic power created by said dam and pond, by the Fox River Pulp & Paper Company, and that said Fox River Pulp & Paper Company have erected very expensive and valuable buildings and works for the purpose of using such hydraulic power. The property of this company is also particularly described in the complaint. They also allege that in 1881 the Green Bay & Mississippi Canal Company was the owner of the undivided half of the north side of island No. 4, and the south side of island No. 3, and of the Mead & Edwards water-power, and that said company leased certain described lands on island No. 4 to the Union Pulp Company, together with 20,000 cubic feet of water per minute, to be drawn from the said Mead & Edwards water-power for hydraulic purposes, for the terms of 10 years, with the right of renewal for 100 years, which said lease is still owned by said company, and that they have erected a large and valuable mill in which to use such hydraulic power. They also allege the ownership by George F. Kelso of a part of the said Mead & Edwards water-power, particularly describing the same.

The plaintiffs then allege that a dam has been built across the said Fox river about 100 rods above the head of island No. 4, "and the defendant, the Kaukauna Water-Power Company, has built a wide and deep canal from the mill-pond above said dam along in a line north and south of the south bank of said river, to a point below the lower end of island No. 4; that such canal is large enough to pass, and is intended to pass, the half of the flow of said river; that there are no openings from said canal into the river to return water to the river above the head of island No. 4, or so that the same can flow into the middle channel of said river, and come into said Mead & Edwards water-power; that it is the intention of the said Kaukauna Water-Power Company to draw from said river above said dam the half of the water flowing in said river, and pass the same through their said canal and through the mills and factories of itself and its lessees into said river at a point below the head

of island No. 4, and so that the same shall not and cannot pass into said middle channel and down into said Mead & Edwards water-power;" that said Kaukauna Water-Power Company proposes, threatens, and intends to carry and pass through its canal from said mill-pond, maintained by the dam above said island No. 4, down below the head of said island No. 4, through the mills and factories of itself and its lessees, and so that it cannot pass into the said middle channel or into the said Mead & Edwards mill-pond, the one-half, at least, of the entire flow of said Fox river, which one-half includes the one-sixth appurtenant to the said south channel, and the one-third thereof appurtenant to the said middle channel, and which should of right flow and come into the mill-pond furnishing water to the mills of these plaintiffs; that it, the Kaukauna Water-Power Company, has so passed through its canal, and the mills and factories of itself and its lessees, about one-half of the flow of said stream during the summer of 1886, to the great damage of these plaintiffs, and by so doing has almost entirely prevented the running of the mills of these plaintiffs, the Union Pulp Company, and the Fox River Pulp & Paper Company, and that it, the Kaukauna Water-Power Company, threatens to, and unless restrained by this court will, so draw and pass said half of said stream, and so deprive these plaintiffs of the use thereof, and of the use of their mills; that such interference by said Kaukauna Water-Power Company, and its lessees and tenants, with the hydraulic rights and water-power of these plaintiffs causes great and constantly occurring damage to these plaintiffs; that such damages are not in their nature susceptible of definite calculation, and are constantly varying in amount, because the amount of water drawn wrongfully from said river by said Kaukauna Water-Power Company, and its lessees and tenants, varies at different times, and to keep accurate *data* relative to the same would require the constant attendance of an hydraulic engineer, and because of the uncertainty about the water which may from time to time come to plaintiffs' said mills, makes it uncertain what business may from time to time be done in such mills, and what working force may from time to time be needed therein, or what product may from time to time be manufactured therein. (13) That the Green Bay & Mississippi Canal Company has a canal leading from the said mill-pond, maintained by said dam across Fox river above said island No. 4, along in line with and north of the north bank of said Fox river, to a point below the head of said island No. 3; that such canal is large enough to pass, and is intended to pass, at least one-half of the flow of said river, and to pass the same down said canal, and into said river at a point below the head of island No. 3, and so that the same cannot run and pass into the said middle channel, and so that the same cannot come into the mill-pond formed between said islands Nos. 4 and 3 by the dam from one to the other, and, during the past summer, has so passed about one-half the flow of said stream, so that the same has not and could not come into said mill-pond between islands Nos. 3 and 4, called the "Mead & Edwards Water-Power." (14) That the Green Bay & Mississippi Canal Company, and its lessees and tenants, are, and have for several years been, and propose to and will continue, drawing and passing through their canal on the north side of said river from the mill-pond maintained by the dam above island No. 4, to a point below the head of island No. 3, and so that it cannot pass into said middle channel and into the mill-pond furnishing water to plaintiffs' mills, about one-half of the flow of the Fox river, and the half appurtenant to the said north channel.

The complaint then alleges that the persons named as defendants in this action are the riparian owners of the south and north shores of said river opposite the islands named, and below said dam, or of the shores of said islands, or of some part thereof, or that they have some interest therein as mortgagees, lessees, or otherwise, stating at length the character and nature of such ownership, or that they have some interest in the water-power created by said dam,

or in the Mead & Edwards water-power, in the Kaukauna water-power, or in the Green Bay & Mississippi Canal Company's water-power. Then follows the general allegations "that the parties above named are the owners of all the lands bordering the north and south shores of said river, from the head of the upper island No. 4 to the foot of the lower island No. 1, also of the shores of all of said islands;" "that the above-named tenants of the various owners are all the tenants of all said owners;" and "that all the parties interested in the amount of water appurtenant to the south, middle, and north channels of said Fox river, where the same passes islands Nos. 3 and 4, are named as plaintiffs or defendants." The complaint concludes with the following prayer for judgment: *First.* Determining and adjudicating what share or portion of the flow of said Fox river, where the same passes islands Nos. 3 and 4, in township No. 21 north, of range 18 east, is appurtenant and of right should be permitted to flow in the south, middle, and north channels of said river respectively. *Second.* Restraining the defendant the Kaukauna Water-Power Company, and all persons and corporations claiming under it as mortgagees, lessees, purchasers, or otherwise, and especially all such as are named defendant herein, from drawing from said Fox river above the head of island No. 4, and passing around and below the head of said island No. 4, and so that the same shall not come into the middle channel of said river, and into the mill-pond of these plaintiffs, called the 'Mead & Edwards Water-Power,' more water, flow of said river, than the one-sixth part thereof, or more than the amount which by nature was appurtenant to and flowed in said south channel of said river. *Third.* That the Kaukauna Water-Power Company pay to these plaintiffs costs of this action.

To this complaint the defendants, the Kaukauna Water-Power Company, Milwaukee, Lake Shore & Western Railway Company, G. Lind, Joseph Carlson, Brokaw Pulp Company, Badger Paper Company, and Joseph Kline, by their attorney, Alfred L. Cary, demur and assign for causes of demurrer: "(1) That the complaint does not state facts sufficient to constitute a cause of action against them. (2) Because it appears on the face of the complaint that the court has no jurisdiction of the subject-matter of the complaint. (3) Because it appears upon the face of the complaint that several causes of action have been improperly united." Michael A. Hunt and Anna Hunt demur separately, and assign the same causes of demurrer. The demurrers were each overruled by the circuit court, and from the order overruling the same separate appeals were taken to this court.

We do not understand that the learned counsel for the appellants have very seriously contended that their demurrers should be sustained upon the second ground alleged, but have contented themselves with an endeavor to show, on the part of the Kaukauna Water-Power Company, and those joining with them in the demurrer, that the court erred in not sustaining their demurrer on the ground that several causes of action have been improperly united, and, on the part of the Hunts, that no cause of action is stated against them, and that several causes of action have been improperly united. As some argument has been made in the briefs of counsel questioning the power of a court to exercise its equity powers for the purposes of regulating, determining, and apportioning the respective rights of parties in the same water-power, or in apportioning and regulating the use of the water of a river for hydraulic purposes by the several riparian owners adjacent to, and to whose lands such hydraulic power is appurtenant, in whole or in part, we call attention to the following cases in which that power has been exercised by a court of equity with the approval of the most learned courts of this country; and we find no cases holding the contrary doctrine, and none have been cited by the very careful and learned attorneys for the appellants on the hearing of these appeals. *Arthur* v. *Case*, 1 Paige, 447; *Belknap* v. *Trimble*, 3 Paige, 577; *Gardner* v. *Newburgh*, 2 Johns. Ch. 165; *Olmsted* v. *Loomis*, 9 N. Y. 423;

2 Story, Eq. Jur. (12th Ed.) § 927 *et seq.*; *Fisk* v. *Wilber*, 7 Barb. 395; *Burden* v. *Stein*, 27 Ala. 104; *Water Co.* v. *Chapman*, 8 Cal. 392; *Pollitt* v. *Long*, 58 Barb. 20; *Burnham* v. *Kempton*, 44 N. H. 78; *Ranlet* v. *Cook*, Id. 512; *Bardwell* v. *Ames*, 22 Pick. 353; *Bemis* v. *Upham*, 13 Pick. 171; *Ballou* v. *Hopkinton*, 4 Gray, 324; *Lyon* v. *McLaughlin*, 32 Vt. 423; *Webb* v. *Manufacturing Co.*, 3 Sum. 189; *Wright* v. *Howard*, 1 Sim. & S. 190; *Mason* v. *Hill*, 3 Barn. & Adol. 304; Pom. Rem. §§ 418–422; *Frey* v. *Lowden*, 11 Pac. Rep. 838; *Cotton Mill Co.* v. *Ford*, 55 Wis. 199, 12 N. W. Rep. 377; *Lawson* v. *Wooden-Ware Co.*, 59 Wis. 397, 398, 18 N. W. Rep. 440; *Allard* v. *Carleton*, (N. H.) 3 Atl. Rep. 313. These cases and others clearly sustain the courts in the exercise of their equity powers in adjusting and protecting the rights of parties interested in hydraulic powers. One reason for the interference of a court of equity in such cases is, perhaps, as well expressed in the case of *Lyon* v. *McLaughlin*, *supra*, as in any other. The court in that case say: "The uncertainty of the extent of the prospective injury, and the impossibility of ascertaining the measure of just reparation, render such injury irreparable, in a legal sense, and therefore a court of equity will entertain jurisdiction of such a bill, and grant the proper remedy, notwithstanding the respective rights of the parties to the use of the water are in dispute, and depend entirely upon the legal construction of their deeds." In the case of *Belknap* v. *Trimble*, *supra*, it was held "that where different mill-owners have a common right to an artificial use of water for their respective mills, the court of chancery has jurisdiction so to regulate the common use as to preserve the rights of each." In *Frey* v. *Lowden*, *supra*, the court say there is no doubt of the power of the court of equity to ascertain and determine the extent of the rights of property in water flowing in a natural water-course, acquired by persons who hold and are entitled to them, and to regulate between or among them the use of the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property. But it is unnecessary to cite further cases in support of the equity powers of the courts in such cases.

The mere statement of the case, as made in the complaint in this action, shows the absolute necessity of the exercise of such a power by the courts, in order to protect the rights of the plaintiffs, as well as the rights of all others interested in the use of the hydraulic power created by the fall of the water of the river at the place mentioned. There is no question in this case as to the unsettled and unascertained rights of the respective parties, and the case does not come within the rule laid down in some of the cases, that when the plaintiff's right is disputed, and not clear, he must first have his right settled in an action at law.

The defendants having demurred to the complaint, all the material facts alleged are admitted for the purpose of the decision upon such demurrer. It is admitted, therefore, that, in its natural state, the water of said river would flow in the south, middle, and north channels, as stated in such complaint, and it is further admitted that the defendant the Kaukauna Water-Power Company has turned the water which was accustomed to run to the plaintiff's dam and pond on the middle channel, away from such channel, and that it threatens in the future to continue such diversion of the water, to the destruction of the rights of the plaintiff in the water-power created by the Mead & Edwards dam and pond, and upon which the beneficial use of their machinery and mills depends, so that, as against the Kaukauna Water-Power Company, and their grantees and lessees, there is certainly a clear cause of action stated in the complaint. It is urged as one ground of demurrer that the complaint also states a separate cause of action against the Green Bay & Mississippi Canal Company, and for that reason the complaint is subject to the objection that several causes of action are improperly joined. We think this contention is not sustained by the facts stated. The complaint does not state that the di-

version of the water from the north channel by the canal company into their canal has taken any of the water from the river which was accustomed to run through the middle channel. The allegations in the complaint, so far as they regard the canal company, would not, if proved, entitle the plaintiff to any damages or relief against said company. We think the demurrer cannot be sustained upon that ground by either of the defendants.

The only other question is whether the Hunts were properly made parties to the action. If the only relief sought was to restrain the Kaukauna Water-Power Company from diverting the water from the middle channel in the future, it might be said there was no reason for making the Hunts, or any others except the Kaukauna Company, and those claiming under them, parties to the action. But that is not the only or the principal relief asked. In addition to the relief claimed against the Kaukauna Water-Power Company, and those claiming under them, this court is asked to settle and determine what share or portion of the flow of the water of said river, where the same passes islands 3 and 4, in township No. 21 N., of range 18 E., is appurtenant and of right should flow in the south, middle, and north channels of said river respectively. If the complaint states facts which entitle the plaintiffs to this relief, and that it does is shown by the cases above cited, then it is evident that, in order to settle the rights of the respective owners of the water-rights in said channels, all persons interested in the water-rights in said channels, or in either of them, are proper parties to the action. If it be urged that the plaintiffs are only interested in having it settled as to what volume of water should of right flow in the middle channel, the answer to that proposition is that the settlement of that right will necessarily affect the rights of the owners of the water-power in the other channels. The individual rights are so connected that one cannot be settled without affecting all the others. It is urged, however, that if all the persons having any interest in the flow of the water of the river in the south, middle, and north channels are interested in the settlement of the questions sought to be adjudicated in this case, and so are proper parties in an equity proceeding for that purpose, and are proper parties under the provisions of section 2603, Rev. St., that it is not apparent, on the facts stated in the complaint, how the Hunts, who own island No. 2 only, and which is below islands Nos. 3 and 4, which form the three channels in which the flow of the water of the river is sought to be apportioned and determined, have any interest in settling that question. It is true, the complaint does not expressly allege that the Hunts have any interest in the matters to be determined in this action, nor that they claim any such interest, but it alleges facts showing that under certain circumstances they might have an interest; that is, that complaint shows that island No. 2 is so situated with regard to the flow of the waters through the south and middle channels that the owners might be interested in the waters flowing through such channels, if the flow through such channels can be utilized for hydraulic power on the shores of said island, and upon that point the plaintiffs allege they have no knowledge. If the owners of this island can utilize the flow of the water for hydraulic purposes on the shores of said island, then it is quite apparent that they may be interested in having it flow in greater volume through one or the other of these channels, depending upon the facility with which hydraulic powers can be created on one or the other of the shores of said island. As upon the face of the complaint the Hunts may have an interest in the questions to be determined in the case, we think they may be properly made parties to the action under the section of the statute above quoted. If they are in fact indifferent, or have no interest in the matter, they can disclaim any such interest, and may upon such disclaimer be dismissed therefrom. If they have any interest, they can set it forth and have it protected, and so have an end of litigation. The effect of the allegations in the complaint as to island No. 2, and its ownership by the Hunts, is that the Hunts may have an interest

in the question to be litigated, although the nature of such interest is not known by the plaintiffs, and they are asked to come into court and disclose their interest, or disclaim having any interest in the controversy, so that they cannot hereafter disturb the settlement of the rights of the parties as determined by the judgment in this action. We think they were properly made parties defendant. *Wilson* v. *Castro*, 31 Cal. 420.

The order of the circuit court overruling the several demurrers of the appellants is affirmed, and the cause is remanded for further proceedings.

CAMPBELL v. CAMPBELL.

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. TRUSTS—ABSOLUTE CONVEYANCE—STATUTE OF USES.
   In an action of ejectment, the defendant claimed that the consideration for plaintiff's purchase was paid by defendant and her husband, and that the conveyance to plaintiff, absolute in form, was in fact made in trust for defendant's husband. *Held* that, as against plaintiff's absolute conveyance, the statute of uses and trusts would not permit such a trust, arising merely from payment of the consideration, to be asserted.
2. SAME—EXPRESS TRUST IN WRITING—EVIDENCE.
   Defendant, to prove an express written trust in favor of her husband, offered in evidence a power of attorney, in the usual form, from plaintiff to her husband, and in connection therewith a letter from the latter to plaintiff, containing this clause: "The remaining 80 acres *I purchased* of Paul last winter, *deeded to you*. I am doing business in relation to it, and would wish to have a power of attorney for doing so." *Held* insufficient to establish a trust.

Appeal from circuit court, Outagamie county; GEORGE H. MYERS, Judge.

Action of ejectment by Robert Campbell against Olla M. Campbell. Defendant was the wife of Thomas R. Campbell, a brother of plaintiff. The premises in question were purchased by decedent and another at sheriff's sale in 1871. Thomas conveyed his interest to plaintiff in 1875, and, after a conveyance of the other half interest by the owner to plaintiff, the latter, in 1877, executed a power of attorney to Thomas to sell the whole of the premises in dispute. A few days before his death, in March, 1879, under this power from plaintiff and wife, Thomas executed a deed of the premises in dispute from his principals to one John Bottenseck, who at once conveyed the same to defendant. The cause was tried without a jury, and judgment rendered against defendant, from which she appealed.

W. J. Allen, for appellant. *C. W. Felker*, for respondent.

ORTON, J. This is an action of ejectment, and the plaintiff proved his title in fee to the premises. The defense is in substance and in effect that the consideration of the purchase of the premises was paid by Thomas R. Campbell, a brother of the plaintiff, and the defendant, his wife, or both, and that the conveyances to the plaintiff were made *in trust* for his use and benefit. There was much evidence upon this issue, and we think the evidence tended strongly to show that the plaintiff furnished and paid said consideration. But all of this evidence was immaterial, in the view we are compelled to take of this case. If Thomas R. Campbell deeded or caused the premises to be deeded to the plaintiff without consideration, or either he or his wife, the defendant, or both of them, furnished the consideration for the purchase, and directed the deeds to be made to the plaintiff, it is pure and simple *a trust*, and nothing else, that the defendant seeks to establish against the absolute conveyances to the plaintiff. The statute of uses and trusts cannot be evaded by calling these supposed rights *equities*.

The defendant sought to prove an express trust in writing in these lands in favor of herself or her husband, and introduced in evidence a power of attorney from the plaintiff to Thomas R. Campbell, executed about the twenti-

eth day of August, 1877, authorizing and empowering him to sell and convey said premises, in his name and for his use, in the form of an ordinary power, to an agent, to sell and convey lands, and, in connection therewith, a letter from said Thomas R. Campbell to the plaintiff, requesting him to execute and acknowledge said power of attorney, and return the same to him. In this letter occurs this clause: "The remaining undivided half of the 80 acres *I purchased* of Paul last winter, *deeded to you*. I am doing some business in relation to it, and would wish to have a power of attorney for doing so." This clause is claimed as an express trust declared in Thomas, and showing that the power of attorney was to be made to Thomas, in order that he might convey the premises in such way as to reinvest himself with the title, or to have it conveyed to the defendant. It will be seen at a glance that this clause has no such meaning. It is not inconsistent with the absolute ownership of the land by the plaintiff. If such was the purpose of this power, why was not a conveyance made directly, either to Thomas or his wife, the defendant, instead of this at least questionable and unnecessary method of causing the title to be so placed? Before his death, Thomas, by virtue of this power of attorney, deeded the premises to one Bottenseick, without any consideration, and Bottenseck conveyed the same to the defendant. There was no express trust, in writing, shown, by which these premises were to be reconveyed to Thomas R. Campbell, or conveyed to the defendant; and if it had been satisfactorily proved that either Thomas or the defendant, or both of them, paid the consideration of the conveyance to the plaintiff, or that Thomas and his wife, the defendant, conveyed to the plaintiff said premises without consideration, no trust whatever, in either Thomas or the defendant, to convey or reconvey to them, or either of them, could *result* or be *implied*. Section 2077, Rev. St.; *Rasdall's Adm'r* v. *Rasdall*, 9 Wis. 379; *Whiting* v. *Gould*, 2 Wis. 552; *Rogan* v. *Walker*, 1 Wis. 527; *Bird* v. *Morrison*, 12 Wis. 153. The circuit court seems to have taken this view of the case in rendering judgment for the plaintiff. It is found "that the power of attorney to T. R. Campbell was solely for the purpose of giving him authority to sell the premises for the benefit of the plaintiff;" "that the conveyance thereof under said power in the name of the plaintiff to Bottenseck, and by Bottenseck to the defendant, were without consideration, and with fraudulent intent to defraud the plaintiff, and to obtain possession and title to said premises;" and "that, at the time such conveyances were so made, the plaintiff was the *bona fide* owner of the land." In the opinion of the learned judge of the circuit court found with the record, it seems that he predicated his decision on the statute of frauds and of trusts. There can be no question of the correctness of the decision. The judgment of the circuit court is affirmed.

Fox River Flour & Paper Co. *v.* Kelly *et al.*

(*Supreme Court of Wisconsin.* December 13, 1887.)

1. Waters and Water-Courses—Water-Power—Dams—Injunction to Restrain Unlawful Use of.

   An injunction will issue to restrain defendants from using water, in hostility to plaintiff's right, for the operation of a mill on their lot, adjacent to the lower end of a system of hydraulic power created by dams forming a pond on the north side of, and a canal or mill-race running nearly parallel with, a stream of water, and which had been built and maintained at the expense of plaintiff and its grantors.

2. Same—Artificial Channel—Rights of Riparian Owner.

   In proceedings to restrain defendants from using water-power, the head of which was 900 feet above their lot, that reached across a mill-race, and to and into a stream, the evidence showed that plaintiff had derived title through mesne conveyances from the original owner, and defendants from his agent and joint owner, between whom an agreement had been made that plaintiff's grantor should hold and own "the water-power and mill privileges" on said stream and lots thereby conveyed; while defendants' grantor was to have, and upon suit for specific performance of

that contract obtained, possession of lots below. *Held*, that defendants had not, in the absence of a grant or title by adverse user, such rights in an artificial channel, although intersecting their lot, as to the water of a natural stream.

3. SAME—TITLE TO WATER-POWER BY ADVERSE USER—EVIDENCE.
A mill-race had been constructed over lands which were subsequently laid out in lots, and sold. On bill to restrain the unauthorized use of the power, defendants claimed that their grantor had always asserted hydraulic rights by virtue of his ownership of the lot, but the evidence failed to show acts making good that claim, while it affirmatively established his disclaimer of any such right in a former litigation with plaintiff's grantor. *Held*, that defendants had derived title neither by grant nor by adverse user.

4. SAME—ESTOPPEL BY SILENCE.
Defendants purchased a lot situate on a race-way, and erected a factory thereon, with a view to operate the same with power drawn from the race. On proceedings to restrain such diversion, it appeared that plaintiff company and its grantors were engaged in selling and leasing hydraulic rights, and, though they knew of the erection of the mill, had not informed defendants of the want of title in them to the power. *Held*, that plaintiff's silence did not estop it from an assertion of its rights, as it might well have expected that defendants would buy or lease from it the amount of power they needed.

5. SAME—TITLE BY CONVEYANCE—WANT OF TITLE IN GRANTOR.
A water-power company, to improve the hydraulic power created by a wing and side dam on the north side of a river, on neither edge of which it owned property, built across the stream another dam, defraying expenditures from subscriptions by riparian owners and others, but issuing no stock, and finally quitclaimed to defendants' grantor and others. On suit to restrain defendants' use of power on the lower end of a canal supplied from a pond formed by the dams mentioned, they interposed the title their grantor had acquired to the new dam. *Held*, that defendants' claim of right would derive no strength from a conveyance to their grantor of whatever right the new dam created, as the evidence showed that at that time he had parted with his title to the lot owned by defendants.

Appeal from circuit court, Outagamie county; GEORGE H. MEYERS, Judge.

Bill in equity by plaintiff, the Fox River Flour & Paper Company, against W. H. Kelly, J. E. Springer, Ole Stephensen, N. E. Stephensen, and A. H. Conkey, as assignee, to perpetually enjoin defendants from using any water-power in hostility to plaintiff's title, without leasing or purchasing the same from plaintiff. The cause was referred to a referee to take evidence, and in September, 1886, the court rendered judgment enjoining defendants, and for costs, the claim for damages having been withdrawn by plaintiff. Defendants appeal. The essential facts are stated in the opinion.

H. D. Ryan and *Nash & Nash*, for appellants. *Moses Hooper* and *F. W. Houghton*, for respondent.

COLE, C. J. The plaintiff claims to be the owner of all the unsold water-power created by a system of dams on the Fox river at Appleton, and has filed this bill in equity to restrain the defendants, who own a mill on a lot below, from diverting or using any water drawn from its said water-power. An objection was taken here by the learned counsel for the defendants that the plaintiff had an effectual remedy at law, and that a court of equity should turn it over to that remedy where there could be a jury trial settling its rights in the water-power before granting the relief asked. The answer raises no such objection, and we think the facts stated in the complaint present a case for the interference of a court of equity, providing the plaintiff establishes its right to all the unsold residue of the power as it claims. It is plain that an action of trespass for every interference with its rights would lead to interminable litigation. And it is well settled that equity will interfere, by way of injunction, to restrain irreparable mischief, or to restrain oppressive and interminable litigation, or to prevent multiplicity of suits. 2 Story, Eq. Jur. §§ 925–927. The plaintiff's case may well stand upon that ground, even if a seasonable objection had been interposed.

This case involves questions relating to riparian rights; and it may be well, at the outset, to refer to some elementary doctrine which states or defines what these rights are. In *Head* v. *Manufacturing Co.*, 113 U. S. 9–23, 5 Sup. Ct.

Rep. 441, Mr. Justice GRAY says: "The right to the use of running water is *publici juris*, and common to all the proprietors of the bed and banks of the stream, from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power inherent in the fall of the stream and the force of the current to drive mills. That power cannot be used without damming up the water, and thereby causing it to flow back." In *Bates* v. *Iron Co.*, 8 Cush. 548–552, Chief Justice SHAW says: "The relative rights of land-owners and mill-owners are founded on the established rule of the common law that every proprietor through whose territory a current of water flows, in its course towards the sea, has an equal right to the use of it, for all reasonable and beneficial purposes, including the power of such stream for driving mills, subject to a like reasonable and beneficial use by the proprietors above and below him on the same stream. Consequently, no one can deprive another of his equal right and beneficial use by corrupting the stream, by wholly diverting it, or stopping it from the proprietor below him, or raise it artificially, so as to cause it to flow back on the land of the proprietor above." Chancellor Kent says: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, (*currere solebat,*) without diminution or alteration. No proprietor has a right to the use of the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat*, is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the waters back upon the proprietors above, without a grant, or uninterrupted enjoyment of twenty years, which is evidence of it." 3 Kent, Comm. *439. The authorities might be multiplied indefinitely which define the right in substantially the same language, but it is unnecessary. In *Lawson* v. *Mowry*, 52 Wis. 219, 9 N. W. Rep. 280, the same doctrine is recognized and applied, and many cases cited which enforce it.

Applying this doctrine to the case before us, and it is plain that in the absence of any grant, or of a title acquired by adverse user, the defendants as riparian proprietors only have the right to the natural flow of the water of the river by their lot; also, as incident to their ownership of the lot, they have the right to utilize any fall in the stream in its natural state, as it passes by their lot, for the purpose of a water-power. This is the full extent of their rights as riparian proprietors owning the lot on the river below the water-power. But it is claimed by their counsel that, upon the facts disclosed in the evidence, the defendants took as incident or appurtenant to their lot, the right to use water from the hydraulic power which had been created on the river; and this is the real point in controversy.

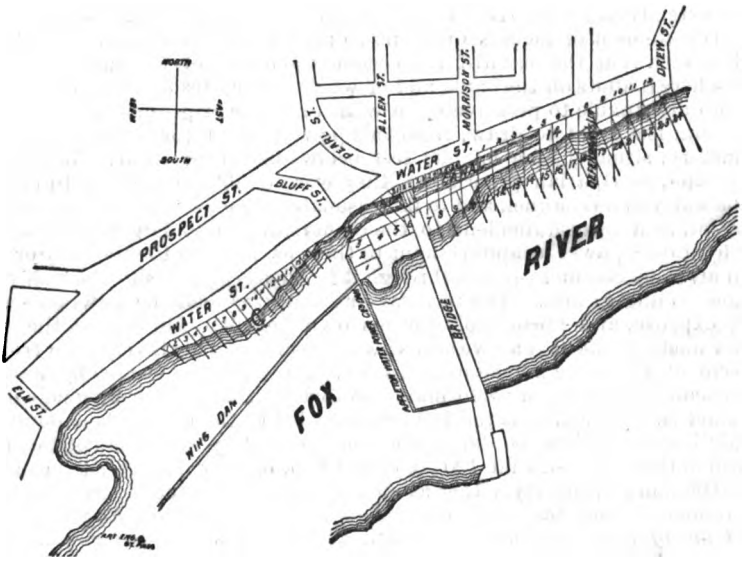
It is impossible, within any reasonable limits, to make a full statement of the facts upon which the defendants base this right. It must suffice to say that the evidence shows that, in 1849, Mr. Amos A. Lawrence was the owner of a part of the site of the city of Appleton, which had been purchased for him by Mr. Reeder Smith, who acted as his agent in making such purchases, under an agreement that he was to have an equal interest in the profits of the adventure as compensation for his services in purchasing and looking after the property. A part of the property lay along the north bank of Fox river; and this was, in 1850, platted into blocks A, B, C, and D, and these blocks into about

a hundred lots. Block C lay along the river, between the westerly line of the Appleton plat and Morrison street, and was divided into lots, which were numbered from one, the westerly line of the block, to twenty-six, at the easterly end at Morrison street, and was bounded on the north by Water street. In 1849, Lawrence commenced the construction of a wing-dam and side-dam, which rested upon the bank of the river on lot 18 of block C, at a point about 160 feet above the east line of the lot as platted on McKelcon's map,[1] which is mentioned in the evidence, and 400 feet or more above or west of the east line of block C. This wing-dam and side-dam were completed in 1850, and

STEPHEN'S MAP OF APPLETON, 1872.

This map does not show the canal in block 14 in its whole length, but represents it as extending only down to lot 4, instead of to lot 12.

The Appleton Water-Power Company's dam, west of the bridge, is not indicated in the map, but has been added for better information.



created a mill-pond or water-power on block C. In the fall of 1850, Lawrence commenced the construction of a mill-race or canal leading from the shore end of the wing-dam down the river, nearly parallel with the bank, and opening at the west end into the mill-pond. In 1851, this canal or raceway had been constructed by Lawrence from the mill-pond down to Dew street, and across 12 lots which constituted block 14. From the time of the completion of the canal until now, the wing-dam and southern bank of the canal have all been maintained,—the water of the mill-pond communicating with the raceway,—and all held and maintained for the purpose of creating a water-power. On or before November, 1850, Smith and Lawrence entered into an agreement for a division of the unsold land, at and near Appleton, of which Smith was to have an equal interest in the profits. By this agreement a division was provided for, and which was ultimately carried out by a decree of the court. The land and the lots contained in the McKelcon plat, and the land in front of that plat, covered by the waters of the Fox river, and the water-power and mill privileges on the river in front of the lots and blocks in the said McKelcon plat, were set over to Lawrence, free from any claim by Smith. Law-

[1] Block C of the McKelcon map here referred to is the same, lot for lot, as block C of Stephen's map of 1872, reproduced above.

rence thus, by this division, became the sole owner of the property just mentioned, free from all equities which Smith had had in it. Block 14 contained 12 lots,[1] and, under the decree, was divided between Smith and Lawrence; Smith taking the even-numbered lots, and Lawrence the odd-numbered. The defendants own lot 8, deriving title from Smith as their remote grantor. The plaintiff claims under Lawrence as its remote grantor, and owns the wing-dam, the side-dam, the dam-landing, and the land, including the mill-race, and the land between it and the river from the dam-landing, about 400 feet, to block 14; also the alternate odd-numbered lots in block 14 from this point down to defendant's lot, excepting some small parcels sold by plaintiff or its grantors, with specified quantities of water to be used with each parcel. Lot 8 lies about 900 feet below the dam-landing, and reaches entirely across the mill-race, and to and into Fox river, so that water can be and is drawn from the canal, and discharged into the river without going off lot 8. The mill-race or canal extends down the river from the dam-landing some 1,200 feet.

This statement of facts is sufficient to render our remarks intelligible. It will be seen that the plaintiff has become the owner of the dam, and of the land where it abuts on the bank, and of whatever creates the hydraulic power; and we are unable to perceive upon what principle or ground the defendants can claim the right to draw, from this power, water for driving their mill or factory, situated on a lot 900 feet below the power itself. We have already said, as riparian proprietors, they were doubtless entitled to the flow of the water in its channel, and to its reasonable enjoyment as it passes through their lot, as a natural incident to the ownership. But how do they acquire any hydraulic power as appurtenant to their lot because the raceway or canal —an artificial channel—passes through it? This is a proposition which we are unable to understand. The raceway or canal was made by Lawrence at his own expense, and presumably for his own benefit. He owned the water-power made by the dam above as his own property. This is very clear from the agreement which the parties made in November, 1850, as well as by the decree of the court enforcing a performance of that contract. The language of the contract is, in effect, that the 100 lots included in the plat of the village made by McKelcon, the land bordering thereon, covered by the waters of Fox river, to which the owner of said 100 lots then had, or may hereafter have, a right of possession or property, either as an abutter, or by virtue of any grant theretofore made, "*and the water-power and mill privileges on Fox river upon the front of said lots; which* 100 *lots, flowed lands, water-power, and mill privileges*" shall thereafter be held and owned as the individual property of Lawrence. Nothing whatever is said about the owners of lots in block 14 having a right or interest in this power. It is most extraordinary if the parties understood or had any idea that the owners of lots on block 14 would take, as appurtenant to their lots, hydraulic rights in the water-power, that so important a matter was entirely omitted. There is no mention of such a right in the contract or decree. It is true, in November, 1850, block 14 belonged to Lawrence, subject to the equitable rights of Smith. It is likewise true that at this time Lamphear was engaged in cutting the raceway or canal, evidently for the purpose of utilizing the water-power which had been created along that artificial channel. But Lawrence entered into no obligation to construct that raceway for the benefit of block 14, or any other property; and defendants' counsel admits that it was entirely at his option to construct it or not. But still it is a significant fact that nothing is said upon that subject in the contract, nor is any mention of hydraulic rights made in the deed. We therefore entirely concur in the view of the court below that by the arrangement for a division of the property which was made by the parties in November, 1850, or prior to that time, there was set off to Lawrence the 100 lots in blocks

[1] See Stephen's map, *ante*, 747.

A, B, C, and D, according to the McKelcon plat, with the riparian rights, and all the water-power created by the system of dams abutting on block C, as his separate property, free from all claims of Smith; and by this division Smith did not get, nor was he intended to have, any hydraulic power or privileges in this water-power as appurtenant to any lot in block 14 which might be set off to him. We do not see how any other conclusion can be reached upon the facts. There is surely nothing in the circumstances attending the construction of the raceway or canal which will warrant the inference that Lawrence intended to give Smith the right to draw water from it to drive mills upon any lots which he might subsequently acquire on the division of the unsold property.

The courts hold that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial water-course constructed on his neighbor's land, do not stand upon the same ground. *Greatrex* v. *Hayward*, 8 Exch. 291; *Wood* v. *Waud*, 3 Exch. 743; *Magor* v. *Chadwick*, 11 Adol. & E. 571; *Sutcliffe* v. *Booth*, 32 Law J. Q. B. 136; *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuck*, 31 Moak, 771, 33 Moak, 91. In the former case, each riparian proprietor *prima facie* is entitled to the unimpeded flow of the water in its natural channel, while in the latter case any right to the flow must rest on some grant or arrangement either proven or presumed from or with the owner of the land from which the water is artificially brought, or on some other legal origin. 31 Moak, 776. Defendants' counsel claims that the case stands upon the same principle as *Pickering* v. *Stapler*, 5 Serg. & R. 107, 9 Amer. Dec. 336; *Tabor* v. *Bradley*, 18 N. Y. 109; *Vorhees* v. *Burchard*, 55 N. Y. 98; *Lampman* v. *Milks*, 21 N. Y. 505, and cases of that character. But we think there is a clear distinction between them. Where one sells land upon which there is a mill, he may well be presumed to sell the water-power used to drive the mill, though the deed does not mention such water-power. The power goes as an appurtenance to the estate or thing conveyed. *Kutz* v. *McCune*, 22 Wis. 628; *Curtiss* v. *Ayrault*, 47 N. Y. 73, go upon the same ground,—that a purchaser of property which is subject to an obvious physical easement is presumed to contract with reference to its condition when he purchased. None of these cases seem to have a very direct bearing upon the question we are considering. But surely not one of them in the least sustains the defendants' right to draw water from the raceway, merely because such raceway happens to cross their lot; for their right, if they have it, must rest upon that ground. As we have said, the raceway was made by Lawrence at his own expense, presumably for his own benefit, in order to furnish water privileges to persons operating mills below the power. As was said in *Lawson* v. *Mowry*, it is common to conduct water from a pond created by a dam by means of artificial channels in order to make available the increase of the head by reason of the additional fall in the bed of the stream below the dam. It is also common to conduct, by such channels, water from a power created by a dam, to places below, where it can be utilized to drive mills. It is unreasonable to suppose that Lawrence, when he constructed this raceway, expected that every person who owned a lot abutting it would have a right to draw from it whatever water he could use on his lot without paying for it. The record shows that leases and sales of given quantities of water from the dam were made to various persons. The fact that such sales and leases could be made, rendered the water-power valuable. Stress is laid upon the circumstance that this raceway was constructed before the lots in block 14 were divided, and that one principal object in making it was to give those lots the advantage of a water-power. Assume that this is according to the fact, still it does not follow that the owners of lots on block 14 were to have the right to take whatever water they might need from the raceway free. It would be absurd to entertain such a supposition. When the raceway was constructed, it was not known who would own lots on block

14. That block had not then been platted, and no arrangement had been made for a division of them between Lawrence and Smith.

Upon the facts, we see no ground for presuming a grant to Smith of a right to use water from the raceway free, and of course the defendants have no such right. If they have that right, what is the extent of it? Is it unlimited to use all they need or can utilize on the lot? If so, what are the rights of other proprietors who own lots abutting the raceway? Have they the same right to take from the raceway whatever water they need or can utilize? Suppose the power is not sufficient to supply all who need water, how are their conflicting rights to be adjusted? These obvious difficulties strengthen the conclusion that no implied grant of the right to take water from the raceway exists or was given as an appurtenance to lot 8. All the facts and circumstances tend to disprove such a right or such a grant. Is there any ground for saying such a right has been acquired by adverse enjoyment? We think not. It is true Mr. Smith says he always claimed and asserted that he had such hydraulic rights by virtue of his ownership of lot 8. He doubtless had forgotten the answer he made to the cross-bill in the equity suit, in which he stated that he had no interest in the property to be benefited by the expenditure made by Lawrence in constructing the water-power, including the raceway. But, if Smith claimed the right to draw the water from the raceway, he did no act to make that claim good, or which the owners of hostile interests were bound to contest, before he parted with the title. Mere words, not accompanied with acts of ownership, would not amount to adverse user or enjoyment. We do not understand that any attempt was made to draw water from the raceway to use on lot 8 until 1879, and then it was resisted by the administrator of the Ballard estate, who represented a hostile right.

But we need not dwell upon this point, which has really no support in the proofs. On the contrary, the evidence fully justifies the conclusion that Smith knew very well that the water-power created by the dam belonged to Lawrence, and those claiming under him, and that the ownership of a lot on block 14 did not carry, as appurtenant to it, any hydraulic power, without special mention of such power. Nor do we think that the plaintiff has lost any right, or that the defendants have gained any equities, because they have made improvements on the lot, without being informed as to the extent of their right to draw water from the raceway. The argument is that they have expended $3,000 or $4,000 in building a factory on the lot, acting under the impression that they had the right to draw water from the raceway to operate it; and those owning the residue of the water-power did not disabuse their minds of that impression, as good faith required. Upon that point the court found as follows: That the widow and most of the heirs of Anson Ballard lived in sight of lot 8 from the time of his death, in 1874, until now; that the defendants, and those under whom they claim, purchased said lot for the purpose of building a factory thereon, and running the same by water from said canal, and had no notice served upon them by the widow or heirs of Anson Ballard or the plaintiff that their right to use water from said canal for hydraulic purposes was disputed, until shortly after the plaintiff purchased said property from the widow and heirs, in November, 1883, when the defendants were notified by the plaintiff that it denied the defendants' right to use such water, unless they leased the same from the plaintiff; and the defendants had no other notice that their right to take water from the said canal was or would be disputed, except such as was common to all men in the public records of the county as to the claim of title to the property.

Suppose the widow and heirs of Ballard did stand by and see the defendants building their factory, had they not the right to presume that the defendants would lease or buy what water they might need to operate it? They had water-rights to sell and lease, and they might well desire to see preparations made for using such water-power. Besides, it is a fair inference that the widow and

heirs did not fully understand what the rights or claims of the defendants were as to the water-power. Consequently, we think that the facts do not show that the Ballard heirs lost any right by delay, or that they can be held to have acquiesced in the claim which the defendants now make of their right to use water from the raceway. There is no gronnd for an equitable estoppel, nor any reason for imputing fraudulent silence to the widow and heirs in allowing the new factory to be built without giving notice of their rights.

The only remaining question which we shall consider relates to the interest in the water-power which Smith acquired under the deed of the Appleton Water-Power Company. From the proofs before us, it is difficult to define what interest, if any, that company had to convey to any one. It never owned any land, nor did it issue any stock for subscriptions; still it raised more than $9,000 by subscriptions,—the greater part from persons who were interested in the water-power,—and these funds were expended in building a dam across the river to the south shore, just below the original wing-dam. The evidence clearly shows that the subscribers did not expect the company would derive any direct benefit from the money expended to improve the water-power, or that it acquired any rights in the power by the expenditure made. The object of the association, said one witness, was to improve the water-power for the men who owned it. They had a direct interest in creating the dam, and doing away with the wing-dam then used. The other subscribers had no object except the general good of the city. It is therefore difficult to tell what interest, if any, the corporation had in the water-power. It certainly did not claim any hydraulic rights therein. Mr. Smith subscribed $200; several others subscribed as much who had no interest whatever in the water-power, and claimed none. After the expenditure of the subscriptions, the company quit-claimed to Smith and others, owners of lots on the north bank of the river, all its right, title, and interest in the dam it had constructed, and in the bulk-head and crib connected therewith. It is possible that this deed transferred some equity in the water-power, but it is not easy to say what it was. It was an undefined and intangible interest at best. But, at all events, this deed to Smith was made after he had conveyed his title to lot 8 by the deed under which the defendants claim. So, in any view, we cannot see that the defendants' rights in the water-power were or can be strengthened by the deed made by the Appleton Water-Power Company to Smith, whatever effect that instrument may have.

It follows from these views that the judgment of the circuit court must be affirmed.

SPRAGUE v. WHITE.

(*Supreme Court of Iowa.* December 31, 1887.)

1. VENDOR AND VENDEE — BONA FIDE PURCHASER — VENDOR IN POSSESSION — UNRECORDED DEED.

A grantor remained in possession of the land after having given a deed, which was recorded. The grantee mortgaged the land, and afterwards reconveyed to the grantor, who did not record the deed. *Held*, that her continuous possession did not impart constructive notice, to the purchaser at a foreclosure sale, of any interest retained by her in the property.[1]

2. SAME—LIS PENDENS—MORTGAGE FORECLOSURE.

Code Iowa, § 2628, provides that, when a petition affecting real estate has been filed, it shall charge third parties with notice, and no interest can be acquired by them against the plaintiff's title. In a foreclosure suit, one who had title of record was made defendant. He was then in litigation with another over rights acquired in the property after the mortgage. *Held* that, as the mortgagee in no way derived his title from them, the provisions of the statute did not apply to a purchaser at the foreclosure sale.

Appeal from district court, Adair county; J. H. HENDERSON, Judge.

[1]As to how far actual possession of land is notice of the rights of the occupant, see *Hafter* v. *Strange*, (Miss.) 8 South. Rep. 190, and note.

Plaintiff, O. H. Sprague, brought an action in equity to quiet in him the title to certain real estate. He claims title under a master's deed, given under a sale by a master in chancery of the United States circuit court for the Southern district of Iowa, under a judgment for the foreclosure of a mortgage. Defendant, Alvira White, alleged that she was the owner of the property. The district court adjudged that defendant was entitled to redeem from the mortgage sale, and the judgment determines the amount which she is required to pay in making the redemption. Both parties appealed.

C. S. Fogg and *C. W. Neal*, for plaintiff. *Gow & Hager*, for defendant.

REED, J. The facts as we find them to be are as follows: Prior to the second of December, 1876, John White, who was defendant's husband, was the owner of the property, and on that day he conveyed it to her. Subsequently, W. M. Rogers recovered a judgment against said John White, and defendant became surety on the bond for the stay of execution thereon. On the sixth of March, 1878, defendant and her husband conveyed the premises to L. L. Durham, and the conveyance was duly recorded. On the eleventh of May following, the property was sold on execution issued on the Rogers judgment, the judgment plaintiff being the purchaser, and a sheriff's deed was executed to him, and on the twenty-first of the same month he executed to Durham a quitclaim deed of the premises. There was a parol agreement between Durham and defendant and her husband that, upon the payment of certain moneys which he had advanced to them, he would reconvey the property to John White. Defendant and her husband remained in possession of the property up to the time of the death of the husband, which occurred on the second of October, 1881, after which defendant continued in possession. On the seventh of January, 1880, Durham, by direction of John White, executed a conveyance of the property to Orlando White, who is the son of John White by a former marriage. That deed remained in John White's possession until his death, when Orlando obtained possession of it, and caused it to be recorded. On the fifth of November, 1881, Durham executed a conveyance of the property to defendant and the surviving children of John White. That deed was delivered to defendant at the date of its execution, but has never been recorded. On the thirtieth of November, 1880, Durham executed a mortgage on the property to Lewis Lombard, to secure an indebtedness of $600. In January, 1883, defendant filed her petition in the district court, in which she alleged that the property belonged to John White at the time of his death, and she prayed that her distributive share therein be admeasured. Orlando White was made defendant in the action, and he answered, alleging title to the property in himself under the deed from Durham of January 7, 1880. In her reply defendant alleged that said deed was without consideration, was never delivered, and that Orlando obtained possession of it by fraud, and she prayed that it be canceled. The issue thus joined was tried on the sixth of February, 1886, and judgment was entered for defendant establishing her right to a distributive share of the property, and the court appointed commissioners to admeasure such share, and the commissioners subsequently filed a report of their doings in the premises, which has been approved by the court. On the twentieth of December, 1884, Lombard brought suit for the foreclosure of the Durham mortgage, making Durham and Orlando White defendants, and a judgment of foreclosure was entered on the twentieth of May, 1885; and, on the twenty-second of July following, the property was sold by the master under the judgment, Lombard being the purchaser. He subsequently assigned the certificate of purchase to plaintiff, and, at the expiration of one year from the date of the sale, the master executed to him a deed of the premises.

No question is made as to the validity of the mortgage, but the sole question in the case is whether defendant is barred of the right to redeem from

the mortgage by the foreclosure proceedings, and the sale and deed thereunder. As Durham, at the request of John White, executed and delivered to him the deed to Orlando White, the strong presumption is that the condition upon which he was to reconvey the land had been performed; but, as that deed was never delivered to Orlando, it never became effective as a conveyance. At his death, then, John White was the equitable owner of the property, but the legal title was in Durham; and his subsequent conveyance to defendant and the surviving children of White passes the title to them. When the foreclosure suit was instituted, defendant was entitled to a distributive share of the property, and had the right to redeem from the mortgage; but the evidence of her right, viz., the deed from Durham to her and the children, was not then of record, nor was it recorded when the master's deed was executed. She was not made a party to the foreclosure suit, but she was then in possession of the property, and continued in possession when the deed to plaintiff was executed; and during the same time her suit for the establishment of her right in the property, and the admeasurement of her share, was pending. It is conceded that the rule is that a purchaser of real estate at judicial sale takes the same discharged of the rights and equities of third parties of which he has no notice. It is contended, however, (1) that, as defendant was in possession at the time of the sale, the purchaser was bound to take notice of the claim or right under which she held possession; and (2) that the pendency of her action for the admeasurement of her share of the property created a *lis pendens*, which imparted constructive notice to the world of her right.

1. The effect of defendant's possession of the property is defeated by the fact that her deed to Durham was recorded when plaintiff's rights accrued. Plaintiff stands in the position of a purchaser from Durham, who was defendant's grantee; and her possession after full conveyance did not impart constructive notice to a purchaser from her grantee of any right or interest retained by her in the property. *Koon* v. *Tramel*, 32 N. W. Rep. 243. Nor was it notice of a subsequently acquired right in the property; for the possession was continuous after the execution of the conveyance to Durham. There was no relinquishment of possession, and re-entry, when the new right accrued; if, indeed, it can be said that a new right did accrue when the condition was performed upon which Durham was bound to reconvey. Neither is the case affected by the fact that, after the conveyance to Durham, the property was sold under the Rogers judgment. As that judgment was a lien on the property at the time of the conveyance to him, Durham was divested of title by the sheriff's sale, and deed thereunder, and he held the property subsequent to that under the deed from Rogers to him. But that is immaterial. The ground upon which it is held that the effect of defendant's possession, as notice of a right in her, is defeated by the conveyance to Durham, is that by that deed she voluntarily relinquished all interest in the property, and the record thereof was notice to the world of such relinquishment; and it can make no difference as to the effect of such notice that the grantee was subsequently divested of the property by the sheriff's sale and deed.

2. It is provided by statute (Code, § 2628) that, "when a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and, while pending, no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title, if the real property affected be situated in the county where the petition is filed." The proceeding for the admeasurement of defendant's interest in the property certainly was a proceeding affecting real estate, within the meaning of that section. It has been held, however, that the section applies only in cases when, pending the action, a third person deals with reference to the subject-matter with a party to the action. *Parsons* v. *Hoyt*, 24 Iowa, 154. Orlando White was a defendant in the action for the foreclosure of the mortgage. He

was made a party, doubtless, for the reason that by the deed from Durham to him, which was then of record, he appeared to be a subsequent purchaser of the property. It is contended that the title conveyed to plaintiff by the master's deed was acquired through him, and that, as he was a party to defendant's action in the district court for the admeasurement of her distributive share, plaintiff was charged with notice of her claim when he purchased the property. But it is not true that plaintiff acquired title under or through him; nor did he take any interest in the property under him. The title conveyed by the master's deed relates back to the date of the mortgage. It passed by virtue of the mortgage and the foreclosure proceeding. Orlando White took the interest in the property which descended to him on the death of his father subject to the mortgage, and it was liable to be defeated by the foreclosure of that instrument. As against the mortgagee, the only right he acquired was to redeem from the mortgage; and that right was cut off by the foreclosure and sale. While, therefore, the foreclosure proceedings had the effect to terminate his right in the property, they did not operate to transfer any right or interest from him to plaintiff, and plaintiff is in no sense a purchaser from him, but he occupies the position of a purchaser from Durham. The proceeding in the district court for the admeasurement of defendant's distributive share in the property was a contest between parties claiming under Durham; but whatever rights they had in the property accrued subsequent to those of the mortgagee, and his rights were in no manner drawn in question in the proceeding; nor was any matter upon which any right of his depended, involved in it. He was not, therefore, charged by the pendency of the proceeding with notice of defendant's claim. And plaintiff, who occupies the same position, aquired the property discharged of her equity.

As we reach the conclusion that defendant is not entitled to redeem, we need not consider the questions arising on her appeal. Reversed.

CHAMBERLAIN *v.* SLAYTON.

(*Supreme Court of Minnesota.* June 15, 1887.)

Judgment affirmed.

(*Syllabus by the Court.*)

Appeal from district court, Murray county; PERKINS, Judge.

B. H. Whitney and *Lind & Hagberg*, for Chamberlain, respondent. *Daniel Rohrer*, for Slayton, appellant.

MITCHELL, J. We find no error in the rulings of the trial court in the admission of evidence, and the portions of his charge excepted to are, as applied to the facts in this case, entirely correct, and could not have been misunderstood by the jury as meaning that they were bound to find for the plaintiff. As to the amount of the verdict, although it may seem somewhat large, yet, in our judgment, there was evidence reasonably tending to prove that plaintiff's time and services were worth the sum allowed by the jury. Judgment affirmed.

BERRY, J., being absent, took no part in the decision of this case.

PENDILL *et al. v.* EELLS *et al.*

(*Supreme Court of Michigan.* January 5, 1888.)

1. LANDLORD AND TENANT—ACTION FOR RENT—EXCLUDING LESSEE FROM POSSESSION.
On the trial of an action to recover unpaid royalties under a mining lease, the evidence showed that the lessors had put locks on the engine-house, and employed a man to see that it was not opened, thus excluding defendants, to whom the lease had been assigned under a mortgage from the lessees, from working the mine, and

though defendants had put on additional locks, plaintiffs had free access to and full possession of the premises. *Held*, that the court should have instructed the jury to return a verdict for defendants.

2. SAME—ASSIGNMENT BY LESSOR—ASSIGNEE CANNOT RECOVER FOR PAST RENTS. Under a deed conveying the grantor's interest in royalties under a mining lease, not carrying with it the right to recover for rents past due, such rents cannot be recovered by the grantee on suit for rents subsequently accrued.

Error to circuit court, Marquette county; C. B. GRANT, Judge.

Action of *assumpsit* for unpaid royalties, brought by Flavia M. T., Frank, James, and Louis Pendill upon a mining lease executed by plaintiff's decedent to the McComber Iron Company, and by the latter assigned to Dan P. Eells, James J. Tracy, Charles P. Leland, Benjamin F. Morse, and James H. Dalliba, defendants. Trial being had before a jury, judgment was rendered upon a verdict against defendants for $377.58, and they bring error.

Ball & Hanscom, for appellants. *F. O. Clark*, for appellees.

MORSE, J. The plaintiffs, as heirs of James P. Pendill, deceased, bring this suit against the defendants for rents or royalties under a mining lease. One of the heirs did not join in the suit. On the third of August, 1885, she disposed of her interest to one of the plaintiffs, but the deed made by her did not carry with it the right to sue for and recover past rents. Therefore, although the suit was brought to recover rent from the sixteenth day of May, 1884, to the sixteenth day of September, 1886, in the present suit the rent from August 3, 1885, could only be considered. The ground of plaintiffs' claim is that on the first day of January, 1877, James P. Pendill leased the premises described in the declaration to the McComber Iron Company for the term of 23 years. The royalty to be paid under this lease was 50 cents for every gross ton of 2,240 pounds of iron ore mined from the premises, and to amount to not less than $3,000 for each year. A report was to be made to Pendill upon the fifth day of every month of the full amount of ore mined, at which time payment for said ore so reported was to be made by the McComber Iron Company. On the sixteenth day of May, 1884, the McComber Iron Company executed a mortgage to the defendants in this suit. This mortgage covered all the personal property and fixtures upon the premises, and also the leasehold interest. The clause in the mortgage referring to the lease reads as follows: "The grantor has given, granted, bargained, sold, assigned, transferred, and set over, and by these presents does give, grant, bargain, sell, assign, and set over to them, the said grantees, their heirs, executors, and administrators and assigns forever, the following goods, chattels, and property, now being, to-wit: *First*, its leasehold right, title, and interest in and to certain premises in the city of Negaunee, county of Marquette, and state of Michigan, to-wit, [the land described in the lease from Pendill to the McComber Iron Company,] and tracks, side-tracks, rights, and privileges pertaining to said land and now thereon, said leasehold interest and rights being derived from a lease from James P. Pendill and wife to said grantor, made January 1, 1877, and recorded in the office of the register of deeds of Marquette county, February 14, 1877, at 10 o'clock A. M., in Book 2 of Miscellaneous Records, pages 396, 397, 398." It is claimed by the plaintiffs that the defendants by virtue of this mortgage, and under it, took possession for the purposes of foreclosure not only of the personal property and fixtures, but of the premises under the leasehold right assigned to them by said mortgage. There was evidence tending to show that in December, 1884, William S. Dalliba, by the direction of James J. Tracy and Dan P. Eells, two of the mortgagees and defendants, went to this mine for the purpose of taking possession of the mortgaged property. It is conceded that he placed one Michael Ryan in charge of the personal property and fixtures with instructions not to permit any person to remove the same. The plaintiffs claim that he also took possession of the premises under the assignment of the lease in the mortgage and thereby the defendants became liable

for the rent. There was no mining done after Dalliba placed Ryan in charge of the property. On the thirteenth of September, 1885, Ryan was dispossessed by the plaintiffs under a judgment of restitution against him. The jury rendered a verdict in favor of the plaintiffs for the sum of $377.58, being the amount of the rent from August 3 to September 13, 1885, and the interest thereon.

In the assignments of error on the part of the defendants in this court the main objections lie to the action of the circuit judge in instructing the jury. It is claimed, and there was evidence tending to show, that in January, 1885, James P. Pendill, the lessor, with one Henry M. Atkinson, who accompanied Pendill at his request, went upon this mining property for the purpose of taking possession, making re-entry and forfeiting the lease for the non-payment of the rent or royalty. Pendill notified Ryan, who was holding possession for the mortgagees, and defendants in this suit, that he came to take possession, and demanded the property. Ryan said he intended to hold the property until he heard from his parties, and refused to accede to Pendill's demand. Pendill placed locks of his own upon the engine-house and other buildings, and gave the keys to Atkinson, putting him in charge of the property. Ryan made no resistance to this procedure. Atkinson kept the keys, retaining thereby what possession had been acquired by the acts of Pendill. Atkinson visited the property frequently, and finally employed a son of Ryan to look after the property for him. The personal property was advertised for sale for taxes in February, 1885, and Pendill and Atkinson went with the tax collector, opened the buildings for him, and bid in some of the property at the sale. There were also negotiations between Pendill and Atkinson looking toward a leasing of the mine to Atkinson, but before the same was completed, and in March, 1885, James P. Pendill died. After the death of James P. Pendill, Atkinson delivered the keys of the buildings over to James Pendill, one of the plaintiffs, at his request, who, acting as agent for the estate of his father, thereafter looked after the property, and demanded of Ryan rent of the house he was living in on the premises. It is contended by the counsel for the defendants that the nature of these acts on the part of James P. Pendill and his son, as agent for the heirs, was such as to be in fact a virtual eviction and dispossession of the defendants, and that after such eviction from the engine-house and working portion of the mine no rent could be recovered under the lease. The court below was requested to instruct the jury, among other things, that if they found from the evidence that the lessor, James P. Pendill, took possession of the engine-house, or caused the same to be locked up, and the defendants to be excluded from the full opportunity to use and enjoy the same, then, in such case, the plaintiffs could not recover. This the court refused. He charged the jury that if the defendants or any of them took possession of the property under the chattel mortgage and the conditional assignment of the lease, and that they retained possession during the time covered by the declaration, from the third of August to the thirteenth of September, 1885, then they became obligated to pay the rent, provided that the lease was not forfeited on the part of Mr. Pendill, and further provided that he had not interfered with their quiet and peaceable enjoyment of the property; that is, provided he had not taken such steps as would prevent the occupation and enjoyment of the property contemplated in this lease. "I charge you that a mere attempt on the part of James P. Pendill to obtain possession of the property and a failure to obtain possession would not prevent the rights of these plaintiffs to recover. The acts of Mr. Pendill must have been such as to have prevented these parties from enjoying the use of the property. So that if you find from the evidence in this case that Mr. Pendill went up there and placed a lock on one of those buildings where the machinery was, and that was all the act of possession he did; and that Mr. Ryan was in possession under these mortgagees, under their directions, with instructions to hold the possession of the property, and that

he did hold possession, and that he disregarded the act of Mr. Pendill, and placed another lock on there himself in behalf of the mortgagees, that act of Mr. Pendill's would not be such as would oust the defendants from the use of the property, or prevent the plaintiffs' right to recover." The counsel for defendants claim that this instruction of the court did not fully meet the case as made. That they were entitled to the request as specifically made by them, that the locking of the engine-house in itself, and keeping a man to see that it was not broken open, effectually excluded the defendants from using the mine and obtaining the benefits of the lease. The evidence in the record is undisputed that when Pendill and Atkinson went upon the premises they tore off the locks placed there by Dalliba and put new locks of their own upon the buildings. In February these locks were still upon the buildings, and they were opened by Pendill and Atkinson for the tax collector. Ryan did not take off these locks, but put on new locks of his own over those placed there by Pendill and Atkinson. No attempt was ever made by the defendants or by any one acting for them to work the mine. The locking up of the buildings and the watching of the personal property by both parties resulted in a compromise on the twenty-eighth of July, 1886, by which the defendants were permitted to take away the engines, boilers, and other machinery, and the tools, mining implements, and supplies, and left to the plaintiffs the trestles, timber work, tramways, and buildings, and all the dump piles of mixed ore.

We think the request of the defendants should have been given. The possession taken by Pendill was sufficient as long as it lasted to exclude the defendants from working the mine. There is no evidence that such possession was ever interfered with, so that the mine could be used. It is true, Ryan put locks over those of Pendill, but this was evidently done not to regain possession of the mine, but to keep the personal property subject to the mortgage and safe from any danger of removal. When James Pendill, one of the present plaintiffs, filed his bill in chancery to enjoin the defendants from removing the personal property and fixtures, which was of the date of the twelfth day of September, 1885, he alleged in said bill under oath that his father, James P. Pendill, entered and took possession of the leased premises about January 30, 1885, on account of the failure of the McComber Iron Company to pay royalty and taxes, and their abandonment of the premises about June 1, 1884; that his father held possession of said premises and the machinery from January, 1885, until his death, and from the date of his decease the son, James, had retained and kept such possession. In fact the undisputed evidence upon both sides shows such acts of possession and control on the part of the deceased Pendill and his heirs as to amount in law to a substantial eviction of the defendants from the leasehold, if they ever meant to take possession or make any use of it. The testimony would have warranted the circuit judge in instructing the jury to find a verdict for the defendants on the ground that the possession of the mine was substantially in Pendill and his heirs, and not in the defendants, from the date of the entry by Pendill and Atkinson and the locking up of the buildings by them.

As it is not likely that the facts upon another trial will materially differ from those contained in this record we do not consider it necessary to consider the other points raised by defendants' counsel. The judgment of the court below will be reversed, and a new trial ordered, with costs of this court to the defendants.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

WITHERAL *v.* MUSKEGON BOOMING CO.

(Supreme Court of Michigan. January 5, 1888.)

1. LOGS AND LOGGING—BOOMS—JAMS—BREAKING UP—DILIGENCE.
When parties conducting booming operations find the stream obstructed by a "roll-way" put in by others, so that more logs cannot be run down without injury to riparian owners by backwater, such parties may take possession of the logs causing the jam for the purpose of breaking it up, and in the meantime must hold back their own logs; and parties using a stream for carrying down logs must use diligence in preventing jams, and if they negligently run logs against a jam caused by others, and thus increase the backwater, or do not use diligence in preventing a jam, or breaking it when formed, they will be liable for damages.
2. SAME—RIGHTS OF LOG OWNERS—FLOODING LANDS OF RIPARIAN OWNERS.
Log-owners are only entitled to the natural capacity of a stream, and may not, by causing jams, flood the lands of riparian owners, though the floods so caused do not extend beyond the high-water stage of the stream in time of freshets.
3. SAME—DAMAGES TO RIPARIAN PROPERTY—ACTION BY PARTY IN POSSESSION UNDER CONTRACT OF SALE.
Plaintiff was in possession of land under a contract of purchase, and was entitled to a deed. *Held*, that he had sufficient title to enable him to recovef for loss of hay and pasturage caused by booming operations.
4. SAME.
Plaintiff took possession of land under a contract which contained the following clause: "The said parties of the first part (vendors) are to have one-half of the proceeds of the hay raised on said premises, until the whole amount is paid." *Held*, that the property in all the hay was in the plaintiff, who could recover for its being swept away by floods caused by booming operations.
5. SAME—LOSS OF PASTURAGE—PROOF OF DAMAGES.
A riparian owner was deprived of the use of pasturage by floods caused by the negligence of defendant. *Held*, that he was entitled to recover the value of the pasturage without showing that his cattle were not as well fed elsewhere, or that he was put to expense in procuring other food.
6. SAME—MEASURE OF DAMAGES—EVIDENCE.
Plaintiff claimed compensation for his hay being swept away by floods caused by defendant's negligence, and gave evidence of the amount of hay cut upon the land the year before the damage complained of was sustained. *Held*, that the evidence was properly admissible to show the capacity of the land for producing hay.
7. SAME—EVIDENCE OF NEGLIGENCE.
In an action for damages for flooding plaintiff's land, it was shown that defendant had possession of the stream, and for a month and more continued to run logs up against a jam, thus increasing the backwater which caused the injury. *Held*, *prima facie* evidence of negligence.

Error to circuit court, Muskegon county; ROBERT M. MONTGOMERY, Judge.

This action was brought by Edson Witheral against the Muskegon Booming Company to recover for damage caused by the negligence of the defendants. Plaintiff recovered judgment. Defendant brings error.

Keating & Dickerman, (*Edwin F. Uhl*, of counsel,) for appellant. *Gallup & Pearson*, (*Smith, Nims, Hoyt & Erwin*, of counsel,) for appellee.

MORSE, J. In November, 1886, the plaintiff, who resides in Missaukee county, commenced this suit against the defendant, in the circuit court for the county of Muskegon, for damages to his premises and property, situated upon the banks of the Muskegon river, in Missaukee county, occasioned, as he claims, by the defendant's wrongful action while in the control and possession of said river, and in the transaction of its business as a booming company. The claim, as developed upon the trial, was for damages to his hay crop in the years 1881, 1882, 1883, 1885, and 1886, and the loss of pasturage for his cattle during some or all of the years from 1881 to 1886 inclusive. The declaration averred that this injury and loss were occasioned by reason of said defendant "carelessly, improperly, and negligently allowing a jam or jams of logs, timber, and other floatables to accumulate in said stream [the Muskegon river] below the close and premises of said plaintiff," and so permitting the same to remain for a long space of time; by reason of which jams

the river overflowed its banks and flooded the plaintiff's lands, destroying his crops of hay, and washing away the approaches to a bridge he had built across the river, so that he was unable to use his pasture land. The plaintiff purchased his land in April, 1876, taking a land contract for the same of the firm of Gerrish, Murphy & Co., who were then the owners of it. The farm contains 240 acres, and lies on both sides of the river. When plaintiff went into possession of it, there were 60 acres cleared on the right or west bank. His house was on the left or east bank. What he has cleared since has been mostly high land. His meadows, or bottom lands, were on the west bank, opposite of his house. He had access to these lands by a bridge maintained by him across the river. He recovered a judgment upon the verdict of a jury in the sum of $500. The defendant brings error.

After the plaintiff had rested his case, the defendant moved to strike out all the evidence in the case, and that the court direct a verdict for the defendant for the reason that the plaintiff had not thus far established any negligence upon the part of the defendant, or shown how or in what manner the defendant had been guilty of negligence, which motion was overruled. We think there was evidence at the close of plaintiff's case sufficient to warrant its submission to the jury. The plaintiff testified that in the middle of April, 1881, the booming company had possession of the river, and its men were running logs thereon; that the logs jammed below his place, and the company, by its employes, kept running logs down against this jam and filled up the river until the jam extended through his farm and above it, and that the jam laid there from the middle of May until the tenth of June. This was certainly sufficient to call for explanation and excuse if any could be shown upon the part of the defendant. Without explanation, it was *prima facie* evidence of negligence.

A mere jam of logs in the river does not, in itself, and by itself, constitute negligence upon the part of the booming company running the river; but the existence of such jam for a month or more, and the continued running of logs in such a manner as to increase the jam during such period, does constitute negligence unless there is a showing that such a state of things could not reasonably be avoided. It was not necessary for the plaintiff to go further than he did and show that the company did not use reasonable care and dispatch in their work, or to specify in what respect its employes were careless or negligent. We do not perceive that the court erred in admitting the plaintiff's proof of title. He had paid up the contract and was entitled to a deed. He went into possession under it at once, and has ever since remained in possessson, and his title under the contract and his possession were sufficient to entitle him to recover for the hay and loss of pasturage. *Field* v. *Log Driving Co.*, 31 N. W. Rep. 17; *Hungerford* v. *Redford*, 29 Wis. 345; *McNarra* v. *Railroad Co.*, 41 Wis. 69; *Carl* v. *Railway Co.*, 46 Wis. 632, 1 N. W. Rep. 295.

The contract contained the following clause: "The said parties of the first part [Gerrish, Murphy & Co.,] are to have one-half of the proceeds of the hay raised on said premises until the whole amount is paid." The defendant's counsel claim that one-half of the hay belonged, under the provision, to Gerrish, Murphy & Co. We do not consider that this clause of the contract gave Gerrish, Murphy & Co. any title to the hay. The plain intent of the language is that plaintiff should account to them in money for the value of one-half of the hay, but the hay was to be gathered, sold, or otherwise disposed of, as the plaintiff saw fit; the title, property, and possession always remaining and being in him. The plaintiff was allowed to state against the objection of defendant's counsel the amount of hay he cut upon this land in 1880, the year before he claimed any damage to his crop by the company. This evidence was admissible to show the capacity of the land for producing hay. *Booming Co.* v. *Jarvis*, 30 Mich. 327.

It is argued that the plaintiff was not entitled to compensation for the loss of pasturage, occasioned by the flood or overflow washing away the approaches to his bridge so that he could not get his cattle across the river and upon his pasture lands, because it is not shown that his cattle were not as well fed in the road or somewhere else, or that they were not in as good condition, or that he was put to any expense in herding or feeding them, growing out of the inability to reach his meadow ground. This argument requires no extended answer. The plaintiff was entitled to the benefit and worth of this pasturage. If it was destroyed by the negligence of the defendant its destruction was, of itself *prima facie* evidence, to say the least, of damage to the amount of its value.

The circuit judge instructed the jury that "the right of the plaintiff to farm his land and of the defendant to navigate the stream were concurrent rights, and the defendant was not responsible for any injury to the plaintiff arising from the location of his farm where the stream was subject to the proper use by the defendant of its water for purposes of navigation. And the first duty of the jury in this case is to distinguish between the responsibility and duties of the defendant in the management of the river, and the duties of the others, of the responsibility of others. It is admitted, for instance, or at least the evidence is all one way on the question, that the defendant did not itself put the logs in question in this stream in any of those years, and therefore it follows that any injury which was caused to the plaintiff by reason of the fact that such logs were in the stream and created jams, would not be recoverable in this action against the defendant, nor would the defendant be liable to the plaintiff for any injury caused by running logs down the stream by the defendant, if it did so in a careful, prudent, and diligent manner, having due regard to the rights of the plaintiff and the injury liable to be suffered by him and other riparian owners by the backing up of water caused by jams, etc. The plaintiff, to make a case, then, must show that the defendant was guilty of the neglect of duty, and of the failure to use due diligence and care to prevent unnecessary flooding while operating upon the river. What then was the duty of the defendant in the premises, the failure to observe which would render it liable? The duty of the company was to employ a sufficient force of men to break the jam as soon as possible when formed by causes not attributable to it, as, for instance, by a roll-way put into the stream by others, as soon as possible after the company had assumed control of such roll-way is meant, or had the right to assume control of it, and to use a sufficient force of men and to employ due diligence to prevent the formation of jams; and if jams were formed by the company while running logs, which could have been prevented by the exercise of due diligence and caution, an injury resulted to the plaintiff by the backwater caused by such jams, the defendant would be liable. So, if a jam already formed by others, as by a roll-way so found in the stream, and the defendant negligently and not of necessity drove logs upon and against such jam, and thereby increased such jam, and the consequent backing of water, when by the exercise of due care it might have broken such jam before running such logs *down to and against it, or if the jury are of the opinion that due care and caution and prudence would have dictated and required the holding back of such logs until such jam was broken, and should find as a fact that the defendant drove such logs down unnecessarily, then the defendant would* be liable for such damage as would be caused thereby; and, of course, as the defendant was not responsible for the logs being in the stream, it follows that no liability would arise on this ground unless the defendant was actually running the logs down to and against the jam. If the current of the stream, unassisted, would take the logs down and the defendant did nothing towards assisting of the logs, no liability would arise. You will understand that the converse of these propositions I have stated is true, viz.: If the company employed a sufficient force of men to break the jams within a

reasonable time after the same formed, or after they took charge of the same when formed by others, or had the right to take charge of the same, and if the servants of the company used due diligence and care to prevent the formation of jams, and did not contribute by negligently running logs against the jams, or form or increase the backwater on plaintiffs land, there can be no recovery. As to when it became the duty of defendant to take charge of jams formed by others, I instruct you that whenever it becomes necessary to enable the defendant to run its logs without damage to the riparian proprietors—and by this I mean without damage other than such as would arise from the unobstructed navigation of the stream by the logs—whenever, I say, it became necessary for the defendant, in order to navigate the stream in this manner, to break jams caused by others, it had the right to take possession of the logs forming such jams and to break the jams. It not only had the right to do so, but before it would be privileged to run logs up and against such jams, thereby increasing the said backing of water upon the plaintiffs land, it would become its duty to do so. Unless such necessity arises from the obstruction of its own business in running the logs upon the river the defendant had no right to assume control or management of logs of third parties which were also floating in the river, unless the parties owning these logs consented to the booming company doing so, and even where this necessity arises from the obstruction to the booming company, it cannot assume control and management of the logs of third parties who have not consented to the same being done unless those parties are guilty of negligence in managing their logs floating on the river, or have not made adequate provision for the same—that is to say, unless it becomes necessary; unless they find jams or other obstructions to the proper navigation of the stream, then the company would have no right to take possession of the logs, and certainly would not be accountable to the plaintiff or to other riparian owners for any injury they suffered by logs owned by other parties being in the stream. Some evidence has been offered which it is claimed tends to show that on certain occasons the water was let down in large quantities from above by parties operating on the Butterfield and Houghton lake, causing an increased flooding of plaintiff's land. The defendant cannot be held responsible for this, and is, of course, not liable for any injury which resulted to the plaintiff by reason thereof. Nor is the company liable for any injury caused by ordinary freshets, nor by floods created or caused by roll-ways of third parties situated below the premises of the plaintiff which created jams, and which caused the water to back upon and flood the premises of the plaintiff. To sum up briefly then, what will justify a recovery, the plaintiff must show, or you must find from the whole evidence either—*First*, that the defendant caused the jams in the river which occasioned the overflowing of plaintiff's land, doing him damage; or, *second*, that jams of logs under its charge occurred, which the exercise of due care on its part might have prevented; or, *third*, that the plaintiff suffered because the defendant did not exercise due diligence in breaking such jams as may have been formed; or, *fourth*, that the defendant caused a flood, or an increase of flooding, by running logs against such jams caused by others, in a negligent and unreasonable manner. To entitle the plaintiff to recover it must also appear that the flooding of which the plaintiff complains exceeded that which resulted from logs running down the river in a natural state. By this I do not mean that because the logs might have jammed if left uncontrolled, that the defendant would not be liable if a jam was negligently permitted to form, and from which the plaintiff suffered while the logs were under the control of the defendant, and being run by the company. I think a positive duty devolved upon the defendant, and it cannot be assumed that the owner of the logs would have left them uncontrolled if the defendant had not taken charge of them, and certainly the right of navigation involves no right upon the part of the owners, or those controlling logs, to cast them into the steam and leave them thus

uncontrolled. The question is whether the plaintiff suffered because of jams which were made by those logs while under the control of the defendant, which logs caused a larger overflow of water than the proper navigation of the stream by such logs would have caused, and caused the forming of, or increasing to damaging proportions of such jams, having been formed by the defendant, taking the stream as it found it, with the logs as it found them in the stream, and running the logs in a diligent, careful, and prudent manner. If these questions are determined in the affirmative the plaintiff is entitled to recover; otherwise, not."

The jury were also instructed that the burden of proof was upon the plaintiff to establish his case on each fact requisite to make his case by a fair preponderance of the evidence in the whole case. Most of the requests asked by defendant's counsel were fairly and substantially covered by this charge; and as a whole no reasonable fault can be found with it. The court was requested to instruct the jury that the natural channel of the Muskegon river is within the boundaries that the water reaches at high stage; that if the jury found that the lands of the plaintiff were overflowed by floods on the river in the absence of logs, or with logs floating in their natural condition and not controlled by man, at the high stages of the river, which it might reach at one or more times during every year, then the plaintiff could not complain if the floods upon his premises were at no greater height than when the river was at high stage, as the boundaries of the river extend to where they would be when this river was at its high stage, and not when the river was at its low stage; that the boundaries of the Muskegon are not the boundaries marked by low-water mark on the river, but those defined and marked by the highest mark of water flowing through the premises of plaintiff at any time during the year; and that the defendant had the right to use the river to the width of these natural boundaries, when the river stands at its highest water-mark, in the transportation of logs. The refusal of the circuit judge to so instruct the jury is assigned as error. The doctrine contended for in the language of this request is broad enough to permit the defendant at any time of the year to dam up the river by jams or otherwise and flood the plaintiff's land to the full extent of the most extraordinary freshet of the year. And it is gravely argued by defendant's counsel that because the testimony shows that in April, when the snow would go off suddenly, nearly the whole of the 15 acres of the plaintiff's bottom land or meadow would be overflowed for three or four days, therefore the defendant was entitled to so flood it in the running of its logs at any time and all times of the year. There is neither sense nor law in this claim. Such doctrine applied to the navigable streams of this or any other state would practically destroy the rights of riparian owners to the use and benefit of the best and most valuable lands in the country, and instead of giving concurrent rights to the land proprietor and the navigator, would make the landed estate servient and subordinate to the rights of navigation. The chief argument in favor of this proposition we listened to, but cannot tolerate. It was contended that the lumbering interests of this state were so extensive, important, and valuable, and the work of running logs in these streams so necessary to the welfare and prosperity of the business interests of our state, that the policy of the law must impose this servitude and damage upon the small farmer, or this vast source of wealth and profit and livelihood to so many of our citizens be crippled or entirely destroyed. But the theory of the law cannot be this. The law had its origin in the desire to protect the weak against the strong, and thereby to preserve order and the public peace. And as the years have advanced and enlightened the law, they have settled, we think, at least in a republican form of government, the right and privilege of the poorest and the weakest man to hold and retain his little own, under the law, equally with the highest and the strongest of his fellows. It is better in the present case, that there should be if need be, a little less wealth and profit

grow out of the lumbering business, rather than that, in effect, the title deed of one man to his home, or any part of it, should be swept or flooded away from him without recompense. The law as to the rights of the log-runner has been well settled by this court on several occasions. The log-owner has the right to use the stream in its natural capacity to float his lumber or timber, and is not responsible for any damage incidentally and without his fault arising therefrom. But he has no right to deal with his logs in such a way, by the formation of jams or otherwise, as to cause the water to overflow the adjoining lands more than it would were the logs left to themselves, and allowed to float down naturally and without artificial interference. *Booming Co.* v. *Jarvis*, 30 Mich. 308; *Log Co.* v. *Nelson*, 45 Mich. 578, 8 N. W. Rep. 587, 909; *Anderson* v. *Boom Co.*, 28 N. W. Rep. 518; *Boom Co.* v. *Speechly*, 31 Mich. 344; *Bauman* v. *Boom Co.*, 33 N. W. Rep. 538.

The Muskegon river has a well-defined channel or bed between well-defined banks or sides. The low or bottom lands upon the sides of the stream that are overflowed more or less in times of high water, are not within the boundaries of said stream. And it has been heretofore settled in 31 Mich. (*Boom Co.* v. *Speechly*) that the capacity of these navigable streams cannot be increased by artificial means so as to permit the log-owner to use at all times the full volume of water that may flow in the stream during unusual and brief freshets. The public right of navigation is "measured by the capacity of the stream for valuable public use in its natural condition, and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation." See, also, *Morgan* v. *King*, 35 N. Y. 460; *Hubbard* v. *Bell*, 54 Ill. 110.

Much of the argument of the defendant's counsel here has been devoted to the claim that the evidence taken together upon both sides established the fact that the defendant used all the diligence and care within its power, under the circumstances, to remove these jams and to run the logs without injury to plaintiff. That the company was not negligent, but that the damage was caused by joint action of log-owners below and above the land of plaintiff, consisting of the maintaining of jams and roll-ways by those below, and the running down by those above of large quantities of logs from the creeks and other tributaries of the Muskegon against these jams below. We think there was evidence sufficient to go to the jury upon the question of the defendant's negligence and liability, and with the weight of the testimony we can have no concern. A careful examination of the charge of the court, as stated in this opinion, will, we think, disclose that the circuit judge clearly advised the jury that the defendant was not liable for the acts of these third parties. The defendant, under the instructions of the court below, was not to be held liable for any damage occasioned before it assumed control of the logs or had the right to do so, and not then if it ran the logs in a careful, diligent, and prudent manner. If the defendant was not running logs down the stream against these jams and did nothing in assisting them down, no liability would arise. And if the company used a sufficient number of men to prevent the unnecessary formation of jams, and to break the jams already formed within a reasonable time after it took charge of them, or had the right to take such charge, and did not run logs unnecessarily against these jams, there could be no recovery.

It seems to me, from the evidence in the record and the charge of the court, that the question of the defendant's liability was fairly submitted to the jury, and that no prejudice resulted to it because of a want of care on the part of the circuit judge in pointing out the distinction between the liability of the defendant company for its own negligent acts and its liability for the acts of other parties who were running logs upon the river. I do not think the jury were misled into assessing damages to the defendant which belonged to others to pay. There was evidence introduced in rebuttal by plaintiff tending to

show that the jams formed by others below, and the running of logs by others above plaintiff's farm, did not cause the injury to plaintiff. As such evidence is not given in full we cannot judge of its weight or truth if we had the right to do so. The judgment will be affirmed with costs.

CHAMPLIN and SHERWOOD, JJ., concurred; CAMPBELL, C. J., did not sit.

JOHNSON *v.* FOWLER.

(*Supreme Court of Michigan.* January 5, 1888.)

1. VENDOR AND VENDEE—VENDOR'S LIEN—FORECLOSURE.
Complainant and defendant contracted to jointly build and keep an hotel on defendant's land. Plaintiff had the option of buying defendant's interest by paying for the land and repaying what he had expended in building. *Held*, in a suit for specific performance of the contract to sell, that defendant had an equitable lien for the purchase money on the property which should be sold to satisfy such lien as in mortgage cases.

2. SAME.
A decree for specific performance of a contract to sell property made the purchase money a lien on the land in favor of defendant, and complainant was ordered to assume certain unascertained debts owed jointly by herself and defendant. *Held*, that such debts should be ascertained and included in the amount due defendant as purchase money.

3. SAME—SALE TO SATISFY LIEN—APPLICATION OF PROCEEDS.
A decree for the sale of land to satisfy a lien should allow the lienor to purchase, and direct the proceeds to be applied, first to the debt and costs, and the residue, if any, to be paid to the debtor; and it is error to order the payment of the money into court, to be divided between the parties as their interests may appear.

Appeal from circuit court, Manistee county, in chancery; J. BYRON JUDKINS, Judge.

Mrs. Sidsel Johnson sued George R. Fowler to dissolve a partnership and settle the accounts, and for specific performance of a contract. A decree was entered for the complainant, and the defendant appealed.

P. W. Niskerns and *S. W. Fowler*, for appellant. *D. S. Harley* and *A. J. Dovel*, for appellee.

CHAMPLIN, J. Complainant filed her bill to dissolve a partnership, for an accounting and settlement of the partnership transactions, and for a specific performance of an agreement entered into between the parties as follows:

"This agreement, made this third day of September, A. D. 1884, by and between George R. Fowler, of the township and county of Manistee, state of Michigan, party of the first part, and Mrs. Sidsel Johnson, of the city and county of Manistee, and state of Michigan, party of the second part, witnesseth, that whereas, said George R. Fowler is the owner in fee and is possessed of all that part of lot five (5) of section thirty-six (36) of township twenty-two (22) north, of range seventeen (17) west, in said township and county of Manistee, state of Michigan, lying and being south of the Allegan, Muskegon and Traverse Bay state road, excepting such parts thereof as he may heretofore have deeded away. The said premises, now belonging to said George R. Fowler, consist of a strip of land on the south side of said state road, one hundred feet wide and extending eighty rods along said state road, and bounded on the south by land of the Manistee Railroad Company, and extending easterly from said one hundred-feet strip eighty rods to the section line; thence south along said section line to the waters of the Manistee lake or river; thence westerly along said waters and the lands of said railroad company; thence northerly to said Allegan, Muskegon and Traverse Bay state road, all being part of said lot five of section thirty-six (36) aforesaid. Now, it is hereby mutually agreed by and between the parties aforesaid that a part of said one hundred-feet strip of land, to-wit: Beginning ten (10) feet east

of the small house thereon, now occupied by William Crew, and running thence easterly along the Allegan, Muskegon and Traverse Bay state road, where the same is now traveled, four hundred feet, being a parcel of land one hundred feet wide and four hundred long, lying and being along said state road, and part of said lot five (5) of section thirty-six (36) of township twenty-two (22) north, of range seventeen (17) west, in said county of Manistee,—shall be, and the same is hereby, set off, and, for the purposes of this contract, the same is valued at the sum of eight hundred dollars, ($800.) The said George R. Fowler and said Mrs. Sidsel Johnson agree to build upon said 100 by 400 feet lot a dwelling-house suitable for an hotel, boarding-house, and saloon; also a barn, to be used in connection therewith, and such other outbuildings, fences, and improvements as may be desirable or necessary in connection with the business to be carried on on said premises. Each party shall pay one-half of all the expenses of such buildings and improvements, and shall advance the money for the same as needed in the course of building and improving, so that the expenses may be paid as they accrue. Said Sidsel Johnson, with her family, is to occupy said buildings and the premises, and shall manage the business there to be carried on. Her husband may act for her in all matters pertaining to this agreement. Said George R. Fowler and said Mrs. Sidsel Johnson shall jointly pay all the expenses of said business, and shall each pay one-half of all such expenses and of all losses that may accrue, and each shall have and receive one-half of the net profits of all business conducted upon said premises. Correct books of account shall be kept of all business there transacted, and such books shall be opened to the examination of each partner at any reasonable time. Whenever said Mrs. Sidsel Johnson shall pay said George R. Fowler the sum of four hundred dollars, being one-half of the price of said 100 by 400 feet lot of land, then said George R. Fowler and his wife shall deed and convey to said Mrs. Sidsel Johnson, her heirs and assigns, the undivided one-half of said premises; and thereupon said George R. Fowler and said Mrs. Sidsel Johnson shall be tenants in common of said premises with all the buildings and improvements thereon; and whenever said Mrs. Sidsel Johnson shall pay said George R. Fowler the further sum of four hundred dollars, being the balance of the purchase money for said 100 by 400 feet lot of land, and shall also in addition thereto refund and pay to said George R. Fowler all the money which he may have invested in the buildings and improvements of said lot, then said George R. Fowler and his wife shall convey said premises with all the buildings and improvements thereon, by a good warranty deed, to said Mrs. Sidsel Johnson, her heirs and assigns, forever; and thereupon said Mrs. Sidsel Johnson shall be the sole owner of said premises in fee-simple. All the remainder of the premises described in the preamble to this agreement, and not included in said 100 by 400 feet lot of land, shall be cultivated, fenced, and improved by said parties jointly, each paying one-half of the expense thereof, and each to have and receive one-half of the crops and produce raised thereon, together with one-half of all the fruit that may grow thereon. If any crop is raised by either party at his sole expense, he or she shall have the whole of such crop. This agreement to be and continue for the term of fifteen years from the date hereof, unless said George R. Fowler should sell or convey any part of the land last mentioned, and then, as to the part sold or conveyed, this agreement to terminate, saving and reserving to each his or her share in the crops then growing thereon. The said parties shall come to a full accounting and settlement twice a year, to-wit: On the first day of January and the first day of July; and if either shall have put into the buildings, improvements, and cultivation of the premises more than his or her share, he or she shall have interest on the excess over his or her share at the rate of seven per cent. per annum, but neither party shall have any compensation for the personal services of himself or herself, nor for the services of the husband of said Mrs.

Sidsel Johnson. All taxes assessed upon said premises while the same are in the joint occupation of said parties shall be paid equally by said parties share and share alike.

"In witness whereof the said parties have hereunto set their hands and seals on the day and year first above written.

"GEORGE R. FOWLER. [Seal.]
"SIDSEL JOHNSON. [Seal.]

"Signed, sealed, and delivered in the presence of
"D. S. HARLEY.
"ANDREW JOHNSON.

"*State of Michigan, County of Manistee—ss.:* On the fifteenth day of November, A. D. 1884, before me, the undersigned notary public in and for said county, personally appeared George R. Fowler and Mrs. Sidsel Johnson, to me known to be the same persons described in and who executed the foregoing instrument, and severally acknowledged the same to be their free act and deed. DAVID S. HARLEY, Notary Public."

Proofs were taken in open court and a decree entered as follows:

"At a session of said court, held at the court-house in the city and county of Manistee, on the sixteenth day of December, in the year 1886.

"Present, Hon. J. BYRON JUDKINS, Circuit Judge.

"This cause came on to be heard at this term of said court upon the pleadings of the parties and the proofs taken in open court, and was argued by the counsel for the respective parties, and mature deliberation being had thereon it appears to the court that on the fourth day February, in the year one thousand eight hundred and eighty-seven, the same being the date of this decree, there is due from the complainant to the defendant the sum of two thousand dollars, in full of all his just demands against the complainant, which sum includes the purchase price of the lot of land hereinafter described; also the money invested by the defendant in buildings and improvements made upon said premises; also his share of the net profits of the business carried on for the joint account of the complainant and defendant, together with all allowance of interest justly due to the defendant; and also all other just demands of said defendant against the complainant; that upon the payment by the complainant to the defendant of the sum of two thousand dollars, with interest thereon at the rate of seven per cent. per annum, to be computed from the date of this decree, the complainant is entitled to have a legal title in fee-simple of said premises, clear of all incumbrances placed thereon by the defendant; that the business carried on upon said premises for the joint account of the parties to this suit came to an end on the first day of May, in the year one thousand eight hundred and eighty-six, and that the joint business or co-partnership relation between said parties should be held as dissolved upon said first day of May, in the year 1886. Therefore, on motion of A. J. Dovel and D. S. Harley, solicitors for the complainant, it is ordered, adjudged, and decreed, that within ninety days from the date of this decree the said defendant shall cause to be removed from said premises all incumbrances by him at any time placed thereon, and the defendant and his wife shall execute their deed and duly acknowledge the same, conveying said premises to the complainant, her heirs and assigns forever, with the usual covenants of warranty, and that upon the complainant paying, or causing to be paid, to the defendant, the sum of two thousand dollars, with the interest thereon at seven per cent. per annum computed from the date of this decree, the defendant shall deliver such deed to the complainant, and thereby she shall be vested in fee-simple of said premises, such payment to be made within ninety days from the date of this decree. The premises above referred to, and to be conveyed under the provisions of this decree, are described as follows, to-wit: Beginning ten (10) feet east of the small house on the south side of the Allegan, Muskegon and Traverse Bay state road, lately occupied by William Crew, and running

thence easterly along said state road for four hundred feet, where the said state road was traveled on the first day of September, in the year 1884, the same being the date of the written agreement between the parties to this suit, being a rectangular parcel of land one hundred feet wide and four hundred feet long, lying and being on the south side of said state road, and part of lot five (5) of section (36) of township twenty-two (22) north, of range seventeen (17) west, in the county of Manistee and state of Michigan. The point of beginning above mentioned is one hundred and fifty-nine feet easterly along the south line of said state road from the point where the west line of said lot five intersects the south line of said state road, as shown by the evidence in this suit.

"It is further ordered, adjudged, and decreed that, if the complainant shall pay or tender to the defendant, within the time above limited, the sum of two thousand dollars, with interest thereon as aforesaid, and the defendant shall neglect or refuse to deliver such deed of said premises to the complainant, then this decree shall stand in place of such deed, conveying the above-described premises to the complainant, her heirs and assigns, forever, and the same may be recorded as such conveyance; and, if the complainant, within ninety days from the date of this decree, shall neglect or refuse to pay or tender to the defendant the sum of two thousand dollars with the interest thereon, as aforesaid, then the said premises shall be sold at public sale to the highest bidder, upon such notice and in like manner as sales upon the foreclosure of mortgages under the decree of this court, and the proceeds of such sale shall be deposited with the register of this court to be divided between the parties of this suit, as their respective interests shall be made to appear to this court, under the further decree of this court to be made in the premises.

"It is further ordered, adjudged, and decreed that the complainant shall assume, pay, and discharge all indebtedness incurred on account of the buildings and improvements made upon said premises, and in the course of the business carried on for the joint benefit of the parties to this suit, and that such joint business shall be held to have terminated on the first day of May, in the year one thousand eight hundred and eighty-six, and that the co-partnership between the complainant and the defendant be and the same is hereby dissolved. Each party to this suit shall pay his or her own costs and expenses of this suit, and neither party shall recover any costs of suit from the other.

"*Dated the fourth day of February, A. D.* 1887.

[Signed] "J. BYRON JUDKINS, Circuit Judge.

[Countersigned] "J. P. BAXTER, Register."

The testimoney as to the amounts put into the concern by the respective parties is not very satisfactory, and we are not disposed to change the result arrived at by the court below so far as the court went. The agreement under which these parties operated, constituted them partners in the venture, with an option to complainant to become a half owner and tenant in common of the land, and the still further option of becoming the sole owner, by complying with the requirements of the contract. The complainant asks for a dissolution of the partnership, and an accounting, and at the same time signifies her election to purchase the whole land, and become the sole owner thereof. To entitle her to do so, she must pay, in addition to the agreed price, all the money which defendant has invested in the buildings and improvements of the land. For this sum defendant would be entitled to an equitable lien as vendor, since it was contemplated that the purchase price should include the moneys invested for improvements, as well as the contract price of the land. It appears by complainant's showing that the entire net profits arising from the partnership business were by her applied in payment for improvements upon the land,—that is, in building the house and barn; and this appears to have been done without the knowledge or consent of defendant. No part of such profits have been paid over to defendant, and no money appears to be on

hand representing such profit, and no partnership assets of any account appear to remain. It follows that one-half of the profits thus applied belongs to defendant, and, as a consequence, his lien would cover his share of the moneys so invested. In so far as the decree proceeds upon the ground that defendant has an equitable lien for the amount found due defendant, and authorizing a sale as in ordinary mortgage cases to satisfy the same, it is correct, although it should authorize the defendant to bid at the sale, and become the purchaser thereof, and it should provide for the payment of any surplus to complainant. But it is erroneous in directing the moneys arising from the sale to be paid into court, to be divided between the parties as their respective interests may appear. The money received from such sale must be applied to the payment of the amount due defendant, and the costs and expenses of the sale, and, if there be any surplus, it must be paid to complainant. Complainant has no ownership or title in the land until she has paid the purchase price, or, in other words, the amount due defendant; neither has she any right to the moneys realized from the sale until after such amount is paid.

It appears from the testimony that certain indebtedness incurred by these parties in making the improvements contemplated by the contract has not been paid, but is still outstanding, and also that certain partnership debts have not been paid; and the decree declares that complainant shall assume, pay, and discharge all indebtedness of these kinds. But the amounts are not ascertained, so far as I can find from the proofs; and it is difficult to see how this decree protects defendant from liability, unless they were ascertained and included in the amount found due and payable to him. Counsel for complainant in his brief says: "The evidence shows that there is some outstanding indebtedness incurred in the course of the building, and also in the business, but the full extent of the liabilities is not shown, and became immaterial upon complainant assuming all the debts." We do not think it became immaterial. The assumption of the debts and the paying them are quite different things. Assuming the debts by complainant does not discharge defendant from liability to the creditor. He is not obliged to take the personal responsibility of the party, whether such party be financially responsible or not for his indemnity. These debts must be ascertained, and complainant must pay them within 90 days from the date of the final decree which will be made after the further accounting is made and filed, and the payment thereof will be made a condition precedent to her right to demand or receive the deed of conveyance of said premises. Complainant will also have 90 days from said final decree in which to make payment of the amount found due by the circuit court, with interest from the date of that decree, namely, the sixteenth day of December, A. D. 1886; and in default of paying said sum in said 90 days, and the aforesaid indebtedness, all and singular the premises described in the decree shall be advertised and sold in the same manner as lands are sold under a decree for foreclosure; and the parties shall be at liberty to bid at such sale; and the surplus, if any, shall be paid over to complainant after paying expenses and costs of sale.

A decree will be entered here affirming the decree of the court below as to the dissolution of the partnership, as to the amount found due from complainant to defendant, and as to the description of the land to be conveyed; and reversing it as to the residue; and remanding the cause to the circuit court for the county of Manistee, with directions to conclude the accounting by ascertaining the unpaid indebtedness, and to whom owing, and thereupon to enter a final decree in accordance with this opinion, embracing in said decree the usual provisions contained in decrees upon foreclosure of mortgages. The defendant will recover his costs of this court.

MORSE and SHERWOOD, JJ., concurred; CAMPBELL, C. J., did not sit.

WELLS v. MCGEOCH.

(Supreme Court of Wisconsin. January 10, 1888.)

1. ACCOUNTING—FINDINGS OF FACT BY COURT—REQUEST FOR ADDITIONAL FINDINGS.
In an action for an accounting, during the term at which the decision was rendered and findings filed, plaintiff asked the court to make additional findings on questions omitted therefrom. *Held*, that a refusal was error; and, upon exceptions that the findings failed to include certain specified material questions of fact litigated at the trial, they will be reviewed by this court.

2. PARTNERSHIP—ACCOUNTING.
Plaintiff and defendant entered into a joint speculation in lard, which resulted disastrously, and a firm in which defendant was a partner failed. By agreement, each was to bear one-half of the loss, but the capital stock of defendant's firm was not to be considered one of the debts they were to pay. *Held*, that defendant was entitled to credit for the amount he had withdrawn of capital and profits from the firm prior to the deal, and had invested in it; and plaintiff, to credit for all moneys due him in the hands of defendant, who managed the deals, at the beginning of the speculation, and for money contributed by him in the settlement of the loss; and the difference between his credits and the total loss would show defendant's contribution.

3. SAME—MISREPRESENTATIONS BY PARTNERS AS TO AMOUNT DUE.
In a settlement of transactions between plaintiff and defendant, the latter overstated the amount of money advanced by him, and understated the amount advanced by the plaintiff. *Held*, that such representations were fraudulent, whether defendant knew them to be untrue, or, being ignorant of the real facts, assumed to know facts adverse to plaintiff which had no existence.

4. SAME—RELIANCE UPON PARTNER'S STATEMENTS—MEANS OF KNOWLEDGE.
Plaintiff had for a long time joint transactions of great magnitude with defendant, in whom he had unbounded confidence, and to whom he had trusted their entire management. The business was done by defendant's firm in Chicago, but the accounts were sent to his Milwaukee house, and plaintiff had free access to them. *Held* that, in a settlement between them, plaintiff was not guilty of negligence in relying upon the statements of defendant as to the amounts of money advanced by each of them in these matters.

5. CONTRACTS—VALIDITY—PUBLIC POLICY—"CORNER" ON MARKET—RIGHTS OF PARTIES INTER SE.
Rev. St. Ill. 1881, *c.* 38, § 130, provides for a penalty against any one cornering the market in certain commodities, or attempting to do so, and that all contracts for that purpose shall be void. Plaintiff and defendant had entered into a speculation to corner the wheat market, which was successful. After the close of the deal, plaintiff's share of the profit was left with defendant, who, by plaintiff's request, afterwards invested it in a lard deal. *Held*, that defendant must account to plaintiff for the money, although the wheat deal was illegal.

6. SAME—"CORNER" ON LARD—RECOVERY OF OVERPAYMENT IN SETTLEMENT.
Plaintiff and defendant attempted to corner the market for lard in Chicago, which was illegal, under Rev. St. Ill. *c.* 38, § 130. In settling their losses, defendant fraudulently overstated the amount of money furnished by him, and understated that furnished by plaintiff, who, relying on this statement, made a large overpayment in settlement. *Held*, that he was entitled to recover it from defendant.

7. SAME—RECOVERY OF OVERPAYMENT UNDER ILLEGAL CONTRACT.
Where plaintiff, in a settlement with defendant, overpaid him, on account of the fraudulent statements of defendant, he can recover back such a sum as will reduce his payment to the amount he would have been required to pay on an accounting between the parties.

8. RELEASE AND DISCHARGE—CONCLUSIVENESS—FRAUD IN OBTAINING.
Plaintiff, in a settlement of certain matters in which he and defendant were jointly interested, gave defendant, and a firm of which defendant was a member, a release in full of all claims. The firm was in the hands of a receiver. *Held* that, as the settlement was made on certain fraudulent statements by defendant, the release did not conclude plaintiff in an action to recover from defendant money overpaid to him, though it might exclude him from any share in money remaining in the hands of the receiver after the settlement of the affairs of the firm.

Appeal from Milwaukee county court.

This action is to recover a large sum of money which the plaintiff, Daniel Wells, Jr., alleges he was induced to pay by means of certain false and fraudulent representations made to him by the defendant, Peter McGeoch, concerning certain large business transactions in which they had been engaged as partners, and which had culminated in heavy losses to them. The complaint

sets out such alleged fraudulent statements at considerable length, and prays that a certain settlement and adjustment of their losses between themselves, alleged to have been made and performed by Wells on the faith of such statements, be opened, and the amount of the common loss which each party ought to pay ascertained and adjusted. The answer denies the fraud charged in the complaint, and maintains that the settlement was an honest one, and should not be disturbed. It is also alleged in the answer that the transactions had by the parties as partners, which they thus settled and adjusted, were illegal, and hence, in respect to them, neither party can have any relief. A general knowledge of the transactions out of which this action arose can be most readily obtained by a perusal of the findings of the county court herein, and the contract executed by the parties in which they settled and adjusted their respective losses, and provided for the payment thereof. Although quite lengthy, those instruments will be here inserted. The findings of facts are supplemented by other facts not found therein, which are stated in the opinion as found by this court. The findings are as follows:

"The defendant, several years prior to June 16, 1883, was engaged in business in the city of Milwaukee under the name of Peter McGeoch & Co., as a commission merchant, in commodities dealt in upon the floor of the chamber of commerce of this city. In 1881, down to June 16, 1883, he was the leading partner in the firm of McGeoch, Everingham & Co., doing like business on the board of trade of Chicago. During those years the defendant, through his Chicago firm, had extensive dealings upon the Chicago board of trade in various commodities, chiefly in futures, on account of himself and the plaintiff. Such dealings began in January, 1881, and continued until about the middle of February, 1882, when a settlement was had, and on the twenty-third day of that month the plaintiff received from the defendant full payment of the balance then appearing to be due him for his share of the profits. The total net profits up to February 23, 1882, received by the plaintiff, was a little more than $300,000, including the half share ($278,161.41) of the profits of an extensive deal in pork and ribs. About February 20, 1882, the plaintiff became associated with the defendant and others in a wheat speculation in Chicago, known as the "April wheat deal," or corner in April wheat, 1882. The defendant, with George C. Walker, N. K. Fairbank, and S. A. Kent, of Chicago, Illinois, commission merchants and members of the board of trade of that city, though not associated in business generally, in February, 1882, bought, and soon took out of the market, all the No. 2 spring wheat within reach, and available to fill contracts for about 3,500,000 bushels, and secured contracts from dealers for the sale and delivery to them in April, 1882, of about 10,000,000 bushels more; and, having thus obtained control of the market, compelled those who had contracted to deliver them wheat, which they could not get, to settle their contracts by the payment of differences upon fictitious values. The defendant was actively engaged in the management and manipulation of the corner, and the plaintiff advanced moneys to be used in carrying it on, upon the agreement that they should divide equally as partners; the share of the defendant, as member of the combination associated in the deal, being one-third. The combination entered into the arrangement with the express purpose of creating a corner in wheat in the market, and the plaintiff well knew such to be the intention when he entered into said agreement with the defendant, and furnished him money to assist in accomplishing that end; and the result shows that the combination was entirely successful. The corner ended with the month of April, 1882. An arbitration, under the rules of the board of trade, to fix the just commercial value of the wheat on the last day of April in Chicago, as the basis of difference to be paid by certain defaulting sellers to members of the combination, was had. The accounts of the deal were closed June 30, 1882. The defendant's one-third share of the net profit was ascertained to be $278,705.57, which sum was

placed to his credit on the books of McGeoch, Everingham & Co., in Chicago, on that day. The largest portion of this profit had been realized by a settlement of differences before the rule authorizing arbitration had been invoked by any of the persons involved in the said corner.

"No account was kept with the plaintiff on the books of the Chicago firms. The plaintiff's account was kept on the books of P. McGeoch & Co., and it was the practice that the dealings of the plaintiff and defendant on joint account, through McGeoch, Everingham & Co., were reported to P. McGeoch & Co., (the defendant,) and the plaintiff's share was entered on his account in the books of that commission house in Milwaukee. The plaintiff's share of the profits of the April wheat corner was not credited on his account in Milwaukee at the time the profits were ascertained, but the whole profit realized in the wheat deal was credited to XX account on the books in Milwaukee,—both parties knowing that XX represented the wheat deal,—owing to some pending suit which might affect the amount; and the fact that it was not so credited seems to have been afterwards overlooked or forgotten,—not with a view of concealing the same from the plaintiff, for he had oftentimes been informed that a large profit resulted from the corner, and that XX represented such profit. Following this corner, the plaintiff and defendant continued speculative dealings for their joint account through the agency of McGeoch, Everingham & Co., in wheat, oats, pork, lard, and other commodities; making profits and losses, which they shared equally. Their profits were quite large during September and October, 1882. They had operated together several years, and both were well acquainted with the manner of doing business upon the chamber of commerce in Milwaukee and the board of trade in Chicago, and well knew how to operate successfully. Early in 1883, the plaintiff and defendant agreed to make a deal in lard in Chicago, and commenced buying (through defendant's firm in Chicago) futures for April, May, and June, and afterwards for July, 1883. As their purchases matured, they received and paid for the lard, and continued to contract for all they could get, within certain limits as to price, for future delivery, until June 16th, when they found themselves unable to provide money sufficient to keep up payments for lard then due upon their contracts, and margins upon their futures; and, as a consequence, the firm of McGeoch, Everingham & Co. failed. In pursuance of the rules of the board of trade, their pending contracts for purchase or sale were closed out. The price of both cash lard and option lard (so called) fell at once fifteen to twenty per cent.; and the firm who had represented the plaintiff and defendant in operating the deal for them, and under their direction, found themselves insolvent, having lost their capital, their earnings, and all the moneys furnished by the plaintiff and defendant and by other principals as advances upon deals which the firm were carrying for them as their agents or brokers. At the time of the failure, McGeoch, Everingham & Co. held for the parties to this suit about 125,000 tierces of cash lard, which had cost some $5,100,000; and of this amount 119,500 tierces were hypothecated to sundry banks in Chicago to secure loans to the firm, amounting to about $3,981,000. Said firm at the same time had contracted to purchase for account of the plaintiff and defendant about 177,000 tierces of lard to be delivered in June and July, 1883, aggregating not less than $7,000,000; on which contracts they had put up several hundred thousand dollars as margins to secure their performance.

"The plaintiff and defendant had furnished to said firm, for the purpose of the deal during its progress, the proceeds of their notes to the amount of $950,000, which were used in paying for lard, in providing margins on the futures, and in paying interest, insurance, and other expenses of the deal. The balances due from said firm to the defendant and to others, and the capital and accumulated earnings of the firm, were to a great extent invested and employed in paying for the property and contracts taken for the parties to this suit in the working of their said lard deal.

"The firm had some commission for other parties, but much the larger part of their losses by their failure were incurred on lard, and for the account of Wells and McGeoch. The failure involved many houses and heavy losses. Values were greatly disturbed, both of lard and other commodities. The indebtedness of McGeoch, Everingham & Co. was to a great number of persons. Their transactions were extensive, and the accurate adjustment of all accounts was laborious. The lard held and pledged by banks was not sold until several weeks after the failure of McGeoch, Everingham & Co., which occurred on Saturday, June 16, 1883. On Monday, June 18th, John R. Bensley was appointed receiver of the assets of the firm, in a suit by judgment creditors. He set about ascertaining losses and liabilities. Creditors brought actions against Wells and McGeoch as principals, and attached their property in Chicago, Milwaukee, and Michigan. It was soon claimed that the creditors of the Chicago firm would accept fifty cents of the amount due them, if paid shortly in cash. The receiver visited Milwaukee before the end of June, and conferred with the defendant and his attorney, and with the plaintiff's attorney. He stated that in his judgment $450,000, in addition to the available assets in his hands, would be required, and would be adequate to effect a settlement at fifty cents on the dollar.

"I further find that the plaintiff authorized the use for the purposes of said deal of the moneys due him from McGeoch, or in the hands of McGeoch, Everingham & Co., and derived from or arising out of former transactions in which plaintiff was interested; and under such authority, and with the consent of plaintiff, the $100,455.39 was so used in the lard deal, and also the plaintiff's share of the profits of the wheat corner of 1882, and represented in the XX account, was so used, and both sums were wholly lost in said deal.

"I further find that it clearly appears to me from the evidence, and from the manner in which, and the objects for which, the lard deal was inaugurated and carried on, that it was for the purpose of creating a corner in lard, and so understood by both parties, with the intention of cornering the market by investing large sums in the purchase of lard, and for futures for the months of June and July, and the scheme failed solely for want of funds to carry it through; and an indebtedness remained unpaid, amounting to upwards of $1,300,000 as a result of the failure of said parties to sustain or consummate the corner enterprise. Of this indebtedness about $1,000,000 was owing on account of transactions made by the firm for Wells and McGeoch in the furtherance of their lard corner.

"I further find that prior to July 4, 1883, it was verbally agreed between the parties that they would each furnish one-half of $450,000 to enable McGeoch, Everingham & Co. to compromise and settle their liabilities resulting from their inability to corner the market in lard; and that McGeoch should assume the payment of $25,000 to the Wisconsin, Marine & Fire Ins. Co. Bank for Wells. Early in July a compromise proposition at fifty per cent. was circulated in Chicago among the creditors, and by the middle of July it was accepted by all. Disagreements arose between the parties when it came to making of a contract between them. It was understood that the liabilities of the firm of McGeoch, Everingham & Co. on the board of trade were about $1,300,000 over and above all offsets; that the assets of the firm in the hands of the receiver were a little over $200,000, and that the whole indebtedness could be compromised for about $650,000. The plaintiff insisted that, if he paid the sum of $225,000, he should be fully released from all liabilities to McGeoch, Everingham & Co., or any of their creditors, or to McGeoch, and should be fully indemnified against any claim, costs, or damages growing out of the lard deal; and he sought in addition thereto, to reserve the right to have a subsequent accounting with McGeoch, Everingham & Co., and with McGeoch, in respect to the whole business of the lard deal. The defendant insisted that the release should be mutual, and the settlement final and absolute. And for the purpose of compromising their supposed liability, incurred on their failure to

successfully corner the market on lard, or in their attempt to do so, an agreement to be executed by the parties was prepared, and after delay and discussion, resulting in important modifications of the original draught, so as to make it express clearly the intentions of the parties, was signed by them on or about July 18th, in form and substance as set forth in the complaint."

Several extracts from such contract or agreement are then inserted in the findings, but, as that instrument will be copied herein at length, those extracts therefrom are now omitted. The findings proceed as follows:

"By the agreement, Wells agreed to assume and pay $675,000, and McGeoch $275,000, of their notes to the banks, and each of them agreed to pay forthwith the sum of $225,000 towards the liquidation and discharge of the said indebtedness of McGeoch, Everingham & Co. under said compromise, and particularly of the indebtedness on which it was claimed that Wells was liable, and to the execution of the compromise agreement; and both parties intrusted the making of the payment of such indebtedness to the firm of Finches, Lynde & Miller and John R. Bensley, the receiver.

"I further find that McGeoch fully performed the agreement on his part. He furnished $225,000 at once to assist in effecting the compromise. The indebtedness was all discharged; the suits were all discontinued without expense to the plaintiff; and plaintiff has hitherto been fully indemnified against all claims and demands of McGeoch, Everingham & Co., or their creditors, or any one else, arising out of said lard transaction. I further find that from the time of the failure of McGeoch, Everingham & Co., June 16, 1883, up to the time of the execution of the compromise agreement, on July 17, 1883, the parties were under great excitement on account of the failure,—the property and credits of each having been attached and garnished; and, while in this condition and situation, several interviews were had between the parties and their several attorneys, and various estimates were made as to the extent of the loss; and it could not be expected that accurate statements of so large a transaction could be made by either of the parties. The business was done through the firm of McGeoch, Everingham & Co. in Chicago, and, although McGeoch was the senior member of that firm, yet his business was on the board of trade; the firm employing book-keepers to assist in keeping a record of the various transactions on the board of trade and otherwise. McGeoch was no book-keeper, and had no knowledge of the books. Statements were delivered to him as he asked for them, and they were usually sent to McGeoch's book-keeper in Milwaukee, who kept an entry of such statements. The plaintiff had free access to those books, both in Milwaukee and Chicago, and almost daily visited the office in Milwaukee, and was informed by the book-keeper in Milwaukee of the transactions in lard many times; as also by McGeoch personally, and by letter, during the lard deal, and until the failure; so that the plaintiff probably had nearly, if not quite, as accurate a knowledge of the lard deal as defendant. And what was said by defendant during the negotiations for a compromise was not said with a view of cheating and defrauding the plaintiff, but was only an estimate of the probable losses and liabilities, and not relied on by plaintiff; for the settlement was finally consummated upon the estimate made by Mr. Bensley, the receiver, who had found from the books as accurate a statement as possible,—for everything had to be done in haste,—as to the amount of the liabilities, and the money necessary to be furnished by each.

"I further find that the moneys furnished by plaintiff and delivered to defendant, together with the amount due him on the April wheat corner, and also the amount specified in the agreement of July 17th, together with the money furnished by defendant individually, and through his firm in Chicago, was all paid and lost. The moneys paid to the receiver were by him applied on the settlement with the creditors, and not one penny of it was retained by the defendant, or repaid to him, or for his use or benefit; and he had no money

in his hands, possession, or control furnished by the plaintiff; and, as before found, the amount specified in the agreement of July 17th, and the credit of plaintiff resulting from the April wheat corner, was, with the knowledge and consent of plaintiff, used and paid by defendant towards the furtherance of the lard corner, and all lost through the failure of McGeoch, Everingham & Co., resulting from the failure of plaintiff and defendant to furnish the money necessary to carry on the lard deal to a successful corner.

"I also find that at the time the several transactions upon the board of trade in the city of Chicago, Ill., took place between plaintiff and defendant, the following statute, offered and received in evidence, was in force, to-wit, the Public Statutes of the state of Illinois, (Rev. St. Ill. Heard's Ed. 1880, c. 138, § 130,) and reads as follows: 'Whoever contracts to have, or to give to himself or another, an option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold; or forestalls the market, by spreading false rumors to influence the price of commodities therein; or corners the market, or attempts to do so, in relation to any such commodities,—shall be fined not less than ten dollars nor more than $1,000, or confined in the county jail not to exceed one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.' It seems beyond any doubt, from all the evidence, that the parties to this suit, in their combination and management of the April wheat deal, and securing and obtaining a successful corner in wheat, clearly violated the provisions of the foregoing statute; and also, in attempting to corner the market in lard, they violated the same statute. Such contracts, as stated in such statute, 'shall be considered gambling contracts, and shall be void.'

"As a result arising from the failure to successfully create a corner in lard, the contract agreement of July 17, 1883, was entered into by the parties to relieve themselves from their great liability resulting from the failure to carry their illegal deal to a successful corner, and the numerous suits, attachments, and garnishments commenced and pending against them.

"The object of this action is to compel the defendant to account, or, in other words, to surcharge the account, as prayed for in the complaint, for the excess of moneys claimed by plaintiff to have been furnished by him over and above the amount furnished by defendant, and employed and lost in the prosecution of this illegal venture,—this effort to corner the market in lard. The question is, the parties having violated the statute above mentioned, will the courts entertain an action asking contribution for losses incurred by the the one party against the other, or for excess of moneys paid in carrying out the illegal venture or contract? And as conclusions of law, from the foregoing facts, I find it quite doubtful in my mind, taking into consideration the testimony of all the circumstances leading to and surrounding it, whether this contract ought to be disturbed, if the original ventures entered into by the parties, and upon which it is founded and based, were not illegal, or against the statute, or contrary to public policy. The rule in this state is, as often stated by the courts in the language of the court in *Case* v. *Fish*, 58 Wis. 106, 15 N. W. Rep. 808, 'that a settlement once deliberately made is not to be opened except upon the clearest and most positive proof of fraud or mistake therein.' And especially is this so when the same has been fully complied with and carried out, but the contracts were contrary to the statute, and illegal and void.

"2. The supreme court of this state has also declared in *Melchoir* v. *McCarty*, 31 Wis. 254, in the following language: 'The general rule of law is that all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void; and that if a party, claiming a right to recover a debt, is obliged to trace his title or right to the debt

through any such illegal contract, he cannot recover, because he cannot be allowed to prove the illegal contract as the foundation of his right of recovery. It is quite immaterial whether such illegal contract be *malum in se*, or only *malum prohibitum*,—in either case the maxim *ex turpi causa non oritur actio* is applicable. And a contract in violation of a statute is void, although the statute fails to provide expressly that contracts made in violation of its provisions shall not be valid. It is sufficient that it is prohibited, and its invalidity follows as a legal consequence.'

"So, also, it is decided by the supreme court of Michigan, in the case of *Raymond* v. *Leavitt*, 46 Mich. 447, 9 N. W. Rep. 525, that one who lends or advances money, to be used for the purpose of making a corner in wheat, cannot recover it back by any legal measures; and on page 452 and 453 of the opinion the court used this language: 'There may be difficulties in determining the conduct as to any violation of public policy, when it has not been covered by the statutes or precedents. But in the case before us the conduct of the parties comes within the undisputed censure of the law of the land; and we cannot save the transaction without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval that it would be absurd to suppose the legislature, if attention were called to them, would not legalize them. We do not think public opinion has become so thoroughly demoralized; and, until the law is changed, we shall decline enforcing such contracts. If parties see fit to invest money in such ventures, they must get it back by some other than legal means.' It would seem, from the foregoing opinion, that there was no statute in Michigan making such contracts illegal and void; and hence, it appears to me, is a very strong case, and very applicable to this case, in respect to the ventures of the parties to this suit in the so-called April wheat corner and the so-called lard corner.

"I have also been referred to the case of *Keene* v. *Kent*, 42 Hun, 659, (decided at a general term of the supreme court of the state of New York, at the October term of said court, 1886,) which also was a case involving lard. In that case, the parties, as in this, entered into an unlawful contract or combination to control the price of lard, and in the opinion the court say: 'This was an agreement and combination which the law will not execute. It will not permit parties receiving property, and contemplating the purchase and sale of more of it, to combine together to keep it off the market, and in that manner oblige the public to pay a larger price for the article than it would otherwise secure. Such a combination is an unlawful conspiracy, punishable as a crime. When it may be successfully carried out, the effect is to impose upon the public; and to oblige individuals, having occasion to purchase the article dealt in, to pay more for it than its market value. So far as such a combination or scheme may be rendered successful, it is little if anything less than respectable robbery, which the law will not sustain. On the contrary, it will leave the parties precisely where they have placed themselves. It will not interpose to secure to either that advantage which, under the terms of the agreement entered into and executed, he had reason to expect would be conceded to him by the other parties to the unlawful transaction. If persons devise and enter into schemes or combinations of this character, they must depend for their remedy upon the application of the rule, which may be observed by other confederates, requiring that there shall be honor among certain classes of persons who violate the laws of the state. They cannot appeal to the courts for redress, or for any aid or assistance in endeavoring to enforce the contract, so far as may be, in favor of one of the parties against the other.'

"3. The contracts or combinations of the parties entered into for the purpose of cornering the market in wheat, and attempt to create the corner in lard, are by the statutes of Illinois denominated gambling contracts, and declared to be void. Such contracts the courts will not enforce, but will leave

the parties in the condition in which they have placed themselves. The authorities are all to this effect.

"4. I therefore have come to the conclusion, from the foregoing facts found, and the law applicable to them, that the court cannot grant the plaintiff the relief prayed for in the complaint. It is therefore ordered and adjudged that the complaint of the plaintiff be, and the same is, dismissed, with costs. Let judgment be entered accordingly."

The contract above mentioned bears date July 17, 1883, and is as follows:

"Whereas, the firm of McGeoch, Everingham & Co. are indebted to a number of creditors in large sums of money, which indebtedness they have arranged to discharge and settle by a compromise proposition, which has been accepted by their creditors; and whereas, it has been claimed that Daniel Wells, Jr., of the city of Milwaukee, Wisconsin, and Peter McGeoch, of the same place, are liable upon some ground to pay, or to assist in paying, the whole or some part of such indebtedness on account of transactions which the said Wells and McGeoch have had or authorized with or through the said firm of which the said Peter McGeoch is senior member; and whereas, the said Wells and McGeoch have agreed to contribute and pay a sum of money for the purpose of assisting in the compromise, payment, discharge, and satisfaction of all the indebtedness of the said firm, and of their own indebtedness, if any, to said firm, or to the creditors of said firm, and also of their mutual indebtedness towards each other; and whereas, the said Wells and McGeoch have executed certain notes as makers, or as maker and indorser, to certain banks, for money raised for the benefit of the said Wells and McGeoch, or one of them, which notes are to be paid in full, being secured by hypothecation of property pledged, deposited, or mortgaged by the said Wells or the said McGeoch:

"Now, therefore, for the purpose of a full, final, and complete settlement between the said parties, it is agreed between the said Daniel Wells, Jr., and the said Peter McGeoch, that the said Daniel Wells, Jr., shall pay to the National Bank of America, in Chicago, the notes, amounting to $100,000, held by the said bank, and signed or indorsed by the said Wells and McGeoch; and that he shall also pay the note or notes for $100,000 held by the National Exchange Bank of Milwaukee, and the note or notes, amounting to $200,000, held by the First National Bank of Milwaukee, and the note or notes, amounting to $50,000, held by the Milwaukee National Bank of Wisconsin, whether such notes be also signed or indorsed by the said Peter McGeoch or not; and that the said Wells shall pay to the Wisconsin Marine and Fire Insurance Company Bank the note of $200,000 on which said Wells and McGeoch are liable to the said bank, and also $25,000 of and to apply upon the note of $300,000 held by the said bank on which the said Wells and McGeoch are liable,—together with all interest accruing on the said notes and the said sums from and after the date hereof. And the said Wells shall procure, as soon as practicable, the release of said Peter McGeoch from each and all of the said indebtedness which the said Wells has so agreed to pay; and also, as soon as practicable, the release and discharge of all liens, mortgages, pledges, or hypothecations of property of the said Peter McGeoch, holden as collateral for the indebtedness so to be paid by said Daniel Wells, Jr. And whereas, there is a balance shown by the books of said McGeoch, Everingham & Co. in favor of the said Daniel Wells, Jr., amounting to $100,455.39, as stated by that firm, to said Daniel Wells, Jr., the said Wells thereby releases and discharges the said McGeoch and the said McGeoch, Everingham & Co. from the said indebtedness, and from all liability to pay him the said sum or $100,455.39, or any part thereof, and from any and all liability whatever except as herein provided. The said Daniel Wells, Jr., further agrees to pay towards the liquidation and discharge of the said indebtedness the sum of $225,000, which amount he will pay, or cause to be paid, to the firm of Finches, Lynde & Miller, of the city of Milwaukee, immediately upon the execution of this

agreement, for the purpose only of paying towards the liquidation and compromise of the indebtedness aforesaid, and particularly of the indebtedness upon which it is claimed that the said Wells is liable.

"And the said Peter McGeoch, on his part, agrees, in consideration of the foregoing, that he will pay to the said Wisconsin Marine and Fire Insurance Company Bank the remaining $275,000 out of the said notes of $300,000 owing thereto by him and the said Daniel Wells, Jr., together with all interest accruing thereon from and after this date; and that he will pay, or cause to be paid, forthwith, all indebtedness of the said Wells to the said McGeoch, Everingham & Co., and to any and all of the creditors of the said McGeoch, Everingham & Co., by executing promptly and faithfully the terms of the compromise made between the said McGeoch, Everingham & Co. and their said creditors; and will procure the full and unconditional discharge of all liabilities, claims, and demands of the said McGeoch, Everingham & Co., and of each of the creditors, or persons holding contracts of the said McGeoch, Everingham & Co., against him, the said Daniel Wells, Jr., whether included or not in the said compromise, within the time fixed by said agreement of compromise, to-wit, ten days from Saturday last, or as soon thereafter as practicable; and that he will procure, also, as soon as practicable, the discharge of the liability of the said Daniel Wells, Jr., to the said Wisconsin Marine and Fire Insurance Co. Bank for said $275,000; and also, as soon as practicable, the release and discharge of all mortgages, liens, pledges, or hypothecations of property of the said Daniel Wells, Jr., held by the said last-named bank as collateral to the said indebtedness of $275,000. And the said Peter McGeoch hereby releases and discharges the said Daniel Wells, Jr., of and from all claims, liabilities, and demands whatever heretofore existing, except those herein agreed to be paid by the said Wells; and further agrees that the money so contributed by the said Daniel Wells, Jr., and to be paid to the said firm of Finches, Lynde & Miller, together with an equal or greater sum which he agrees forthwith to contribute for that purpose, and togetder with the money now in possession of the receiver of the estate of the said firm of McGeoch, Everingham & Co., shall be forthwith applied to the payment and discharge of the indebtedness which the said McGeoch is by this agreement bound to cause to be paid or discharged, and particularly to the execution of the compromise agreement aforesaid between the said firm and their creditors; the making of which payment is intrusted by both parties hereto to the said firm of Finches, Lynde & Miller, and John R. Bensley.

"It is understood that, by the said agreement of compromise, the creditors have agreed to receive, in full discharge of the said unsecured indebtedness, fifty cents upon the dollar, or one-half the amount thereof. It is also understood that the said agreement of compromise does not include the debts owing by the said firm which are secured by the pledge of property or otherwise to the extent of the proceeds of such property, but does include the balances or remainders which may be found due to the said creditors after applying upon their respective indebtedness the amount of the securities so deposited with or pledged to them.

"This agreement is made in full settlement and discharge of all liabilities between the parties hereto; and the said McGeoch agrees to hold the said Wells harmless, and to indemnify him against all losses, damages, expenses, costs of suits, of whatever nature, which may arise hereafter out of any failure upon the part of said McGeoch to perform the stipulation herein contained, and also against all such costs or expenses which have arisen in the suits now pending against the said Wells on account of the matters aforesaid, whether as principal or garnishee, except as to counsel fees owing by the said Wells, which he undertakes to pay and discharge; which pending suits said McGeoch shall cause to be discontinued as soon as practicable."

The terms of the above contract were fully performed by the respective par-

ties. The case is further stated in the opinion. The plaintiff appeals from the judgment dismissing the complaint, with costs.

Winfield Smith, *Wells*, *Brigham & Upham*, and *J. T. Fish*, for appellant.

Let it be conceded that the lard transaction was an illegal attempt by the parties to this action to corner the market. Be it also conceded that the action is brought to surcharge the account between them. In the case at bar, the parties met, and their primary object was to raise money to pay their existing debts. If the money was raised for an illegal purpose, and the defendant, by false representations, obtained from the plaintiff any money that the plaintiff would not have paid had he known the truth, such money can be recovered back. This court, speaking through Mr. Justice ORTON, has announced the doctrine applicable to such a case in *Kiewert* v. *Rindskopf*, 46 Wis. 484, 1 N. W. Rep. 163. "The *gravamen* of this action is the fraud practiced by the defendant in obtaining the two thousand dollars from the plaintiff by falsely representing that this sum was within and a part of the contract with Wright, and that the sum agreed to be paid to Wright was *three* thousand dollars, when in fact it was only *one* thousand dollars. Where money is so charged to have been obtained by fraudulent representations, the only material questions to be considered are: *First*. Were such representations intentional, material, and false? *Second*. Did they produce a false impression upon the mind? *Third*. Were they the inducement of the payment? *Fourth*. Were they relied upon as being true? If these elements are present, they constitute a positive fraud without exception, and the matters to which such fraudulent representations relate, whether legal or illegal, will not lessen the fraud, or affect the liability of the guilty party. Kerr, Fraud & M. 73; *Smith* v. *Mariner*, 5 Wis. 551; *Kelley* v. *Sheldon*, 8 Wis. 258; *Reynell* v. *Sprye*, 21 Law J. Ch. 633." This was so expressly held in *Insurance Co.* v. *Elliott*, 10 Ins. Law J. 333, 5 Fed. Rep. 225; and in *Catts* v. *Phalen*, 2 How. 376; Wood, Mast. & Serv. § 202; *Andersons* v. *Moncrieff*, 3 Desaus. Eq. 126. And again, in *Heckman* v. *Swartz*, 50 Wis. 270, 6 N. W Rep. 891: "But if the original transaction was illegal as to all of the parties, it having been fully executed and carried out, the defendant, having received the avails of it, cannot now refuse to account, upon the ground of its illegal character. *Armstrong* v. *Toler*, 11 Wheat. 258; *Bank* v. *Bank*, 16 Wall. 483–500; *Baehr* v. *Wolf*, 59 Ill. 470; *Douville* v. *Merrick*, 25 Wis. 688." In *Lemon* v. *Grosskopf*, 22 Wis. 451, the present chief justice says: "It is said that when money is paid by one person, on an illegal contract, to the agent of the party entitled to receive it, such agent cannot set up the illegality as an answer to the claim of the principal; that, as between the agent and the principal, the action is not founded on the illegal contract, nor does the obligation of the agent to pay over the money grow out of such contract, but arises from the fact that the agent has received money for the principal. This may be true in some cases, and seems to be the ground upon which *Tenant* v. *Elliott*, 1 Bos. & P. 4; *Farmer* v. *Russell*, Id. 296; *Sharp* v. *Taylor*, 2 Phil. Ch. 801; *Owen* v. *Davis*, 1 Bailey, 315; and some other cases to which we were referred on the argument,—are decided." In *Gilliam* v. *Brown*, 43 Miss. 641, the court held the transaction illegal, but that the defendant could not set up the illegal contract, and said: "It is well settled that, after the illegal contract has been executed, one party, in possession of all the gains and profits resulting from the illicit traffic and transations, will not be tolerated to introduce the objection that the business which produced the fund was in violation of law." This doctrine has been approved by Mr. Justice NELSON in *McBlair* v. *Gibbes*, 17 How. 232, 237; by Mr. Justice MILLER in *Brooks* v. *Martin*, 2 Wall. 70; and by Mr. Justice STRONG in the case of *Bank* v. *Bank*, 16 Wall. 483. See *Wann* v. *Kelly*, 5 Fed. Rep. 584; *Cook* v. *Sherman*, 20 Fed. Rep.

167; *Merritt* v. *Millard*, 5 Bosw. 645; *Berkshire* v. *Evans*, 4 Leigh, 223, *Blakesley* v. *Johnson*, 13 Wis. 530; *Clemens* v. *Clemens*, 28 Wis. 637.

If the defendant had occupied no other relation to the plaintiff than that of agent he could have been convicted of embezzlement for appropriating this money to his own use. This proposition was held in the case of *Woodward* v. *State*, 2 N. E. Rep. 321, (decided by the supreme court of Indiana,) and which was a prosecution for embezzlement. One defense was that the money embezzled was money collected on the sale of a lottery ticket, and lotteries were prohibited by the laws of the state; and the court held these facts constituted no defense,—citing *Express Co.* v. *Lucas*, 36 Ind. 361; *Rothrock* v. *Perkinson*, 61 Ind. 39; *State* v. *Tumey*, 81 Ind. 559; *Carkins* v. *Anderson*, 32 N. W. Rep. 155; *Bell* v. *Day*, 32 N. Y. 165, 173. While the vendor of wheat or lard may set up the illegality of the contract of sale, yet, when he has closed that contract, paying the damages for non-fulfillment, that contract is at an end. The proceeds are then in the hands of the recipient,—lawful money, untainted by the preceding transaction,—and he must account for it to his principal or partner. *Breeders' Ass'n* v. *Ramsdell*, 24 Mich. 441; *Ingram* v. *Mitchell*, 30 Ga. 547; *Lane* v. *Hewitt*, 45 Ga. 507; *Daniels* v. *Barney*, 22 Ind. 207, and 32 Ind. 19; *Express Co.* v. *Lucas*, 36 Ind. 361; *Murray* v. *Vanderbilt*, 39 Barb. 140; *De Leon* v. *Trevino*, 49 Tex. 89; *Pfeuffer* v. *Maltby*, 54 Tex. 454; *Lewis* v. *Alexander*, 51 Tex. 578.

McGeoch was the agent and partner of Wells. It is the duty of the agent to be well informed in relation to the transactions which occur during the execution of the agency, and, further, to keep his principal fully informed of all material facts which come to his knowledge. 1 Wait, Act. & Def. 235. See *Murray* v. *Beard*, 102 N. Y. 505, 508, 7 N. E. Rep. 553. *Uberrima fides*—the most perfect good faith—is exacted of the agent. *Clark* v. *Bank*, 17 Pa. St. 322; *Forrestier* v. *Bordman*, 1 Story, 44, 56; *Dodge* v. *Perkins*, 9 Pick. 368, 390–393. Absolute and unqualified fraud, therefore, committed by one partner against another, is a crime of no ordinary stamp. Colly. Partn. 166, 167, § 178; Pars. Partn. (Ed. 1867,) *c.* 7, § 6, pp. 223, 224; *Baker* v. *Charlton*, 1 Peake, 111. See *England* v. *Curling*, 8 Beav. 129, for an example of bad faith between partners, and of the court's displeasure thereat. See, also, *Blisset* v. *Daniel*, 10 Hare, 493.

McGeoch and the firm of which he was a member kept the accounts. If, by articles or arrangements, any one partner is intrusted with the accounts, it would be a peculiar breach of duty on his part to keep them in such way as to mislead his partners, whether by mis-entry or by non-entry. *Maddeford* v. *Austwick*, 1 Sim. 89; *Kelley* v. *Greenleaf*, 3 Story, 93, 103. "If a partner who exclusively superintends the business and accounts of the concern should, by concealment of the true state of the accounts and business, purchase the share of the other partner for an inadequate price by means of such concealments, the purchase will be void." Story, Eq. Jur. § 220; *Maddeford* v. *Austwick*, 1 Sim. 89; *Case* v. *Cushman*, 3 Watts & S. 544; *Brooks* v. *Martin*, 2 Wall. 70, 84; *Cook* v. *Sherman*, 20 Fed. Rep. 167

In respect to mistakes sufficient to authorize the court to set aside a written contract, Mr. Pomeroy clearly lays down the rules, (2 Pom. Eq. Jur. § 868,) and at section 850 thus quotes the words of a distinguished judge: "There must not only be good faith and honest intention, but full disclosure; and, without full disclosure, honest intention is not sufficient." *Ex parte Lucy*, 4 De Gex, M. & G. 356; *Neale* v. *Neale*, 1 Keen, 672. It has been said: "No person can be presumed to be acquainted with all matters of fact connected with a transaction in which he engages." 2 Pom. Eq. Jur. p. 318, § 852. This is one of those mistakes classified by the same author as concerning "the subject-matter," not in the "terms" of the agreement. 2 Pom. Eq. Jur. § 853. The mistake which is remediable is a mental condition, a conception, a conviction, erroneous, which influences the will, and leads to some

action. 2 Pom. Eq. Jur. §§ 839, 854; *Paine* v. *Upton*, 87 N. Y. 327; *Newell* v. *Smith*, 3 Atl. Rep. 674; *Haven* v. *Foster*, 9 Pick. 111; *Clark* v. *Pinney*, 6 Cow. 297; *Mowatt* v. *Wright*, 1 Wend. 355; *Rheel* v. *Hicks*, 25 N. Y. 289.

"It is upon the same ground that a court of equity proceeds where an instrument is so general in its terms as to release the rights of the party to property, of which he was wholly ignorant that he had any title, and which was not within the contemplation of the parties at the time when the bargain was made." Story, Eq. Jur. § 145; *Rameden* v. *Hylton*, 2 Ves. Sr. 304; *Farewell* v. *Coker*, 2 Mer. 353; *Hore* v. *Becher*, 12 Sim. 465. So, if a person should execute a release to another party upon the supposition, founded in mistake, that certain debts had been discharged, although both parties were innocent, the release would be set aside, upon the ground of mistake. Story, Eq. Jur. 142; *Fane* v. *Fane*, 15 Moak, Eng. R. 552. However general the terms of the contract may be, it comprehends only those things in respect of which it clearly appears the parties propose to contract. *Case* v. *Cushman*, 3 Watts & S. 544. Nor should the words employed in a release be extended beyond the consideration; otherwise, we make a release for the parties which they never intended nor contemplated. *Rapp* v. *Rapp*, 6 Pa. St. 45; *McLarren* v. *Robertson*, 20 Pa. St. 125; *Noble* v. *Burke*, 5 Phila. 526; Whart. Cont. 1037; *Lyman* v. *Clark*, 9 Mass. 238. See authorities cited herein. To the same effect is *Codding* v. *Wood*, 3 Atl. Rep. 455.

The fact that Wells may at some time have known, or that he had means of learning, how much money he had advanced, will not prevent recovery in a case like this. *Kelly* v. *Solari*, 9 Mees. & W. 54, is a leading case. See, also, *Waite* v. *Leggett*, 8 Cow. 195, 17 Cent. Law J. 23. Ignorance of a material fact at the time of doing an act, or making a contract, will in general be ground for relief in equity, not only when there has been a suppression or concealment of facts by one of the parties amounting to fraud, but also in case of ignorance and mistake by both parties, and where the fact, though previously known, had been forgotten. *Bingham* v. *Bingham*, 1 Ves. Sr. 126; *Allen* v. *Hammond*, 11 Pet. 71; *Hore* v. *Becher*, 12 Sim. 465; *Wemple* v. *Stewart*, 22 Barb. 154; *Calverley* v. *Williams*, 1 Ves. Jr. 210. See, as to forgetfulness, an excusable cause of mistake, *Wheeler* v. *Town of Westport*, 30 Wis. 392, 413–416. Equity jurisdiction extends to the settlement of accounts made according to the intention of the parties, and relief will be granted as the circumstances may require, either by setting aside the settlement, or by permitting a party to surcharge or falsify. Finally, the equitable jurisdiction may be exercised by the relief of a pecuniary recovery for money paid under a mistake, whenever no adequate remedy can be obtained by an action at law." 2 Pom. Eq. Jur. § 871.

The knowledge of Mr. McGeoch of the falsity of his statement is a fact believed to be demonstrated; but it is not essential in this case to be proven. A misrepresentation is equally fraudulent if the party making it has no reasonable ground to believe it to be true, or does not believe it to be true. 2 Pom. Eq. Jur. §§ 880–892; *Strong* v. *Strong*, 5 N. E. Rep. 800; Kerr, Fraud & M. 69–74. When he discovered his mistake, he should have rectified it. 2 Pom. Eq. Jur. §§ 888–902, 907; Kerr, Fraud & M. 67; *Wheeler* v. *Smith*, 9 How. 55; *Wheadon* v. *Olds*, 20 Wend. 174.

Finches, Lynde & Miller and *Joshua Stark*, for respondent.

The rule as to the weight due the findings of fact of the county court is laid down by RYAN, C. J., in *Ely* v. *Daily*, 40 Wis. 52, as follows: "It is only upon *apparent* satisfactory preponderance of evidence that we feel authorized to reverse the findings of fact of a circuit judge;" and commended the wisdom of the comments of Chief Justice DIXON in *Snyder* v. *Wright*, 13 Wis. 771, on the unfitness of submitting mere issues of fact to this court. In *Cunningham* v. *Brown*, 44 Wis. 72, 77, the rule was thus stated by Justice ORTON

"It is the settled practice of this court not to disturb the findings of the circuit court upon questions of fact, except in cases where the preponderance of of the evidence is most clearly against them; and the reasons of this rule are most comprehensively expressed by the chief justice in *Ely* v. *Daily*, 40 Wis. 52. Again, in *Leary* v. *Leary*, 32 N. W. Rep. 623, the court (by Justice TAYLOR) said: "The judgment of the circuit judge who tried the case must be upheld by this court, in the absence of a strong preponderance of the evidence against its correctness." See, also, *Birkett* v. *Hird*, 55 Wis. 650, 13 N. W. Rep. 686, to the same effect.

The settlement between the parties can only be set aside upon clearest proof of fraud or mistake, (*Case* v. *Fish*, 58 Wis. 56, 106, 15 N. W. Rep. 809; *Kercheval* v. *Doty*, 31 Wis. 476; *Birkett* v. *Hird*, 55 Wis. 650, 13 N. W. Rep. 686; *Hoyt* v. *McLaughlin*, 52 Wis. 280, 8 N. W. Rep. 889;) and the proof of fraud must be clear and convincing, (*Fick* v. *Mulholland*, 48 Wis. 413, 4 N. W. Rep. 346; *Lavassar* v. *Washburne*, 50 Wis. 200, 6 N. W. Rep. 516.)

False representations, believed to be true when made, and as to which the plaintiff had an equal opportunity of ascertaining their truth or falsity, from which he was not diverted by artifice of the defendant, do not constitute fraud. *Mamlock* v. *Fairbanks*, 46 Wis. 415, 1 N. W. Rep. 167; Kerr, Fraud & M. 98, 101. Misrepresentation, to afford ground for relief in court of equity, must be of something material, and an inducement to the other party to act, and he must have been misled. 1 Story, Eq. Jur. §§ 195–197, 202, 203; *Dunn* v. *Remington*, 9 Neb. 82, 2 N. W. Rep. 230; *Marsh* v. *Cook*, 32 N. J. Eq. 262; *Castleman* v. *Griffin*, 13 Wis. 535; *Barber* v. *Kilbourn*, 16 Wis. 511; Kerr, Fraud & M. 94. So, if the defrauded party, with full knowledge of the fraud, settle the matter in relation to which the fraud was committed, and give a release to the party who has defrauded him, he will lose all title to legal or equitable relief. 1 Story, Eq. Jur. § 203*a*; *Adams* v. *Sage*, 28 N. Y. 103; *Baker* v. *Spencer*, 47 N. Y. 562; *Parsons* v. *Hughes*, 9 Paige, 591; 2 Lead. Cas. Eq. 1732.

Mistake, to constitute ground for equitable relief, must be mutual. *Humphreys* v. *Hurtt*, 20 Hun, 398; *Ramsey* v. *Smith*, 32 N. J. Eq. 28; *Dulany* v. *Rogers*, 50 Md. 524, *Bartlett* v. *Blaine*, 83 Ill. 25. Equity will not relieve against mistakes arising from negligence. *Brown* v. *Fagan*, 71 Mo. 563; *Morehouse* v. *Yeager*, 41 N. Y. Super. Ct. 135; *Snyder* v. *Ives*, 42 Iowa, 157; *Glenn* v. *Statler*, Id. 107. The mistake must be material, and the court must be satisfied that but for the mistake the complainant would not have assumed the obligation. *Grymes* v. *Sanders*, 93 U. S. 55.

The combination of several parties, including the plaintiff and defendant, for cornering the market in relation to wheat in the spring of 1882, was an unlawful conspiracy, punishable as a crime. *Sampson* v. *Shaw*, 101 Mass. 145; Rev. St. Ill. 1881, *c.* 38, § 130; *Lyon* v. *Culbertson*, 83 Ill. 33; *Raymond* v. *Leavitt*, 46 Mich. 447, 9 N. W. Rep. 525; *Coal Co.* v. *Coal Co.*, 68 Pa. St. 173; *Arnot* v. *Coal Co.*, 68 N. Y. 558; *Ex parte Young*, 6 Biss. 53, 65. "A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of confederates, and giving effect to the purposes of the latter, whether of extortion or mischief." Whart. Crim. Law, § 2322; *Com.* v. *Carlisle*, Brightly, N. P. 40; *People* v. *Fisher*, 14 Wend. 9, 28 Amer. Dec. 501, and note. For the penalty denounced against conspiracy, in Wisconsin, see Rev. St. § 4568.

The agreement or conspiracy of Wells, McGeoch, and others to corner the market in relation to wheat, and divide among them the profits which might be gained by means of such corner, being illegal, fraudulent, and void, it follows that no action can be maintained by any party to such conspiracy against his associates, or either of them, to enforce an accounting, contribution, or division of profits, or for any other relief founded upon such agree-

ment. The following are some of the English authorities on this point: A decision was made by ELDON, C. J., in *Aubert* v. *Maze*, 2 Bos. & P. 371, (1801,) holding that money paid by one of two partners for the other, on account of losses incurred by them on illegal partnership insurances, could not be recovered by him against his copartner. In *Knowles* v. *Haughton*, 11 Ves. 168, (1805,) Sir WILLIAM GRANT, M. R., held that the profits of a partnership in underwriting, illegal by St. 6, Geo. I. *c.* 18, § 12, could not be the subject of account in equity; and he dismissed a bill for an account, and payment of a moiety of such profits. To the like effect are *Mitchell* v. *Cockburne*, 2 H. Bl. 379, (1794;) *Cousins* v. *Smith*, 13 Ves. Jr. 542, (1807;) *Ex parte Bulmer*, Id. 313, (1807;) *Evans* v. *Richardson*, 3 Mer. 469, (1817;) *Battersby* v. *Smyth*, 3 Madd. 110, (1818;) *Ewing* v. *Osbaldeston*, 14 Eng. Ch. 53; *Sykes* v. *Beadon*, 11 Ch. Div. 170. The supreme court of the United States occupies the same high ground, refusing to compel an accounting or a division of profits between partners or associates, *participes criminis*, in an unlawful business or adventure. *Bartle* v. *Nutt*, 4 Pet. 184; *Wheeler* v. *Sage*, 1 Wall. 518; *Brown* v. *Tarkington*, 3 Wall. 377.

To the same effect are the decisions of the highest state courts. *Fletcher* v. *Watson*, 7 Grat. 1. A partner in a firm selling lottery tickets filed a bill in New Jersey against his associate in the firm for an accounting as to the profits of the business. The vice-chancellor, sustaining a demurrer to the bill, said: "It seems to me plain that the suit, in the most favorable statement to be made of it, is not one which this court will entertain. Its object is to consummate a partnership contract, entered into and continued exclusively for the prosecution of an illegal and mischievous business. By the law of New Jersey, lotteries are common nuisances." "Even if the contract of partnership in their business were made in a state where the business was tolerated by law, still the court will not undertake to enforce or administer it." The court discussed the subject at length, and denounced the lottery business as "eminently one to which the maxim applies, *ex turpi causa non oritur actio;*" citing, with approval, the words of Lord MANSFIELD in *Holman* v. *Johnson*, 1 Cowp. 343: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Watson* v. *Murray*, 23 N. J. Eq. 257. The doctrine of this case was applied by the supreme court of New Jersey in the case of *Gregory* v. *Wilson*, 36 N. J. Law, 315. *Todd* v. *Raffe ty's Adm'r*, 30 N. J. Eq. 254; *Root* v. *Stevenson's Adm'r*, 24 Ind. 115. The supreme court of Illinois, in *Miller* v. *Davidson*, 3 Gilman, 518, 44 Amer. Dec. 715, affirmed the proposition that "no principle is better settled than that where two or more persons embark in an unlawful transaction, and one gets the advantage of the others, and appropriates more than his proportion of the spoils to himself, the court will not interfere to make him divide with the others. * * * The law will not meddle with gains obtained by its own outrage, as between those who have been engaged in trampling it under foot." *Skeels* v. *Phillips*, 54 Ill. 309. To the same effect is *Neustadt* v. *Hall*, 58 Ill. 172; *Craft* v. *McConoughy*, 79 Ill. 346, 22 Amer. Rep. 171; *Lane* v. *Thomas*, 37 Tex. 157; *Read* v. *Smith*, 60 Tex. 379; *Mulhollan* v. *Voorhies*, 3 Mart. (N. S.) 46. The Iowa supreme court affirmed the doctrine that the law leaves the parties to a contract of copartnership for an illegal business or purpose where it finds them, and will not entertain an action for an accounting in respect to such a copartnership. *Anderson* v. *Powell*, 44 Iowa, 20; *Boyd* v. *Barclay*, 1 Ala. 34. *Hooker* v. *Vandevater*, 4 Denio, 349, was an action by one of the parties to a combination of proprietors of forwarding lines on the Erie and Oswego canals (having for its object to do away with competition, and keep up the price of freights to certain rates fixed by themselves) to recover profits due under the agreement between the parties. The action failed; the court holding "that the transaction amounted to a conspiracy to commit an act 'injurious to trade,' within the legal meaning of the statute

denouncing it as a crime, and was therefore illegal and void." In *Stanton* v. *Allen*, 5 Denio, 434, the action was upon a note and bill of exchange which arose out of the business of the same combination referred to in *Hooker* v. *Vandewater*, *supra*. The court held that the contract between the parties to the combination "unquestionably contravened public policy, and was manifestly injurious to the interest of the state; hence it was void at common law." *Atcheson* v. *Mallon*, 43 N. Y. 147. *Snell* v. *Dwight*, 120 Mass. 9, was a bill in equity by one of the parties to a contract for illegal trading with inhabitants of states in insurrection against the United States government, against another party to the contract, for an account of resulting profits. The court said: "It is well settled that when a contract is illegal, and prohibited by law, no action can be maintained upon it, in law or equity, either to enforce its obligations, or to secure its fruits to either party." *Dunham* v. *Presby*, 120 Mass. 285, presented a state of facts similar to the case last cited, and a like appeal to equity for an account of profits of the illegal trading. In both cases the relief was denied. In *Coal Co.* v. *Coal Co.*, 68 Pa. St. 173, which was an action upon an accepted draft, it was set up as a defense that it was given for a sum found due the plaintiff from defendant in the equalization of prices under a contract to which they and three other coal companies were parties, which provided for dividing the market for coal from certain regions among the parties to the contract in certain proportions. Its effect was to control the price of coal over a large district. The court held the contract to be illegal and void by the statute of New York against conspiracy, and at common law, as against public policy. *King* v. *Winants*, 71 N. C. 469; *Gould* v. *Kendall*, 15 Neb. 549, 19 N. W. Rep. 483; *Hardy* v. *Stonebraker*, 31 Wis. 640; *Fairbank* v. *Leary*, 40 Wis. 637.

There are many well-considered cases holding that, even in transactions between a principal and his agent or broker in illegal grain, stock, or other speculation, notes given for losses, advances, or profits are void, because of their connection with the illegal adventure. See cases above cited, especially *Ex parte Bulmer*, *Coal Co.* v. *Coal Co.*, *Brown* v. *Tarkington*, *Stanton* v. *Allen*, and others, *supra;* and also the following: *Brown* v. *Turner*, 7 Term R. 630; *Harley* v. *Stapleton*, 24 Mo. 248; *Whitesides* v. *Hunt*, 97 Ind. 191, 49 Amer. Rep. 441; *Cunningham* v. *Bank*, 71 Ga. 400, 51 Amer. Rep. 266; *Fareira* v. *Gabell*, 89 Pa. St. 89; *Bell* v. *Quinn*, 2 Sandf. 146; *Banking Co.* v. *Rauterberg*, 103 Ill. 460; *In re Green*, 7 Biss. 338; *Barnard* v. *Backhaus*, 52 Wis. 593, 6 N. W. Rep. 252, and 9 N. W. Rep. 595; *Everingham* v. *Meighan*, 55 Wis. 354, 13 N. W. Rep. 269; *Lowry* v. *Dillman*, 59 Wis. 197, 18 N. W. Rep. 4; *Lemon* v. *Grosskopf*, 22 Wis. 447. No action can be maintained to recover goods sold or money advanced for any illegal purpose, (*Raymond* v. *Leavitt*, 46 Mich. 447, 9 N. W. Rep. 525; *Sampson* v. *Shaw*, *supra;*) money sent to aid the Rebellion, (*Hanauer* v. *Doane*, 12 Wall 342; *Iron Co.* v. *Spradley*, 51 Ala. 171; *Booker* v. *Robbins*, 26 Ark. 660;) sale of liquor on Sunday, and without license, (*Melchoir* v. *McCarty*, 31 Wis. 252;) services or losses of broker in wagering contracts for grain, (*Irwin* v. *Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160; *Higgins* v. *McCrea*, 116 U. S. 671, 6 Sup. Ct. Rep. 557;) moneys paid in furtherance of a contract, the object of which is to violate the spirit and policy of a public statute, and not expended, (*Perkins* v. *Savage*, 15 Wend. 412.) See, also, *De Groot* v. *Van Duzer*, 20 Wend. 390.

The money claimed to be due from McGeoch was received from the illegal Walker wheat corner, and was to be accounted for between Wells and McGeoch. *Lemon* v. *Grosskopf*, 22 Wis. 451, was an action to recover on a note given for moneys received on sale of lottery tickets for plaintiff. "It was as well a part of his (Grosskopf's) agency to receive and account for the money as to sell the tickets. And an action to recover this money goes in affirmance of the illegal contract, and to enforce the performance of this duty. The main object of the agency was to do an act criminal by our statute,—to engage 'in

a traffic, not merely forbidden, but fraudulent and indictable.' And if the agent is dishonest in the transaction of the business, if he refuses to account for money which he has secured for the tickets sold by him, should the court interfere, and enforce the performance of his duty? It seems to us that the court must decline to interfere on either side, upon the maxim, *ex turpi causa non oritur actio.*" The doctrine of this case, thus stated, is sound in principle, and in harmony with the great weight of authority. It is directly supported by the cases of *Boyd* v. *Barclay*, *Gregory* v. *Wilson*, and *Root* v. *Stevenson*, *supra;* and also by *Booth* v. *Hodgson*, 6 Term R. 405; *Kirk* v. *Morrow*, 6 Heisk. 445; *Chappell* v. *Wysham*, 4 Har. & J. 560; *Brewer* v. *Kingsberry*, 69 Ga. 754; *Campbell* v. *Anderson*, 2 Duv. 384; *Wooten* v. *Miller*, 7 Smedes & M. 380; *Thorne* v. *Insurance Co.*, 80 Pa. St. 15; *Rolfe* v. *Delmar*, 7 Rob. (N. Y.) 80; *Overby* v. *Overby*, 21 La. Ann. 493.

LYON, J., (*after stating the facts.*) Most, if not all, of the material facts stated in the findings and opinion of the county judge, are well sustained by the testimony, and will not be disturbed. The learned judge found that the wheat deal of 1882 and the lard deal of 1883 were illegal transactions, and held that no recovery can be had in this action, because the claim of the plaintiff grows out of such illegal transaction. Upon that theory, the findings of fact seem to be sufficiently full and comprehensive. Much testimony, however, was given on the trial, directed to questions of fact upon which the findings are silent. During the term at which the decision was rendered and the findings filed, counsel for Mr. Wells, the plaintiff, asked the court to make additional findings upon a large number of questions thus omitted therefrom. "Whereupon [as stated in the bill of exceptions] the court ruled that the request should have been made before the findings had been made and filed by the court; and the court refused to pass upon the question, and dismissed the application, and refused to look into or examine the requests submitted."

The ground upon which such refusal is rested is untenable. A party to an action in which it is the duty of the court to file findings of fact cannot know in advance of such filing what they will be. He may rely upon the presumption that the court will discharge its duty by finding upon all disputed questions of fact involved in the case, and he cannot be put in default because he has failed to indicate to the court in advance the specific facts upon which he desires findings. It is sufficient to secure a review by this court, on appeal, if due exception be taken that the findings fail to cover and include certain specified material questions of fact litigated on the trial.

In the view we have taken of this case, (which is hereinafter expressed,) some of the omitted propositions of fact are material to a correct determination thereof. At the risk of some repetition of what appears in the decision and findings of the county court, a statement of the case including such omitted facts, as the same appears in the pleadings, findings, and evidence, will now be made, after which the law of the case will be considered.

1. From January 1, 1881, to June 16, 1883, the defendant, Peter McGeoch, was engaged in the city of Milwaukee in the business of a broker and commission merchant, dealing in grain and other produce, under the name and style of P. McGeoch & Co. During the same time, he was a partner in the firm of McGeoch, Everingham & Co., which was engaged in a like business in Chicago, operating on the board of trade in that city. There were four partners in the firm, but McGeoch owned a one-half interest in its business and profits, and was the leading partner therein. During the whole time aforesaid, the parties—Wells and McGeoch—were jointly interested as partners in very extensive transactions in grain, lard, pork, and other commodities. These transactions were mostly in futures, that is, purchases and sales for future delivery, and were conducted by McGeoch alone, through his said firm

in Chicago and his Milwaukee house. There were many hundreds of such transactions, and they amounted in the aggregate to many millions of dollars. In February, 1882, the parties settled and adjusted their previous dealings on joint account, and the profits of each were found to be over $300,000. This sum includes the profits of each, amounting to over $278,000, in an extensive deal in pork and ribs. The parties then engaged in a wheat deal in Chicago in connection with others. This speculation is known as the "April (1882) corner in wheat." It was prosecuted with energy, sagacity, and courage, and resulted in a successful corner of the market, and in a net profit to Wells and McGeoch of $278,705.57, or $139,352.78 each. The final result of this deal was reported by McGeoch, Everingham & Co., at Chicago, to the house of P. McGeoch & Co., at Milwaukee, and the aggregate profit of the two parties was credited in the books of the latter house to XX account. It was not entered up to the credit of the respective parties, because a suit was then pending which might result (but never did) in changing the figures somewhat. The fact that the amount so entered had not been divided between the parties on the books of P. McGeoch & Co. seems to have been overlooked or forgotten, and so it remained therein as originally entered. Wells' share of the profit on the wheat deal of 1882 was left in the hands of McGeoch for future operations, and the credit of $278,705.57 to XX account was transferred to the credit of McGeoch alone on the books of the Chicago house. The joint adventures of the parties, under the direction an management of McGeoch, were continued until the failure of the Chicago house, June 16, 1883. There was a large number of transactions during that time,—some of which resulted in profits to the parties; others, in loss. These were reported to the Milwaukee house, and Wells' share of such profits and loss were entered in the books of that house to his account, but stood to the credit of McGeoch on the books of McGeoch, Everingham & Co. On June 16, 1883, the aggregate of profits over losses in those transactions belonging to Wells (excluding the lard deal hereafter mentioned) amounted to $100,455.39. Early in 1883, the parties inaugurated in Chicago what is called the "lard deal;" or perhaps, rather, McGeoch inaugurated it, and Wells soon thereafter took a joint interest therein with him. This was a deal in April, May, June, and July lard. Through the Chicago house, they purchased cash lard, and lard for future delivery, in enormous quantities. Their transactions amount to over $12,000,000. Of course, vast sums of money were required to carry on the deal. Wells authorized McGeoch to use in the deal all his funds in the hands of McGeoch, and the same were so used. They raised on their individual notes, from various banks, $950,000, and, by hypothecation of cash lard which they held, they raised nearly $4,000.000 more. To the above sum should be added any sums which McGeoch furnished and put into the deal. All these contracts for lard were made by the firm of McGeoch, Everingham & Co. as principal. No account with Wells was kept on the books of that firm, but the lard-deal account therein was designated as "41." Transactions relating to that deal were frequently, perhaps daily, transmitted to P. McGeoch & Co., at Milwaukee. To carry the deal to a successful termination, Wells and McGeoch were forced to buy all the lard in the market. The quantity thrown upon the market was unexpectedly large, and additional large sums of money were required for such purchases, as well as for margins on purchases for future delivery. The financial ability of the operators was not equal to the emergency. The crisis came June 16, 1883. The parties were unable to furnish any more money to their brokers, and the latter could not put up certain large margins regularly required of them under the rules of the board of trade, to which they were subject; so the firm of McGeoch, Everingham & Co. failed, and the lard deal collapsed, entailing an enormous loss upon its operators. Many actions were at once brought against the parties, and against McGeoch, Everingham & Co., by the creditors of that firm, both in

Illinois and Wisconsin. Both parties resided in Milwaukee. In one of the suits against the firm of McGeoch, Everingham & Co., a receiver, a Mr. Bensley, was appointed. The appointment was a most fortunate one for the parties interested. The receiver at once qualified, and entered upon the duties of his office. He gathered in the scattered assets of the firm, and set himself to ascertain the extent of the disaster, and the means of repairing it, as far as possible. Before the end of June, he informed the parties that the debts of the firm, estimated at about $1,300,000, (over $1,000,000 of which was on account of the lard deal,) could, in his opinion, be compromised at 50 cents on the dollar, if the money could be furnished soon; and that with $450,000 in cash, and the assets of the firm in his hands, estimated at something over $200,000, he could pay all the liabilities, and thus relieve, not only the firm, but Wells and McGeoch, from the enormous indebtedness resulting from the failure of the lard deal. Thereupon negotiations were had between the parties, resulting in the contract of July 17, 1883, which is set out in full in the foregoing statement of facts. Each party paid to the receiver $225,000, as therein agreed; and with that money, and the proceeds of the assets of the firm which came to his hands, (such proceeds amounting to nearly $340,000,) the receiver procured the discharge of all the indebtedness of the firm, paid all costs in pending suits, and all expenses of his receivership, and paid a surplus of nearly $28,000 to the partners in that firm, other than McGeoch.

Thus far the transactions between the parties are narrated in the findings of the county court substantially as here stated, and perhaps more fully. We now proceed to state certain facts proved on the trial to which little or no reference is made in the findings. Each party had invested a large sum of money in the lard deal, which was irretrievably lost. They jointly owed other large sums, for the payment of which both were legally liable. Utter financial ruin of both was imminent, and, naturally, both were anxious to avert it if possible. The receiver was pressing a compromise upon the creditors of McGeoch, Everingham & Co., and had expressed the opinion to the parties that with the assets in his hands, and $450,000 in cash additional, he could pay off the liabilities of the firm; most of which were incurred on account of the parties in the lard deal. Under these circumstances, the parties, aided by legal advisers, met, negotiated, and entered into the contract of July 17, 1883. Pending such negotiations, and as part thereof, McGeoch represented to Wells that the latter had a credit with him of a little over $100,000, being his share of the profits of their joint operations, and that he had invested it in the lard deal, pursuant to the authority which Wells gave him to do so. He also stated to Wells that he (McGeoch) had invested $700,000 in the deal, including a note to a bank of $250,000. The parties then owed to banks, on their individual notes, $950,000, including the $250,000 just mentioned. Each was a party to all these notes, either as maker or indorser. McGeoch thereupon proposed to Wells that he (Wells) should assume payment of the remaining $700,000; McGeoch assuming payment of the $250,000. As McGeoch represented the matter, this would make Wells' payment on account of the deal, in round numbers, $800,000, and McGeoch's, $700,000. To equalize these payments, it was agreed, after some negotiation, that McGeoch should pay $25,000 on one of the bank notes assumed by Wells, and should give the indemnity contained in the contract of July 17, 1883. It may be observed here that on the above basis, to have made the payments of these parties equal in amount, McGeoch should have paid $50,000 to Wells, or on his account, whereas he paid $25,000. Thus, Wells allowed McGeoch $25,000 for the indemnity just mentioned. It is perfectly obvious that the result of this agreement was that Wells assumed to pay $25,000 more, and McGeoch the same sum less, than one-half the losses of the deal. The sums theretofore put in the deal by each party, and the sums assumed by each on account of existing indebtedness to

banks, having thus been adjusted and equalized on the basis of McGeoch's representations, each party agreed to raise, and did raise, and pay to the receiver, his agreed proportion of the amount estimated to be necessary to discharge the liabilities above mentioned. Such negotiations were had, and the contract of July 17, 1883, was entered into, with the express understanding between the parties that the money of Wells in the hands of McGeoch, the $675,000 of bank indebtedness assumed by Wells, and the $225,000 paid by him to the receiver, equaled one-half the losses by the lard deal, plus $25,000, including costs and expenses of closing out the deal; and that the $275,000 assumed by McGeoch, the $225,000 paid by him to the receiver, and the sums put into the deal by him before the failure, would equal one-half of such net loss, minus $25,000.

The evidence leaves no room for doubt that McGeoch represented to Wells that he had put into the lard deal $700,000, including the bank debt of $250,000 assumed by him, or $450,000 without it; and that the balance in his hands to the credit of Wells was but $100,455.59. His attorneys, to his knowledge, were notified in writing by the attorneys of Wells, before the contract of July 17th was executed, that Wells would execute it on the faith of these representations; and neither McGeoch, nor his attorney for him, denied that he made such representations. Further, one of McGeoch's attorneys drew and delivered to the attorneys of Wells a memorandum in which, after referring to certain indebtedness, it is said that the same "is exclusive of $1,500,000 which the two parties, Wells and McGeoch, severally owe at the bank, or have raised," etc. The amount owing at the bank was $950,000; leaving $550,000 as the sum raised and put in the deal by both parties. Of this last sum it was stated by McGeoch that Wells had put in only a little over $100,000; thus leaving his (McGeoch's) investment in the deal nearly $450,000, exclusive of the $250,000 raised by him at the bank. This memorandum was so delivered before the contract was signed, and McGeoch saw it, and made no objection to it. It has the force of a direct statement to Wells that he (McGeoch) had thus actually invested in the deal $700,000, including the bank debt of $250,000. Besides, the oral testimony alone, on the same subject, is quite sufficient to prove that such misrepresentations were repeatedly made by McGeoch to Wells during the negotiations.

2. The conclusions we have reached as to the law of this case render it necessary to determine the following questions: *First.* Were such representations true or false? If false, *second*, were they fraudulently made by McGeoch? And, *third*, did Wells rely upon them, and make and perform the contract of July 17, 1883, on the faith of them, believing them true?

First. Were the above representations true or false? It is admitted by all the counsel that McGeoch retained in his hands the share of Wells in the profits of the wheat deal of 1882, being $139,352.78, and that he invested the same by authority of Wells in the lard deal. Hence the representation that the amount of the money of Wells in his hands which he so invested was but $100,455.59 was not true; the actual amount was $239,808.17. As to the representation by McGeoch that he had put into the lard deal $700,000, his counsel claim that it was substantially true. A large amount of testimony is directed to this point; and much argument has been employed, and many ingenious theories advanced, by both parties, to demonstrate the truth or falsity of this representation. To one not an expert accountant, the combination of figures and accounts involved in these theories, and pressed upon us in the argument, are quite bewildering, and it must be added that none of them are satisfactory. Fortunately, the record furnishes us the means of solving the question. It is an admitted fact in the case that the losses in the lard deal amounted to $2,352,036.52. The proofs are very satisfactory that, by the compromise with the creditors of McGeoch, Everingham & Co., there was released on account of the indebtedness incurred in the lard deal $513,-

537.76. This appears in the testimony of Stoltz, the book-keeper of that firm, and by an account furnished by him, showing the entries made in the books of that firm, after its debts and the expenses of the receiver had been paid, to balance and close the accounts of the firm. It is undisputed. Moreover, it is just about the sum we should expect to find: for such indebtedness amounted to something over $1,000,000, and the amount released by the compromise was 50 per cent. thereof. Deducting the amount released by the compromise from the total loss, we have $1,838,498.76, which is the amount paid by both parties on account of losses, including the costs and expenses above mentioned. Of this last sum it is conceded that Wells paid $1,139,808.17. As a matter of course, the difference between the two sums last mentioned, which is $698,690.59, is the total sum paid by McGeoch. Deduct therefrom the sum afterwards paid by him to the receiver, and we have $473,690.59; which is the amount he had put into the lard deal, when he represented to Wells that he had thus put in $700,000. He therefore overstated his investment $226,309.41, in addition to the understatement of Wells' investment above mentioned. The following table will show the above computation in a more condensed form:

Total loss,		$2,352,036 52
Released by the compromise,		513,537 76
Paid by both parties,		$1,838,498 76
Wells paid—		
To banks,	$675,000 00	
In McGeoch's hand, admitted by him,	100,455 39	
One-half profit of wheat deal of 1882, in McGeoch's hands, not accounted for by him,	139,352 78	
Paid to receiver,	225,000 00	
		1,139,808 17
McGeoch invested in lard deal,		$698,690 59
Deduct his payment to receiver,		225,000 00
Paid by McGeoch before July 17, 1883,		$473,690 59
McGeoch represented his investment to be,		$700,000 00
He actually had invested only,		473,690 59
McGeoch overstated his payments,		$226,309 41
He understated the amount of Well's money in his hands,		139,352 78
Total,		$365,662 19

This method of ascertaining the amount paid in the lard deal by McGeoch renders it quite unnecessary to ascertain the sources from whence the money came. The amount may, probably does, include the capital of McGeoch invested in the firm of McGeoch, Everingham & Co., and his share of the commissions theretofore earned by that firm. It is maintained by counsel for Wells that, by the terms of the settlement between the parties, these items were not to be allowed to McGeoch. We do not so understand the proofs. The testimony on that subject was given by Mr. Winfield Smith, one of Wells' attorneys, who took a leading part for Wells in the negotiations which resulted in the contract of July 17, 1883. He testified that, during the negotiations, (probably near the close thereof,) he had a conversation with McGeoch and Mr. Finches, (one of his counsel,) in which McGeoch assented to the proposition that the capital stock of the firm "was not to be considered one of the debts due from the firm which McGeoch and Wells would have to assume or

endeavor to pay, in whole or in part." This proposition seems to have been carried out. The representations made by McGeoch as to the amount he had invested in the lard deal were made before the above conversation took place; and, in order to determine whether such representations were fraudulent or not, *all* the money he so invested, no matter from what source derived, should be allowed him. Moreover, aside from the question of fraud, in an accounting between the parties of their investments in the lard deal, we do not think the above understanding or agreement as to capital is sufficiently broad to exclude the allowance to McGeoch of the proceeds of his share of capital and commission which he had theretofore drawn out, and invested in such deal. The allowance of these items to him does not seem to conflict with the agreement that the capital stock of the firm was not to be considered a debt of the firm which the parties were to assume or endeavor to pay. The agreement was satisfied when, by the failure of the firm, the partners therein, other than McGeoch, lost a large portion of the capital they had invested in business. McGeoch's capital and his share of the commissions had already been drawn out, and invested in the deal, and the amount thereof thereby ceased to be a liability of the firm. The agreement affects only such capital as remained a liability of the firm.

Second. Having determined that McGeoch, in his own interest, overstated to Wells his investment in the lard deal, and understated the amount of Wells' money in his hands which he (McGeoch) invested in the same deal, and having determined, also, the aggregate amount thus overstated and understated, we will now proceed to consider whether such misrepresentations were fraudulently made by McGeoch. This question requires but little discussion. If McGeoch knew that he was overstating his own investment, or understating the amount of Wells' money in his hands which he invested in the lard deal, his representations were fraudulent. If such representations were made in ignorance of the real facts, they were equally fraudulent; the fraud in the latter case consisting in his assuming to know facts, adverse to the interests of Wells, which he knew nothing about, and which had no existence. *Miner* v. *Medbury*, 6 Wis. 295. It would be unreasonable to hold McGeoch to the duty of exact knowledge of the amount of his investments, but it is not unreasonable to hold him to the duty of knowing approximately such amounts. The books of his two houses, at Chicago and Milwaukee, would have shown those facts with reasonable accuracy, had he consulted them; and it would not have been a difficult matter for him to obtain the information at very short notice. The county court found that he was no book-keeper, but this finding must be taken with some qualification; it probably means that he was not an expert book-keeper. It certainly cannot be truthfully said of a man who had capacity to conduct, and did conduct, commercial transactions, amounting to millions of dollars in each year, usually with great success, and who can claim rank with the ablest business men in the county, that he has no knowledge of book-keeping. But, if he was unable to ascertain the amount of his investments by a personal examination of his own books, he had in his employment capable, expert book-keepers, who kept such books, and who knew all about their contents, who, if desired, would readily have given him the required information. In the circumstances of this case, there is no admissible theory upon which it can be truly said that such erroneous misrepresentations are consistent with honesty of purpose. He either knew that the representations were grossly false, or he made them recklessly, without stopping to inquire whether they were true or false. In either case, as before observed, the misrepresentations were fraudulent.

Third. We are now to inquire whether Wells relied upon such false and fraudulent misrepresentations made by McGeoch, and made and performed the contract of July 17, 1883, on the faith of them, believing them to be true. The proofs tend to show that the accounts of the transactions in Chicago on

the lard deal were frequently transmitted to P. McGeoch & Co., at Milwaukee, and that Wells had free access to them. From this it is argued that he might have known, had he taken the trouble to investigate, the true condition of the deal, at any given time, and that his failure to do so was negligence which is fatal to his right to recover in this action. It may be true that Wells had access to the means of thus ascertaining the condition of the deal, and the amount invested therein by McGeoch; but it is certain that he did not do so. When we consider the extent and magnitude of the transactions of the deal, the length of time which they cover, and that none of them occurred under the personal supervision of Wells; and the further facts, which clearly appear in the evidence, that Wells had most unbounded confidence in the ability and integrity of McGeoch, and in none of their numerous transactions had he given any personal attention thereto, but trusted entirely to McGeoch,—we cannot say that he was guilty of negligence in failing to keep himself personally advised of the condition of the deal. In other words, we think he had a right to rely upon the representations of McGeoch in respect to the amount of money invested by him in the deal, both of his own money and that of Wells. As to the $139,000 of Wells' money in his hands, being the profit of the wheat deal of 1882, it is sufficient to say that Wells had not forgotten that he had that sum in the hands of McGeoch, but he supposed the dealings on their joint account, after the wheat deal, had reduced that amount to a little over $100,000. The representation of McGeoch in that behalf was, in effect, (though not in words,) that it had been so reduced. Wells had kept no account of those dealings; trusting, as he had a right to do, to the integrity of McGeoch to properly account for all sums in his hands. He was justifiably ignorant of the fact that their joint dealings, after the wheat deal, had resulted in a profit to him of over $100,000, which McGeoch had in his hands, leaving the $139,000 intact. McGeoch cannot now be heard to say, after Wells had trusted him so implicitly, that, although he grossly and fraudulently misrepresented the amount of their respective investments, still that Wells had no right to believe his statements. We do not care to discuss this question further. The testimony convinces us that Wells had the right to rely upon the statement of McGeoch in the premises, that he did rely upon them implicitly, and that on the faith of them, and believing them to be true, he paid a very large sum of money to discharge their joint liability over and above what he ought to have paid on the basis upon which the transactions were settled, and what he would have paid had McGeoch truly stated his investments.

3. We are now to consider the law of the case applicable to the foregoing facts. The judgment of the county court is rested upon the propositions that the wheat deal of 1882 and the lard deal of 1883 contravened a statute of Illinois, and were illegal transactions; that Wells was obliged to trace his alleged right to recover in this action through such illegal transactions; and hence that he cannot recover therein.

In addition to pleading the illegality of those deals as defenses to the action. McGeoch, through his counsel, has expressed to us, in strong and earnest language, the wrong and injustice and the enormity of the evils which necessarily result from such illegal transactions, and has also denounced them as crimes against the public. Also, counsel cited several cases in which, in most impressive language, the immorality and illegality of such transactions are asserted. We cordially indorse all that was said to us on that subject in the arguments, as well as the language of the courts to which our attention has been called. When we said in *Melchoir* v. *McCarty*, 31 Wis. 252, that "all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void; and that, if a party claiming a right to recover a debt is obliged to trace his title or right to the debt through any such illegal contract, he cannot recover, because he cannot be allowed to

prove the illegal contract as the foundation for his right of recovery,"—we stated the rule as strongly as any court has stated it. To that rule this court has rigorously adhered. The rule is elementary, and we are not aware of any adjudication which has denied or shaken it. Numerous cases sustaining it will be found in the brief of the learned counsel for McGeoch. It is unnecessary to cite them here, but reference to them will be made in the report of the case. Thus far, we are in entire accord with McGeoch, his counsel, and the learned county judge. We have no doubt the county court ruled correctly that the wheat deal of 1882 and the lard deal of 1883 were illegal transactions, under the statutes of the state of Illinois. They were also illegal at the common law, as against public policy. However, the nature of the wheat deal of 1882 seems to be of little importance in the case. Wells' share in the profits of that deal was left in the hands of McGeoch, and by him invested in the lard deal by consent and direction of Wells. Had McGeoch paid the $139,000 to Wells, and had Wells subsequently returned it, or a like amount, to McGeoch, to be invested in the lard deal, it would not be claimed, we think, by any one, that the illegality of the wheat deal would alone protect McGeoch from accounting to Wells for the money. We think the transaction which actually took place is, in legal effect, the exact equivalent to the one supposed.

Second. If it be true, as the county court held, that, in order to establish his demand against McGeoch, Wells was obliged to trace his claim through such illegal transactions, the county court was right in dismissing the complaint. We are clearly of the opinion, however, that the ruling of the county court in this behalf is erroneous. The *gravamen* of this action is the fraud of McGeoch in misrepresenting to Wells the amount of their respective investments in the lard deal. Although, in form, the demand of the complaint is that the account of the transactions in that deal should be surcharged and corrected, yet, in substance and effect, the action is to recover damages suffered by Wells by reason of the fraud of McGeoch. The lard transaction is only involved incidentally in the case. It is resorted to only for the purpose of ascertaining whether the representations made by McGeoch were true or false. There is no rule of law which prohibits a resort to an illegal contract for a purpose so purely incidental. The case is within the principle laid down in *Kiewert* v. *Rindskopf*, 46 Wis. 481, 1 N. W. Rep. 163. In the opinion by Mr. Justice ORTON, it is there said: "The *gravamen* of this action is the fraud practiced by the defendant in obtaining the two thousand dollars from the plaintiff by falsely representing that this sum was within and a part of the contract with Wight, and that the sum agreed to be paid to Wight was *three* thousand dollars, when in fact it was only *one* thousand dollars. Where money is so charged to have been obtained by fraudulent representations, the only material questions to be considered are: *First.* Were such representations intentional, material, and false? *Second.* Did they produce a false impression on the mind? *Third.* Were they the inducement of the payment? *Fourth.* Were they relied upon as being true? If these elements are present, they constitute a positive fraud without exception; and the matters to which such fraudulent representations relate, whether legal or illegal, will not lessen the fraud, or affect the liability of the guilty party. Kerr, Fraud & M., 73; *Smith* v. *Mariner*, 5 Wis. 551; *Kelley* v. *Sheldon*, 8 Wis. 258; *Reynell* v. *Sprye*, 21 Law J. Ch. 633." There is no serious conflict of authority on this subject. Nearly all the cases involving the question are in harmony with *Kiewert* v. *Rindskopf*. Many of these cases are cited in the brief of counsel for Wells, and will be preserved in the statement of their argument in the report of the case. All the conditions of a recovery required in *Kiewert* v. *Rindskopf* are established in this action; hence Wells is entitled to recover.

Third. It is scarcely necessary to add that the full release of McGeoch by Wells from all claims and demands on account of the lard deal, contained in the contract of July 17, 1883, is no obstacle to a recovery in this action; the

contract having been obtained by the fraud of McGeoch. Such release may have excluded Wells from any share of the money remaining in the receiver's hands after his trust was executed, but it is not perceived how it can conclude Wells in this action, which is founded upon the fraud of McGeoch.

4. The only remaining question is that of damages. The *gravamen* of the action being the fraud alleged, it is plain that Wells should recover all that he paid, by reason of such fraud, in excess of what he would have been required to pay on the agreed basis had McGeoch represented the investments truthfully. But he cannot recover a sum which will reduce his payments, on account of the lard deal, below what he would have been required to pay on an accounting between the parties, for it cannot be correctly said that he has lost anything beyond that limit. The amount of such loss is easily ascertained. It is measured by the extent of the misrepresentations of McGeoch in his own favor, subject to the limitation just mentioned. We have already seen that these amount to $365,662.19 against Wells. Hence, in order to indemnify Wells for the consequences of McGeoch's fraud, the latter should pay Wells one-half the amount last above stated, to-wit, $182,831.10, less any sum necessary to be deducted in order to make Wells' payments equal the amount he ought to pay, as that amount would be ascertained were an account of the lard deal stated between the parties. This will place Wells in the same position that he would have been in had McGeoch represented their respective investments truly, and had the amount that each, upon the agreed basis, ought to have paid, been adjusted accordingly. In order to find whether one-half the aggregate of McGeoch's misrepresentations of the investments made by him in the lard deal for himself and for Wells exceeds the sum which Wells ought to recover, we will see how an account stated would stand:

Both parties paid,	$1,838,498 76
One-half is	$919,249 38
Wells agreed to pay, in addition,	25,000 00
Wells ought to pay,	$944,249 38
He paid,	1,139,808 17
Wells overpaid,	$195,558 79
McGeoch ought to pay,	$894,249 38
He paid only,	698,690 59
McGeoch's deficiency,	$195,558 79

But there remained in the hands of the receiver after the business was closed, and all demands paid, the sum of $27,886.32. In the absence of a special agreement to the contrary, this money belonged to the parties in equal shares. Hence, in the accounting, $13,918.16 should be deducted from Wells overpayment, as above stated, to find the maximum limit of his recovery. Had there been no surplus, Wells would recover $182,831.10, and would be compelled to lose the difference between that sum and the amount he overpaid, ($195,558.79,) because of the illegality of the lard deal, which bars a recovery on an account stated. But, inasmuch as there was a surplus, we state the account in the interest of McGeoch, and find that the recovery should be reduced to $195,558.79—$13,918.16=$181,640.63.

The judgment of the county court is reversed, and the cause will be remanded, with directions to its successor, the superior court, to render judgment for the plaintiff for $181,640.63, and interest thereon at 7 per cent. per annum from July 17, 1883, to the date of the judgment.

BOOTH *et al.* v. OLIVER.

(*Supreme Court of Michigan.* January 5, 1888.)

LANDLORD AND TENANT—AGREED LIEN ON "IMPROVEMENTS" FOR RENT—MACHINERY. A lease for a planing-mill stipulated that the lessor should have a lien for rent and unpaid taxes upon all *improvements* put upon the premises, and that machinery put up by the lessees should be treated by both parties as chattel property. The lessees having mortgaged machinery affixed by them to the premises, the mortgagee replevied the property from the lessor, who had taken possession under claim of a lien for rent. *Held* that, under the lease, machinery was not included in the term "improvements," and the lessor could have no lien thereon except by having reduced it to his claim when the mortgage was executed.

Error to circuit court, Delta county; C. B. GRANT, Judge.

Plaintiffs, Booth & Sons, brought replevin against John F. Oliver for machinery mortgaged to them, and claimed by defendant under a lien for rent. Judgment for plaintiffs, and defendant brings error.

F. O. Clark, for appellant. *F. D. Mead*, for appellees.

MORSE, J. This is an action of replevin to recover possession of a planer and other machinery in a planing-mill, in the city of Escanaba, in Delta county. The defendant is one of the lessors of the mill, and the plaintiffs claim the property by virtue of a chattel mortgage executed by Harris Brothers, the lessees of the mill. On the first day of March, 1878, Nelson Ludington and others executed and delivered to the defendant, John F. Oliver, and Frederick O. Clark, a paid-up lease for the term of seven years of the premises, upon which said planing-mill was situated. The lease contained an agreement that Oliver & Clark should have the "right to remove from said premises all machinery, shingle-mills, and improvements made for the managing of a mill located upon said premises after the date of this lease, and may remove the same after the expiration of this lease." On the twenty-fourth day of March, 1880, Clark & Oliver made a lease of a portion of the premises described in their lease from Ludington to one Wells M. Ruggles. The lease to Ruggles covered the ground upon which the planing-mill was located. This lease was recorded in Book E of Deeds, in the register of deeds office for the county of Delta, on the fifth day of October, 1880. The lease was for the term of six years from and after December 19, 1879. It contained the following provision: "And it is understood that the parties of the first part [Clark & Oliver] reserve, and shall at all times have, possess, and hold a lien upon all improvements made on said premises by the party of the second part, [Ruggles,] as a security for any unpaid balances of money due under this contract, either as rental or unpaid taxes, and said balances being deemed and to be treated as balances of purchase money, and which lien may be enforced against such improvements in like manner as liens conferred by chattel mortgage are, or may be entitled to be, enforced under the laws of the state of Michigan." The lease also contained a clause authorizing the lessee to remove from said premises all machinery located upon the same by him, and provided that he might remove the same after the expiration of his lease in case the rent and taxes had been paid; "all said machinery so put in by said second party to be considered and treated by both first and second parties as chattel property." Ruggles only paid $55 of the rent, which was stipulated to be $200 for each of the first two years, $300 for each of the next two years, and $400 for each of the last two years. On the seventh day of October, 1881, Ruggles assigned all his interest in the lease to the Harris Bros., said Harris Bros. assuming all liabilities under the same to Clark & Oliver for unpaid rent and taxes. This assignment was also recorded in a book of deeds in the register's office.

The machinery replevied was placed in the planing-mill by Harris Bros., after the assignment of the lease to them. It was firmly and substantially affixed to the mill, and was so placed for the purpose of carrying on the plan-

ing-mill, being bolted down through the floor and into the joists and timbers upon which the floor of said mill rested, and otherwise fastened so as to make it substantial in its operation by steam-power, and permanently affixed to said building, so as to require the disconnecting and loosening of bolts and other fastenings by which it was affixed to the building before it could be removed. It was put in between the first day of October, 1881, and the thirtieth day of November in the same year. On the last-named day Harris Bros. made a chattel mortgage covering this machinery to one John Semer for $1,000. On the twenty-fourth day of November, 1883, there was due upon this mortgage the sum of $631.62. On that day Semer assigned this chattel mortgage to the plaintiffs in this case. Harris Bros. also executed a second chattel mortgage upon the same property to one Wallace, who on the twenty-second of January, 1883, assigned the same to plaintiffs. At that date there was $900 due upon it. August 22, 1884, Harris Bros. also mortgaged this machinery to plaintiffs for $500. These mortgages were all renewed from time to time in accordance with the statute. The lease from Ludington and others to Clark & Oliver was recorded in Book E of Deeds, in the register of deeds office for Delta county, June 1, 1880. At the time of the trial there was admitted to be due and unpaid for rent and taxes under their lease the sum of $1,650.19 from Harris Bros. to Clark & Oliver. When the writ was issued in this suit, the defendant, Oliver, was in possession of the property on account of the failure of Harris Bros. to pay said rent and taxes, having taken possession under a clause in said lease authorizing him to do so. When he took possession, this machinery was still affixed to said building as heretofore stated, and at the time of the service of the writ he held the possession of the same "as security for said rent, or so claimed to hold it," acting for himself and said Clark. When the property was taken by the sheriff under the writ of replevin, the machinery had been disconnected from its fastenings by the said Oliver for the purposes of removal, but was still in the building. The value of the property was agreed to be $1,200. The plaintiffs made a demand for the property before commencing suit. Ruggles used the property as a planing-mill and grist-mill before his assignment to the Harris Bros. The facts as above stated were stipulated upon the trial.

The circuit judge instructed the jury that the machinery did not come under the clause of the lease which gave Clark & Oliver a lien upon the improvements; that a distinction was made in the lease between machinery and improvements, which showed the intention of the parties that the term "improvements" should not cover or embrace the machinery; that the machinery under the agreement of the parties must be considered personal property, notwithstanding the manner of its fixture to the building; that as, at the time Harris Bros. gave these chattel mortgages, Clark & Oliver had not taken any steps to reduce this property to their possession, and Harris Bros. were in possession, they had a right to mortgage or sell this machinery, and Clark & Oliver would have no remedy; that if Clark & Oliver had any lien upon the property, it was the same as an unrecorded chattel mortgage, and could not aid them in this case; and that they must therefore find a verdict for the plaintiffs. The defendant brings the case here for review on writ of error.

The circuit judge was right in holding the property replevied to be, under the circumstances, personal property. The parties to the lease, Clark & Oliver, lessors, and Ruggles, lessee, expressly stipulated in the instrument that all machinery put in by the lessee should be treated as "chattel" or personal property. Harris Bros. were the assignees of Ruggles, and the machinery put in by them was covered by this stipulation. When the parties have thus agreed to treat this machinery as personalty, the manner and method of its fixture to the building becomes unimportant. Being personal property, this machinery was subject to chattel mortgage the same as any other personalty.

But the defendant claims that, by reason of the clause as to removal in the

lease from Clark & Oliver to Ruggles, this property could not be removed from the building until the rent and taxes were paid; that a lien under the lease existed upon the machinery for unpaid taxes and rent, which lien was superior to the chattel mortgages, and must be first satisfied. He claims that the manner of the affixing of the machinery to the building, in the absence of any agreement, gave the said machinery the appearance of realty, and that the agreement constituting it personalty is found in the lease, and the same instrument which gives to Clark and himself a lien upon it, and forbids its removal from the premises, until the rent and taxes are paid; that the mortgagees had notice from the character of the attachment of the machinery to the building that it was realty; and if they ascertained it was personalty, they must obtain their knowledge from the lease, which would also give them notice of the lien. This machinery, before it was placed in the mill, was personal property. It therefore never ceased to be anything but personalty, as its attachment to the building, by the express agreement of all the parties interested did not change its character. It was therefore always to be treated as personal property, and to be governed by the rules applicable to such property. Whether the lien in the lease covered this machinery under the term "improvements" or not, no person was obliged to go to this lease to determine whether the machinery was personal or real estate. And the record of the lease was no notice to third parties of the existence of such lien. They were not bound to search the record of deeds to ascertain whether or not this personal property was incumbered.

We also think the circuit judge was right in holding that Clark & Oliver, at the time these mortgages were given, having taken no steps to reduce the property under the lien claimed by them, and Harris Bros. being in possession, they (Harris Bros.) had a right to mortgage the machinery, and Clark & Oliver would have no remedy. Their lien was not as binding as an unrecorded chattel mortgage under the decisions of this court. See *Holmes* v. *Hall*, 8 Mich. 66, and *Dalton* v. *Laudahn*, 27 Mich. 530.

The claim of the defendant's counsel upon the argument that "the moment the property was permanently affixed in the manner it appears it was attached, there vested in the lessors a *present interest, permanent and unchangeable*, and a *conditional possession*, which could not be changed in its character, namely, in its permanent affixing, [except upon the conditions upon which there might be a removal,] and that the lease, therefore, gave them, in effect, a pledge of the property in possession," is not tenable under the circumstances of this case. As before said, and under the numerous decisions of this court, cited by both counsel in their briefs, the manner and character of the attachment of the machinery to the building cuts no figure in the case, and cannot weigh or have any control as against the expressed intention of the parties. The rights of Clark & Oliver under this lease cannot be enlarged by the method of affixing the property in question to the mill.

The judgment of the court below is affirmed, with costs.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

BRENNAN v. BUSCH.

(*Supreme Court of Michigan.* January 5, 1888.)

1. GUARANTY—EVIDENCE.

In *assumpsit* to recover the balance due upon an account the evidence was that defendant carried on his business through contractors whom he largely paid by the store goods of plaintiff; that he gave plaintiff a written guaranty to pay for supplies which he should furnish to his contractor K.; that defendant told him to pay the men of K. and B., (another of his contractors,) and he would repay him; that statements of the account were furnished defendant who made partial payments, and never objected to any of them until after K.'s job was closed; that K. earned enough

money on the job to pay the account; that by the agreement the defendant was only to pay to the extent of moneys K. was to receive from the job; that he had paid that amount or more; that he had written to plaintiff several weeks before K.'s job closed, that, "Yours, showing a balance, * * * at hand. I wish once more to call your attention to what I have told you, and also written in former letters, that I would not assume an unlimited account of K., but only so far and fast as he earns it;" and that plaintiff never received the letter. *Held*, that the evidence sufficiently showed that plaintiff had authority to pay the orders, and that he kept within the limit, even though the jury found specially that he did not have *unlimited* authority.

2. TRIAL—REMARKS OF COUNSEL—PREJUDICIAL ERROR.

In an action of *assumpsit* counsel for plaintiff asked defendant if he had ever been on the witness stand before, and upon the question being overruled, made the statement that he would offer to show that defendant had been a witness about a hundred times; the court refused to tell the jury that the statement was irregular; he then asked him if he had had about 10 cases in the supreme court of the state; this question was also overruled. *Held*, that the questions and offer to prove were improper, but that they did not so prejudice the rights of defendant as to warrant a reversal of the judgment.

Error to circuit court, Marquette county; C. B. GRANT, Judge.

Action of *assumpsit* by Patrick Brennan against William C. Busch. Judgment for plaintiff, and defendant brings error.

F. O. Clark, for appellant. *W. P. Healey*, for appellee.

SHERWOOD, J. This is an action of *assumpsit* brought by the plaintiff against the defendant to recover the sum of $877.97, with interest, for goods sold and delivered, for moneys paid on orders of the defendant, and for team work furnished to the defendant. The claim is for a balance due upon the account. The declaration is on all the common counts, accompanied by a bill of particulars of the plaintiff's items claimed thereunder. Plea, general issue. The trial was had in the Marquette circuit, and the plaintiff recovered a verdict and judgment for the sum of $930.72.

It appears from the record that in 1885 and 1886 the defendant, Busch, owned pine lands in Baraga county, and the plaintiff owned and carried on at the same time a store at which he sold merchandise and supplies for lumber camps at L'Anse. The evidence tends to show that Busch carried on his lumbering at the camps by contracts with others who did the work, and whom he largely paid through the store goods of the plaintiff; that he let one contract in 1885 to Martin Kelsey, a brother-in-law of the plaintiff, to get out a certain quantity of logs on lands about 25 miles from L'Anse, and on November 9, 1885, he wrote the plaintiff as follows: "I have just closed, or rather arranged, with Mr. Martin Kelsey for putting in pine for me on Point Abbey, and agreed to pay for the same as work progresses. To aid him in starting I would agree to guaranty payment for supplies necessary to supply such job. Send me bill of such amount of supplies as may be got under this order." The plaintiff responded to the letter of Mr. Busch by furnishing supplies to Kelsey between that time and December 1st to the amount of $218.11. Defendant did not give any other order by letter, but in a few days he visited L'Anse and there saw the plaintiff, and plaintiff testified: "A little before Christmas Busch told me to pay the men. He told me that Thanksgiving day. He told me to pay his men, and Belanger's men, another contractor of his; that is, orders drawn by Kelsey on him. I began paying them about Christmas. December 24th I paid $100," and the plaintiff further testified that "it was agreed right along between himself and the defendant that he [plaintiff] was to pay the men and he [Busch] would take up the orders," and that witness was to keep on paying the men. The plaintiff furnished the defendant with monthly statements of the account, and plaintiff testified that defendant never objected to any of them until after the job of Kelsey was closed, which was about the first of May, 1886. The orders paid by the plaintiff were charged in the monthly statements sent, and from time to time the defendant made partial payments of the amounts charged. The testimony of the parties was conflict-

ing upon several points, and the defendant claims that by the arrangement between them he was to pay the plaintiff only to the extent of the moneys Kelsey was to receive upon the job, and that he had paid that amount or more when the suit was brought; and further that the defendant wrote to the plaintiff on the twenty-fourth day of February, 1886, the following letter: "DEAR SIR: Yours, showing a balance of $673.78, at hand. I wish once more to call your attention to what I have told you, and have also written in former letters, that I would not assume an unlimited account of Kelsey, but only as far and fast as he earns it. Of course, would have to protect labor first." The plaintiff, however, testified that he never received such letter, and some question was made upon the testimony whether such letter was ever sent to the plaintiff. There was, however, testimony offered upon the trial tending to show that Kelsey earned upon his job, according to his contract with Busch, more than enough to pay the account of the plaintiff including that claimed for in this suit.

The defendant's counsel, on the trial, objected to any testimony showing payments of orders drawn by Kelsey upon the defendant, upon the ground that the plaintiff had no authority to pay such orders. We think there was testimony in the case tending to show that the plaintiff had such authority, and that he kept within the limits of it, and the special finding of the jury that he did not have unlimited authority does not conflict with the fact that he did have limited authority.

The following occurred upon the trial and which is alleged as error by counsel for the defendant: The defendant was upon the stand as a witness for himself, when the following questions were asked by Mr. Healy, counsel for the plaintiff: "Have you been on the witness stand before? *Mr. Clark.* I object to that as incompetent. *Court.* I do not think that it is material. *Mr. Healy.* I will offer to show that Mr. Busch has been a witness on the stand about one hundred times. *Mr. Clark.* I object to that statement in court. *Mr. Healy.* I offer it to go to his credibility. *Court.* I think the proper way would be to put questions. *Mr. Clark.* I ask the court to say to the jury that the statement of counsel is irregular, and out of order. *Court.* Go on. *Mr. Clark.* Note an exception. I want an exception to all these things that are overruled. *Q.* You have had about ten cases in the supreme court of Michigan? *Mr. Clark.* I object to the question. *Court.* I think the objection is good."

The foregoing questions and offer to prove were improper, and were so ruled by the court, but we find nothing in them so prejudicial to the rights of the defendant as to warrant a reversal of the judgment upon that ground. No other questions are made upon the testimony needing further attention. The defendant presented 10 requests to charge. They are quite lengthy, and some of them ask the court to assume facts from the testimony which should be found by the jury. We have examined them all carefully, and it is unnecessary to discuss them at any length, as we are all satisfied that all therein contained, proper to be given to the jury, is included in the charge given by the circuit judge. Several of the requests ignore the testimony of the parties in relation to the agreement between them for the credit claimed to have been extended by the plaintiff. Each party gives a different version of the same, and the theories of each were submitted to the jury in the charge with propriety and care, and we have been unable to discover, either in the rulings upon the requests or in the portions of the charge excepted to, any prejudicial error.

The judgment must therefore be affirmed.

MORSE and CHAMPLIN, JJ., concurred; CAMPBELL, C. J., did not sit.

WOODS v. BURKE.

(*Supreme Court of Michigan.* January 5, 1888.)

1. TENANCY IN COMMON—RIGHT OF POSSESSION—ASSIGNMENT.
In an action to recover possession of real estate upon which there was situate an hotel, the evidence was that the premises were sold by contract to P. who transferred his interest to C. and W. as tenants in common; that W. transferred his interest in the property and a half interest in the hotel furniture to defendant, who agreed to keep up the payments on the original contract; that W. assigned to C. his interest in his assignment to defendant and in the original contract, who assigned to plaintiff; that defendant was not in default upon the original contract, but that he had failed to pay for the furniture as he had agreed in the assignment from W. to him. *Held*, that defendant was rightfully in possession under the original contract by virtue of W.'s assignment, and that he had never forfeited his right.

2. EVIDENCE—COPY OF WRITTEN CONTRACT—PROOF OF LOSS OF ORIGINAL.
In an action to recover possession of real estate claimed under a contract of sale, *held*, that a copy of the contract could not be offered in evidence without first proving the loss or destruction of the original, or that it was not within the jurisdiction of the court.

Error to circuit court, Mecosta county; C. C. FULLER, Judge.

Action by Annie B. Woods against William Burke to recover possession of real estate. Judgment for defendant, and plaintiff brings error.

Jennings & Mann, for appellant. *D. F. Glidden* and *Frank Dumon*, for appellee.

SHERWOOD, J. The plaintiff commenced her action before a circuit court commissioner to recover possession of lots Nos. 16, 17, 21, and 22, in block 10, in Warren & Bronson's First subdivision in the city of Big Rapids, on which was situate an hotel known as the "Commercial House." The defendant obtained judgment, complainant appealed to the circuit, where on the trial a like judgment was obtained, and the plaintiff now seeks a review in this court.

Two errors are assigned upon the record. The *first* is that the court refused to admit in evidence a copy of a certain contract for the purchase of the lots. *Second*, that the court erred in rendering judgment, "that defendant is not guilty of unlawfully holding the premises described in the complaint against the rights of the complainant." The testimony in the case was all offered by the plaintiff, and from which it appears, or rather there was testimony given tending to show, that Hannah T. Gray sold the premises in question to Spencer Preston by contract; that Preston transferred his interest under the contract to John T. Clark and John Woods, the husband of the plaintiff; that John Woods transferred his interest in the property and his undivided half interest in the furniture in the hotel to the defendant, Burke. Clark and Woods were in possession of the property when Woods sold to Burke, as tenants in common under the original contract for the purchase of the same. Burke was to give $2,000 for the interest he purchased, and paid all but $333.33. Woods made his transfer to Burke in 1883. In 1884 Woods assigned his interest in his contract of assignment to Burke, and in the original contract from Gray to Preston, to Clark, who assigned the same to Mrs. Dorgle, and she, on the second day of May, 1885, assigned her interest thus acquired in the property to Mrs. Annie B. Woods, the plaintiff. The defendant agreed, in addition to the $2,000 paid for his interest, that he would keep up the payments on the Gray-Preston contract. The complaint in this case alleges that the defendant holds possession of the real estate in question "contrary to the conditions and covenants of an executory contract for the purchase thereof." On the trial it was substantially admitted that Burke was not in default in making payments upon the original contract held from Gray, but that the default relied upon was the failure of Burke to pay for the furniture, as he had agreed in the assignment from Woods to him.

The question, however, whether or not the right to recover possession under the contract claimed can be maintained, we are prevented from considering. That contract includes the original contract for the purchase of the hotel property of Mrs. Gray, and the latter was properly excluded by the court, or rather the evidence offered to prove it. It was attempted to introduce a copy, without first proving the loss of the original or its destruction, or that it was not within the jurisdiction of the court, and the copy was properly excluded.

Enough was shown to establish the fact that Burke went into possession of the property under the original contract by virtue of Wood's assignment, and that he had never forfeited his right to such possession. From the record it would appear that the defendant was rightfully in possession of the premises as against any claim made by the plaintiff, and the judgment must be affirmed.

MORSE and CHAMPLIN, JJ., concurred; CAMPBELL, C. J., did not sit.

ROGERS v. WHITE.

(*Supreme Court of Michigan.* January 5, 1888.)

1. EJECTMENT—EVIDENCE—TITLE DEEDS.
   In ejectment, where plaintiff claims title under tax deeds, and defendant under a government patent, it is admissible for defendant to introduce in evidence the deeds connecting him with the patentee.
2. SAME—POSSESSION UNDER DEED FROM PARTY IN POSSESSION.
   Possession under a deed from one in possession, when such deed was delivered, will allow the defendant in ejectment to contest the case by attacking the plaintiff's title.
3. TAXATION—LEVY UNAUTHORIZED IN PART—SALE VOID.
   When any part of a tax levy does not appear by the record to have been duly authorized, a sale of land for its proportionate share of such levy is invalid.

Error to circuit court, Allegan county; D. J. ARNOLD, Judge.

Ejectment by Samuel Rogers against Elbridge White. The cause was tried by the court, and judgment given for the defendant. The plaintiff brings error.

Padgham & Padgham and *Edward Bacon*, for appellant. *Howard & Roos*, for appellee.

SHERWOOD, J. This case is an action of ejectment brought by the plaintiff to recover possession of 120 acres of land situate in the county of Allegan. The plaintiff claims the land in fee, and bases his claim upon two tax titles under conveyances by the auditor general, for the taxes of 1879 and 1880, respectively. The cause was tried before Judge ARNOLD, in the Allegan circuit, who found the facts and gave judgment for the defendant. The plaintiff brings error.

The evidence does not appear in the record. The findings were requested by counsel for the plaintiff, and the case is now before us upon the several findings of law and entry of the judgment for the defendant. I have no doubt but that the defendant's interests in the property were such as to properly enable him to defend by attacking the validity of the plaintiff's tax titles, and show them to be worthless if he could. Adam White, as appears by the findings in the case, purchased the premises from Chase H. Dickinson on the twenty-first day of January, 1882, and received a warranty deed from him therefor; that Adam entered into immediate possession under his deed, and continued the same until he sold to the defendant by warranty deed, and delivered the possession to the defendant, who has continued in the occupancy and possession of the same to the present time, and claiming to be the owner thereof. It also further appears by the findings that the United States con-

veyed the land to Marvin Hannahs, who, previous to his death, gave it by his will to his son, George Hannahs, and he, after the commencement of this suit, in 1886, conveyed the same by quitclaim deed to the defendant's grantor, C. H. Dickinson.

It will be discovered these conveyances perfected the defendant's chain of title from the government, unless it was broken by the titles of the plaintiff. It was proper to introduce them in evidence. They only furnished the evidence of title existing, and which inured to the benefit of the defendant under these deeds. *Gamble* v. *Horr*, 40 Mich. 562; *Maxwell* v. *Paine*, 53 Mich. 31, 18 N. W. Rep. 546; *Hall* v. *Kellogy*, 16 Mich. 135; *McFarlan* v. *Ray*, 14 Mich. 465. Under these authorities the possession found by the court under the claim of the title made was sufficient to permit the defendant to make the contest he has in this case.

The validity of the tax deeds is the next question in the case. Under the findings of the court for the taxes of 1879, it clearly appears that an excess beyond what the law allowed of $25 was raised and collected for township purposes, and the land in question was assessed for its proportionate share thereof, and was sold for such portion of the illegal tax. This was sufficient to invalidate such sale. *Case* v. *Dean*, 16 Mich. 12; *Lacey* v. *Davis*, 4 Mich. 140; *Buell* v. *Irwin*, 24 Mich. 145; *Wattles* v. *Lapeer*, 40 Mich. 624; *Silsbee* v. *Stockle*, 44 Mich. 561, 7 N. W. Rep. 160, 367. The deed on the sale made for taxes of 1879 was not much relied upon at the hearing, and we will therefore pass to the other.

It is claimed that the title for the taxes of 1880 is invalid for the following reasons: (1) Because the memorandum offered as the record of the proceedings of the township meeting for the year the assessment was made is so defective that no valid tax can be based upon it. (2) If it shall be held a record for any purpose, and the memorandum presented can be held a record upon which to levy a tax, and regulate the amount thereof, the township tax actually levied is excessive and therefore void. (3) The highway and bridge taxes are placed in the column of township taxes, and it makes void the taxes if they are extended, and in these the excess is $41.60. (4) Because the records of the board of supervisors for the year the taxes were assessed do not show what the equalization of the township taxes was. (5) Because the return of the overseer of highways of delinquent highway taxes is not properly sworn to. (6) Because there is no certificate of the county treasurer to the correctness of the list returned to the township treasurer. The circuit judge found, as matter of law, that the sum of $41.60 was spread in the column of township taxes for the year 1880, and that the same was illegal and excessive, and the taxes for which the land was sold in 1880 included a proportionate share of such excess, and were void, and that the deed made on such sale is of no effect. The findings of fact fully sustain the conclusion reached by the circuit judge. The $41.60, it appears from the findings, was the amount of two orders drawn and signed by the clerk of the township and delivered to different parties for repairing a bridge. There is no record that any such expenditure was ever authorized at a township meeting, or by the township board, or by the commissioner of highways. Neither does it appear that any record was ever made of any determination by the commissioner of highways that the public interests and convenience required that any repairs be made to this or any other bridge, or that this or any other bridge ought to be built, or that said commissioner made a personal examination of this or any other bridge, and that the commissioner of highways never furnished the township clerk with the amount of orders drawn in writing for the repairing of said bridge in any form. Under these findings the application of the law made by the learned circuit judge was irresistible. The authorizing and levying of a tax cannot entirely be done by parol. Cooley, Tax'n, 247; *Moser* v. *White*, 29 Mich. 59; *Powers' Appeal*, Id. 504; *Faymouth* v. *Koehler*, 35 Mich. 22;

Clay v. *Improvement Co.*, 34 Mich. 208; *Kroop* v. *Forman*, 31 Mich. 144; *Doe* v. *McQuilkin*, 8 Blackf. 335; *Page* v. *Cardegan*, 6 N. H. 182, 191; *Farrer* v. *Fessenden*, 39 N. H. 268, 277; *Gearhart* v. *Dixon*, 1 Pa. St. 224, 228.

There is no occasion for considering the other points of defendant's counsel. This one disposes of plaintiff's case under his title for taxes of 1880 adversely to him, and the judgment at the circuit must be affirmed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

WINGARDEN v. VERHAGE.

(*Supreme Court of Michigan.* January 5, 1888.)

PARTNERSHIP—ACCOUNTING—PROFITS.

In a suit for a partnership account, it appeared that defendant had received all payments made to the partnership, that complainant had put $82 into the business in the first instance, and had increased that amount by a sum of $50 and certain profits left in the business to $165; that other profits of the partnership amounted to $181.53, and losses to $66.66, leaving a net profit of $114.87. *Held* that, under this evidence, complainant was entitled to receive one-half of the net profits, and also the amount of principal put in by him, for which sums the defendant should account to the complainant.

Appeal from circuit court, Ottawa county, in chancery; DAN J. ARNOLD, Judge.

This action was brought by James Wingarden against John Verhage for a partnership account. The decree of the court below was in complainant's favor. Defendant appealed.

P. H. McBride, for appellant. *J. H. Tatem*, for appellee.

CHAMPLIN, J. In the spring of 1883 the parties to this suit entered into a copartnership in the purchasing and selling of potatoes. Each party was to devote his time to the business, and the profits and losses were to be shared equally. There was no fixed amount of capital, nor was the partnership name agreed upon. The business of the firm appears to have been transacted in the name of the defendant, who made all the shipments of potatoes and received the pay therefor. The bill is filed to obtain an accounting and settlement of the partnership affairs. It is impossible to do exact justice between these parties for the reason that no proper books of account were kept, and there is no means of ascertaining with exactness the cost of the potatoes purchased. It is shown that the parties paid from 35 to 50 cents a bushel; but no account was kept, and there is no way of ascertaining how many bushels were purchased for each price. The complainant testifies that the average profit was 10 cents a bushel, and that there were no losses. The defendant denies this, and shows losses upon the sales of two or three car-loads. I am satisfied from the testimony that complainant invested all money advanced to him by the defendant in the purchase of potatoes. Complainant admits the receipt of $192.70, and produces receipts from persons from whom he bought potatoes to the amount of $192.30, besides one of $17.64 for oats he bought for defendant. In accounting for this money advanced him by defendant, he includes a receipt from his brother for potatoes purchased from him, of $89. The complainant testified that he put into the partnership business $82 he had on hand in the first instance, and afterwards the profits on the first car-load sold; $100 avails of a note which he owned; and $50 which he borrowed. He testifies also that he turned the note out to his brother to pay for the potatoes purchased from him. If he did this, he could not have applied the money received from defendant to that purpose. I am satisfied that he is mistaken with reference to investing the avails of the note in the business. From the testimony I am satisfied that he invested in the business $82 which he had in hand at the commencement; that afterwards he put in his share of the net profits

of the first car-load sold, amounting, according to the testimony of Mattie Verhage, to $33, and the further sum of $50, which he borrowed for the purpose making a total capital put in by him, and for which he should be credited, of $165. The total profits arising from the business testified to by Mattie Verhage amounted to $156.53, to which should be added the profit on last car-load shipped to New Jersey, as testified to by defendant, making a total profit $181.53. From this should be deducted the losses testified to by Mattie Verhage, amounting to $54.36, and the further loss, testified to by defendant, of 35 cents a bushel on 14 bushel of inferior potatoes sold at Lansing, $4.80; and for expenses of team and trip to Grand Rapids, $7.50; total amount to be deducted, $66.66, leaving net profit of $114.87, one-half of which, $57.43, should be credited to the complainant. The total amount of money in defendant's hands, and which he should account for and pay over to complainant, was $222.43, which, with interest to the date of the decree in the court, amounted to the sum of $262.46, for which sum the court below entered a decree.

We think this amount is substantially correct, and the decree is affirmed, with costs.

SHERWOOD and MORSE, JJ., concurred. CAMPBELL, C. J., did not sit.

ROSE *v.* ROSE.

(*Supreme Court of Michigan.* January 5, 1888.)

DIVORCE—PROOF OF MARRIAGE—COHABITATION.

Where, in an action for divorce and alimony, the complainant fails to allege any marriage between her and the defendant, but relies upon the fact of cohabitation to establish the marriage relation, and the record shows that for the greater part of their period of cohabitation plaintiff was incompetent to contract, and does not show that there was any contract of marriage since the disability was removed, a judgment for plaintiff is erroneous.[1]

Appeal from circuit court, Newaygo county, in chancery; C. C. FULLER, Judge.

Bill for divorce by Tirzah Rose against Samuel Rose. There was a decree for complainant. Defendant appeals.

George Lutton, for appellant. *Albert G. Day*, for appellee.

SHERWOOD, J. This suit is brought by the complainant against the defendant to obtain a decree of divorce and alimony. The bill does not expressly aver a marriage between the parties, but that they have lived and cohabited together, and that she has done so as his wife since the month of September, 1862, and that during said period seven children were born to them as the result of said intercourse and cohabitation, and that he has during said period recognized the complainant as his wife, and treated her as such, "and paid bills contracted by her as such, and gave the children his own name;" that she has worked for him, and helped earn his property, and treated him well; that for 10 years past he has been a hard drinker, and has become very abusive to her, and now refuses her support, refuses to recognize the marriage relation between them, or to treat her as his wife, and alleges she is not his wife, nor entitled to any support from him, or to any interest in his property;

[1] Cohabitation and reputation are merely circumstances from which a marriage may sometimes be presumed. It is a presumption that may be rebutted by other facts and circumstances. Appeal of Trust Co., (Pa.) 6 Atl. Rep. 60. When the relation between a man and a woman living together is illicit in its commencement, it is presumed to so continue until a changed relation is proved, and, without proof of subsequent actual marriage, it will not be presumed from continued cohabitation and reputation of a relation between them which was illicit in its origin. Id.; Williams v. Williams, (Wis.) 1 N. W. Rep. 82; Cartwright v. McGown, (Ill.) 12 N. E. Rep. 737; Rice v. Randlett, (Mass.) 6 N. E. Rep. 288.

that she claims she is his wife, and entitled to relief, and of the character she asks in her bill. The defendant made answer, and says that he was not married to the complainant; that she came to his place in July, 1861, with two children, and he employed her to work for him; that she was married to a Mr. Wheeler in 1850, by whom she had the two children; that defendant knew at this time she was married, and so remained until the twenty-third day of January, 1879, when she obtained a decree of divorce from said Wheeler. Defendant further avers that he never lived and cohabited with the complainant as his wife, but admits she remained in his house until the fourth day of February, 1886, and during this time she had six children, of whom four were born alive, and of whom two are now living, a son and daughter; that he is the father of said children, and that they were all born before complainant obtained her bill of divorce from Wheeler; that he never recognized the complainant as his wife, and admits that he has paid bills of her contracting for goods used in his family, and by complainant and the children; that "the children, the fruits of the illicit intercourse, have been and are known by the name of Rose." He denies the cruelty charged, and of being a drunkard, and avers that complainant left his house of her own accord, and without any occasion from him; and avers that when she went she left a house "to which she is at any time welcome to return," and that he never at any time abused her, and does not refuse to support her. Defendant further avers that, after complainant obtained her divorce, she desired and requested him to marry her, but he declined; and that the complainant then understood, as now, that he would never contract that relation with her. These statements of portions of the contents of the bill and answer are sufficient to an understanding of the case upon the pleadings. A large amount of testimony was taken, and the cause was heard before Judge FULLER, who made a decree declaring the complainant to be the legal wife of the defendant since the twenty-second day of January, 1879; that the two children were the son and daughter of the parties; and that the defendant is guilty of the cruelty and excessive drinking charged in the bill. The circuit judge further decreed a divorce between the parties, and that defendant pay to the complainant within 30 days the sum of $6,000 as permanent alimony.

Only two questions need be considered: *First*, has a marriage in fact been established between the parties at common law? and, *second*, if so, has the cruelty been proved? Of course, if the first is found against the complainant, there will be no necessity for the consideration of the other.

We shall not review the testimony in our discussion of the case at any great length. It has all been carefully examined, as well as the pleadings, and they have failed to satisfy us that any marriage between these parties was ever agreed upon, or existed between them. Certain it is that no valid marriage could have been contracted between them previous to the time complainant obtained her divorce from Wheeler, in January, 1879, and the record discloses no treaty between them looking to a marriage since that time. Mr. Rose, in his answer, says that she once approached him upon the subject soon after she obtained her bill of divorce, but that he then informed her that he should not contract such alliance with her; and the circumstance, in the consideration of this question, that the complainant herself nowhere in her bill of complaint, or in the subsequent proceedings, avers that the parties were ever married, or that anything like a marriage contract was ever attempted to be made between them, cannot be overlooked. This was a fact she knew, if it existed, and I think she should have given us the benefit of that knowledge, at least, in her bill of complaint. She can hardly expect that this court will infer the most material fact in her case when she fails to allege, in her bill, its existence. The complainant's bill, and her testimony relied upon to support it, present a sad exhibition of the indecencies and immoralities of these parties, and the continuance of which, through almost an entire generation, unpunished,

is now sought by the complainant to be made the basis of the most sacred of all contracts known to the law. A court of equity will never set its seal of confirmation to such baseness and immorality.

The decree of the circuit judge must be reversed, and complainant's bill dismissed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

BUHL IRON-WORKS *v.* TEUTON *et al.*

(*Supreme Court of Michigan.* January 5, 1888.)

1. SALE—DELIVERY—GOODS IN HANDS OF WAREHOUSEMAN—NOTICE—BILL OF SALE—RECORDING.
   How. St. Mich. §§ 6190, 6193, provide that every sale of goods or mortgage of personal property, in the possession of the vendor or mortgagee, unless accompanied by immediate delivery, followed by actual and continued change of possession, shall be conclusive evidence of fraud as against creditors, unless, in the one case, it shall be made to appear that the sale was made in good faith, without fraudulent intent, and, in the other, unless the mortgage or copy shall be filed in the office of the township or city clerk where the mortgagor resides. In an action of replevin wherein plaintiff claimed title under a bill of sale of property in the hands of a warehouseman, against the attaching creditors of the vendor, who claimed the instrument to be a mortgage, an instruction that if the bill of sale was made in good faith, and without fraudulent intent, plaintiff may recover, and that, even though the bill of sale be a mortgage, the property being in the hands of a warehouseman, it is not necessary to file the bill of sale in the clerk's office, is erroneous, in the absence of notice to the warehouseman of the change of ownership.
2. SAME—EVIDENCE—PAROL, TO SHOW BILL OF SALE A MORTGAGE.
   Parol evidence may be introduced to show that an instrument purporting to be a bill of sale was intended as security for an indebtedness.[1]
3. SAME—SURRENDER OF NOTES BY CREDITOR NOT CONCLUSIVE.
   The surrender by a creditor of certain notes due from a debtor, upon the execution of a bill of sale by the latter to the former, is not conclusive that the transaction was intended as a sale of the goods, and not a mortgage.
4. SAME—AGREEMENT TO RETURN GOODS.
   Where a creditor takes a bill of sale from a debtor with the understanding that, upon the payment of certain indebtedness, the goods shall be returned, the transaction is of the character of a mortgage, rather than a sale.
5. TRIAL—CONFLICTING EVIDENCE—PROVINCE OF JURY.
   Where the testimony upon a question in issue is conflicting, an instruction of the court directing the verdict upon that question would be error.

Error to circuit court, Wayne county; WILLIAM JENNISON, Judge.

Replevin brought by the Buhl Iron-Works against the firm of Teuton, McWilliams & Co. to recover certain steam fixtures. Verdict and judgment for plaintiff. Defendants bring error.

Brennan & Donnelly, for appellants. *Meddaugh, Driggs & Harmon*, for appellee.

CHAMPLIN, J. The plaintiff and defendants were unsecured creditors of the Detroit Tug & Transit Company. The plaintiff is a corporation. The defendants are copartners doing business under the firm name of Teuton, McWilliams & Co. The indebtedness to the plaintiff was evidenced by two promissory notes, due on the sixth and eighth of January, 1886, respectively, for $1,000, and were payable at the Detroit National Bank. The plaintiff claims that on the eighth of January, 1886, it purchased the property in dispute,—consisting of one 12-inch rotary steam-pump, built by Silsby Manufacturing Company; seven pieces of suction pipe; one strainer; one slip-joint; one steel portable boiler, built by the Eagle Iron-Works; one box of tools and connections, complete, used with said boiler,—and gave in payment therefor

[1] See, also, Allen v. Bryson, (Iowa,) 25 N. W. Rep. 820.

the two promissory notes above mentioned. A bill of sale of the property was executed, and delivered to plaintiff, in the following form:

"DETROIT, January 8, 1886.

"*Buhl Iron-Works, bought of Detroit Tug and Transit Co.*

1 12-inch rotary steam-pump, with suction pipe, strainer, tools, and connections, complete.

1 steam-pump, boiler, and outfit, complete, now stored in warehouse foot of 3d street, - - - - - - 2,000.

"Received payment, January 8, 1886.

"DETROIT TUG AND TRANSIT CO.,
"Per S. A. MURPHY, President."

The property was stored in a warehouse owned by Chesebrough & Co. It was further claimed that the Morton Truck Company was ordered to send a truck to the warehouse and deliver the property to the Buhl Iron-Works at its shop on Third street. At the time the bill of sale was made out, the Detroit Tug & Transit Company was pretty well in debt to other parties, and among them the defendants, Teuton, McWilliams & Co. It further appeared that the transit company had the warehouse rented for two years, and the pumps and boiler had been put in there at the close of navigation, and the transit company stored them there when not in use. Both pump and boilers were on wheels, and could be readily removed from the warehouse. Chesebrough & Co. had a claim for storage on this property, at this time, for $383.90, but this amount was disputed by the transit company. When the Morton Truck Company went to the warehouse for the property, Mr. Chesebrough refused to deliver it, for the reason that Chesebrough & Co. had a claim for storage amounting to $383.90, and they did not deliver it. The property remained in the warehouse, and on the eleventh of February, 1886, the defendants commenced a suit in attachment against the Detroit Tug & Transit Company, and attached the property covered by the bill of sale. Judgment was regularly entered September 16, 1886. Execution issued, which was levied upon the same property, and advertised and sold, subject to the charges of Chesebrough & Co. for storage to defendants. The defendants paid the warehouse charges, and afterwards removed the property, and rented it to other persons. It further appears from the testimony that neither the Detroit Tug & Transit Company nor the Buhl Iron-Works notified the warehouseman that the property had been sold by the one, or purchased by the other. There was testimony tending to prove that the bill of sale was given as security for the indebtedness of the Detroit Tug & Transit Company to Buhl Iron-Works, and that the original indebtedness was never discharged; that it was arranged and agreed that the Detroit Tug & Transit Company could have the property back on paying the Buhl Iron-Works the said indebtedness; that a settlement was had, and by agreement made with Mr. Murphy, the president of the transit company, the property was reconveyed, not to the Detroit Tug & Transit Company, but to the Detroit Tug & Wrecking Company. This agreement was perfected about the time the suit in replevin in this case was commenced, although the understanding had existed for a long time previously. The Buhl Iron-Works, before bringing suit, made demand of the defendants of the property, but did not offer to pay any warehouse charges.

The court instructed the jury that if they were satisfied that the bill of sale was made in good faith, and without any design or intent to defraud the defendants, or other creditors of the tug company, the plaintiff was entitled to recover, subject to the lien of the warehousemen; that, even though the so-called bill of sale was a mortgage, yet as the property when it was sold to Buhl Iron-Works was in the hands of a third party, namely, in the hands of a warehouseman, it was not necessary to file the bill of sale in the clerk's office, and that therefore the question of notice was not raised. He, however, permitted the defendants to submit to the jury the following question: "Was the trans-

fer of the property to the Buhl Iron-Works a sale outright, or was it given as security." The jury retired, but returned into court, and said they could not agree upon the special question. The court then withdrew the question from them, and they thereupon returned a verdict for the plaintiff, subject to a lien in favor of the defendants for storage claim. The amount of such lien they did not find. The defendants' counsel, previous to the charge of the court to the jury being given, requested the court to instruct the jury as follows: "(1) If the jury find, from the evidence, that the transfer of the steam-pump and boiler in question was as a security for the indebtedness, then the right of the Buhl Iron-Works is that of a mortgagee, and the instrument should have been filed in the city clerk's office, and, unless it was so filed, the defendants are entitled to recover. (2) The jury is further instructed that, even though the paper purporting to transfer the pump and boiler to the Buhl Iron-Works may be in form a bill of sale, yet it may be shown by parol testimony that the transfer was intended as security. The surrender of the notes (if they were surrendered) on the making of the bill of sale is not conclusive that it was a sale. (3) If the Buhl Iron-Works retained its claim against the Detroit Tug & Transit Company, and did not discharge it therefrom, and took the bill of sale with the understanding that, on the payment of the two notes and the open account, the Detroit Tug & Transit Company could have the pump back, then you may find that the transfer was given as a security. (4) You are further instructed that the testimony in the case would warrant you in finding that the bill of sale was given as a mere security, and you may consider all the circumstances of the case in arriving at your verdict."

The legal points involved in the case will be clearer if I quote two sections of our statute relative to fraudulent conveyances. Section 6190, How. St., enacts: "Every sale made by a vendor of goods and chattels in his possession, or under his control, [*Cooper* v. *Brock*, 41 Mich. 491, 492, 2 N. W. Rep. 660,] unless the same be accompanied by an immediate delivery, and to be followed by an actual and continued change of possession of the things sold, * * * shall be presumed to be fraudulent and void, as against the creditors of the vendor, * * * or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intention to defraud such creditors or purchasers." Section 6193, How. St., provides: "Every mortgage or conveyance, to operate as a mortgage of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things mortgaged, shall be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the clerk of the township or city clerk of the city * * * where the mortgagor resides," etc. These sections of the statute are intended to provide against two classes of frauds: The first section relates exclusively to absolute sales and assignments; and the latter, to conveyances intended as security merely. In the case of an absolute sale, where there is no immediate delivery and actual and continued change of possession of the property sold, the sale is presumptively fraudulent merely, as to creditors; which presumption becomes absolute, unless the purchaser makes it appear that the sale was in good faith, and without any intent to defraud creditors. Under the section last cited, the mortgage or conveyance intended as security of property where there is no immediate delivery, and actual and continued change of possession, is absolutely void as to creditors who have obtained liens upon the property, or who became such after the giving of the security, unless such conveyance is filed as provided in the statute. Under this section the question of good faith and intent is immaterial.

Whether, therefore, the bill of sale from the Detroit Tug & Transit Company to the Buhl Iron-Works was an absolute sale, or a mere security for a debt, was one of great importance, as it respected the rights of the parties. If it was an absolute sale, good faith, and absence of intent to defraud creditors, would have excused immediate delivery; but if a mortgage, without immediate delivery or filing, it was void, as against defendants. The court, however, charged the jury that it was immaterial whether it was an absolute sale or a mortgage, because, the property being in the hands of a warehouseman, no immediate delivery in either case was necessary. In this view he regarded the possession of the warehouseman as the possession, not of the vendor, but of a third party. This was error. The warehouseman was not such a third party as dispensed with delivery and actual change of possession. The vendor had control of the property while it was stored in the warehouse. The warehouseman, in one sense, was an agent of the vendor, and his possession was that of his principal. To constitute a change of possession, the warehouseman must at least be notified of the sale or security, and he must thereafter hold it for the vendee or mortgagee. *Wheeler* v. *Nichols*, 32 Me. 233; Blackb. Sales, 28; *Bentall* v. *Burn*, 3 Barn. & C. 423; *Cushing* v. *Breed*, 14 Allen, 376; *Boardman* v. *Spooner*, 13 Allen, 353; *Appleton* v. *Bancroft*, 10 Metc. 236; Wood, St. Frauds, § 338; Browne, St. Frauds, § 318. The point, hitherto, has been only inferentially passed upon by this court. In *Sheldon* v. *Warner*, 26 Mich. 403–407, it was contended that, when the mortgagee got his mortgage, the property was actually out of the possession of the mortgagor, and in that of the boom company, and that thereafter no change of possession or delivery was needed to enable him to hold against third parties. The court said: "But whatever view of this point may be admissible where a party other than the mortgagor has a hostile, or complete and absolute, possession, which excludes the exercise by the mortgagor of control, and disables him from doing anything tantamount to an actual delivery, it appears to me that, in a case circumstanced as this is, there is no room for raising the question. The possession which the boom company appears to have had up to the time of the agreement with the defendants was measurably that of Burt. The nature of the property made it necessary to handle and move it through the action of the company. But whatever they did was not done strictly in the exercise of any dominion over the property. Their doings were not in contravention of any right of property, control, or possession of Burt, [the mortgagor,] but were subservient to his authority and purpose. They did not hold adversely to him, or independent of him. In a limited sense, they were his agents; and so far as the nature of the property, and its position, permitted a change of possession, the custody of the boom company was no obstacle to a change from Burt to the plaintiff." *Carpenter* v. *Graham*, 42 Mich. 191, 3 N. W. Rep. 974, was a case of an absolute sale of goods stored in a warehouse. The vendors gave a written bill of sale, and notified the warehouseman of the sale. He was also notified by the purchaser, and agreed thereafter to hold the goods for the purchaser. It was held that this was a sufficient delivery and change of possession of the property, as against an execution creditor of the vendors.

These cases, and those referred to in the case last cited, settle the doctrine that the delivery must be such as the articles are capable of, and, if in the possession of an agent, such agent must be notified of the sale, and, unless he consents to act as the agent of the vendee or mortgagee, the property ought actually to be taken possession of by the purchaser or mortgagee, for the agent cannot be permitted to hold them as agent of the vendor or mortgagor. To hold that a person may place his property in the hands of his agent, and then, by secret conveyances, bid defiance to his creditors, would afford an easy evasion of the statute, and promote the evils it was intended to prevent. When it is said that a sale or mortgage of goods in the hands of a third person is

good, without an actual delivery, it must be understood as referring to cases where such third person is in possession, and holding adversely to the vendor or mortgagor, so that no better delivery can be made. This was the case in *Nash* v. *Ely*, 19 Wend. 523, cited on plaintiff's brief. Some text-writers have failed to notice the distinction, and have laid it down broadly, from the language used by Chief Justice NELSON in that case, that, if the purchaser or mortgagee finds the property in the possession of a third person when the sale or mortgage is made, he may suffer it to remain until he chooses to take the personal charge of it. And this case has been followed in *Goodwin* v. *Kelly*, 42 Barb. 194. I do not intend to be understood as holding that the consent of the agent or bailee to hold the property for the purchaser or mortgagee is essential to a valid delivery. If he is notified of the transfer, he will cease to hold as the agent of the vendor, and, if he still retains possession, he will become the agent of the vendee by operation of law. *Hodges* v. *Hurd*, 47 Ill. 363.

The facts of this case do not bring it either within the reason or authority of those cases of grain or other commodity in a warehouse, which, by the usages of trade, in commercial transactions, is treated as delivered by passing from vendor to purchaser the written evidence of title and ownerhip. The property sought to be sold and conveyed here were not articles of trade, but parcels of property designed for use, and which had been used by the owner in carrying on its business, and which had been stored in the warehouse for future use, when the season when it could be employed should again open. In this case there was no such delivery and change of possession as the statute requires. The warehouseman was not notified of any sale by the transit company to the Buhl Iron-Works. The property remained in the warehouse more than a month after the bill of sale before it was attached; and so far as creditors knew, or had the means of knowledge, it remained the property of the Detroit Tug & Transit Company; and, so far as Chesebrough & Co. knew, they were holding it subject to their lien for storage for the Detroit Tug & Transit Company.

Under the testimony in this case, the defendants were entitled to the first, second, and third requests above quoted. The fourth request was properly refused. The sufficiency of the testimony to warrant a finding is for the jury, and it would be error for the court to instruct them in the manner requested where there was any conflicting testimony. The judgment is reversed, and a new trial ordered.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

GRAHAM *v.* TOWNSHIP OF ST. JOSEPH.

(*Supreme Court of Michigan.* January 5, 1888.)

TAXATION—PERSONAL PROPERTY—CORPORATE STOCK—ERRONEOUS TAXATION OF CORPORATE PROPERTY.

Sess. Laws Mich. 1885, No. 153, § 2, provides that "all shares in foreign corporations (except national banks) owned by inabitants of this state" shall be taxed. "Shares in corporations, the property of which is taxable to itself, shall not be assessed to the shareholders." Section 4 provides all corporate property, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, where its principal office in this state is. By subdivision 2 of section 13, each person is required to set forth, as property liable to taxation, "all shares in foreign corporations, (except national banks,) and their value." And by section 2 it is provided that, for the purpose of taxation, personal property "shall include all goods and chattels within the state; all ships, boats, and vessels belonging to inhabitants of this state;" and that the personal property of a non-resident cannot be taxed unless it has an actual *situs* in the state. Plaintiff, a resident of defendant township, was taxed on stock in a foreign corporation, whose boats lying at Benton in the state were taxed there. *Held* that, as the boats were improperly taxed, the stock was liable to be taxed by defendant.

Case made from circuit court, Berrien county; A. J. SMITH, Judge.

John H. Graham sued the township of St. Joseph to recover a tax alleged to have been improperly levied. Judgment for the plaintiff, and case made.

L. C. Fyfe, for plaintiff. *N. A. Hamilton*, for defendant.

SHERWOOD, J. The plaintiff in this case is a resident of the township of St. Joseph in the county of Berrien, and in 1886 was a stockholder in the Graham & Morton Transportation Company, a corporation organized under the laws of the state of Illinois. His stock was assessed in the township where he resided that year, and he paid the taxes levied against him under such assessment, protesting against the same, and he brings this suit to recover the taxes he thus paid. The testimony was by stipulation, and in substance is as follows: (1) All the stock of the corporation is owned by Andrew Crawford, who resides in Chicago, Illinois; J. H. Graham, who resides in St. Joseph; and J. S. Morton, whose residence is at Benton Harbor, Michigan. (2) J. H. Graham has resided in St. Joseph more than a year last past; and that there was assessed against him upon his stock, for 1886, taxes to the amount of $171.55, and that the same was paid by him, under protest and involuntarily, to the township treasurer for the township; and that this suit was instituted in time under the statute to recover them. (3) The property of the corporation was assessed to it, and taxes paid thereon in the township of Benton, in which Benton Harbor is situated, for 1886. The corporation owns no real estate, and in its business uses the docks and warehouses owned by Crawford and the plaintiff, and it has no docks, warehouses, or office elsewhere. At the time of the assessment of the plaintiff's stock, none of the company's property was elsewhere than at Benton Harbor, and its books and bank-account were also kept there. (4) A portion of the company's property consists of two steam-boats; Benton Harbor being their winter port. When the assessment of the plaintiff's stock was made by the supervisor of St. Joseph, the plaintiff protested against being assessed for his stock, and informed the officer that all of the company's property was assessable in Benton, and was so assessed; but the supervisor insisted upon making the assessment, which resulted in the plaintiff being obliged to pay the amount stated. It is conceded by the stipulation that, if the plaintiff's stock was properly assessable in St. Joseph, then the tax was legal, but, if not, then it should be repaid to the plaintiff. Upon the statement of facts, of which the foregoing is the substance, the circuit judge found that the stock of plaintiff was not properly assessable in the township of St. Joseph, and judgment was rendered accordingly.

The question in this case depends upon the proper construction of the provisions of the tax law of 1885, at page 175. Under this statute, real estate, for the purposes of taxation, "shall include all lands within the state, and all buildings and fixtures thereon and appurtenances thereto. Except in cases otherwise expressly provided by law, personal property shall include all goods and chattels within the state; all ships, boats, and vessels belonging to inhabitants of this state, whether at home or abroad, and their appurtenances." See section 2. Section 4 of the act provides that "all corporate property, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation. The place where its principal office in this state is situated shall be deemed its residence." Section 2 also provides: "All shares in foreign corporations (except national banks) owned by inhabitants of this state shall be taxed. Shares in corporations, the property of which is taxable to itself, shall not be assessed to the shareholders." Under the second subdivision of section 13, "each person is required to set forth in his statement of his property, for taxation, to the supervisor, all shares in foreign corporations, (except national banks,) and their value"

There can be no question but that, under the foregoing provisions, the plaintiff's shares of stock are taxable in St. Joseph, where he lives, unless they are exempt under the last clause quoted from section 2. If the property of the company was not legally taxed in Benton, the fact that it was taxed there could not affect the right to tax the plaintiff's stock in St. Joseph. Was the company's property properly taxed in Benton? If so, the judgment should be affirmed; the supervisor having been informed of the Benton assessment when he listed and assessed the plaintiff's stock. There is no question but that the property taxed was the two vessels, and that they belonged to the Graham & Morton Transportation Company at the time the assessment was made, and that the company was a foreign corporation, having its residence in Illinois. A tax is a portion of the property of the citizen required by the government for its support in the discharge of its various functions and duties, and may be imposed when either person or property is within its jurisdiction. "A personal tax cannot be assessed against a non-resident; neither can the property of a non-resident be taxed, unless it has an actual *situs* within the state, so as to be under the protection of its laws." Vessels are taxable property, and may be taxed to the resident owner in this state the same as other property; and a corporation whose property is taxable in this state stands precisely on the same footing as an individual, under our taxing laws. It is unquestionably the general rule that personal property can only be assessed to the owner at the place where he resides; and if it is sought to tax it in another jurisdiction because of its tangible character, and its location being there, the authority so to do must be plainly written in the statute. It was held in *Hays* v. *Steam-Ship Co.*, 17 How. 596, that a vessel registered in New York, plying between Panama and San Francisco, was not taxable in California. It was also held in *St. Louis* v. *Ferry Co.*, 11 Wall. 423, that ferry-boats running to a city, but owned in another state, are not taxable in the city as property within it. See, also, *State* v. *Haight*, 30 N. J. Law, 428; *People* v. *Commissioners of Taxes*, 11 Alb. Law J. 401; *Morgan* v. *Parham*, 16 Wall. 471; *Com.* v. *Hays*, 8 B. Mon. 1.

Under the constitution, taxes are to "be levied on such property as shall be prescribed by law." The legislature in the statute hereinbefore referred to, in describing the property in this state to be taxed, as we have seen, divide it into real and personal property, and then says, in more particularly defining personal property, "all goods, chattels, and effects belonging to inhabitants of this state, situate within this state." Vessels are a peculiar class of property. They are distinguished from other personal property by the statute. This property, owned in other states, owes no duty to Michigan in passing over the waters of the lake, or floating upon its harbors during the close of navigation, which would license the state to seize upon a portion of the boat's property, and use it to discharge the burdens of the state. For certain purposes, it is true, the boats while lying in the harbor, or riding upon the waters of the lake, within the limits of the state, is within the jurisdiction of the state. The free use of those waters, however, is secured to the owner of the vessel by the constitution and laws of the land; and I do not think it was the intention of the legislature, under our tax law, to impose upon a vessel owned in another state the burden of contributing to the support of our state government because she lands her freight and passengers at our wharves, or rides at anchor in our harbors during the raging of the storm or the inclement season of winter.

I think these boats were not taxable in Benton, and that the plaintiff's stock was properly taxed in St. Joseph. The judgment should therefore be reversed, and judgment entered in this court for defendant, with costs of both courts.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

MYNNING v. DETROIT, L. & N. R. CO.

(*Supreme Court of Michigan.* January 5, 1888.)

1. APPEAL—DECISION—LAW OF CASE.
When this court has declared the law of a case, the rule of law laid down in the decision of the cause remains the law, to be applied upon the same state of facts in all the subsequent proceedings in the cause.

2. NEGLIGENCE—PROVINCE OF COURT AND JURY.
Where the whole testimony in a case, and all legitimate inferences that can be drawn therefrom, shows that the plaintiff's intestate was injured by reason of his own want of ordinary care, the question whether there was or was not negligence on the part of the injured party is a question of law, to be decided by the court.[1]

3. SAME—BURDEN OF PROOF—ORDINARY CARE.
In an action to recover damages sustained by reason of defendant's negligence, the burden of proof is upon the plaintiff to show (1) that the injured party was in the exercise of ordinary care at the time he was injured; and (2) that the injury was the result of defendant's negligence.

4. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.
In an action based upon negligence, it is error for the trial court to instruct the jury, upon the question of the contributory negligence of the injured person, that "if any reasonable mind can come to a different conclusion than that the plaintiff was guilty of negligence, if there is any doubt upon the subject, or a reasonable mind can form an opposite opinion, instead of that he was guilty of negligence, then it would be for them to deliberate upon the testimony, and ascertain if, from all of it, they can come to the conclusion that the plaintiff was not guilty of contributory negligence, and hence ought to recover."

5. SAME.
It is error for the trial court to charge the jury, respecting testimony which the defendant claimed conclusively showed that the deceased did not exercise ordinary care, that such "testimony must be such as to drive you to that conclusion,—to prevent your arriving at any other conclusion."

(*Syllabus by the Court.*)

Error to circuit court, Mecosta county.

Chris T. Mynning, administrator of Phillip A. Mynning, deceased, sued the Detroit, Lansing & Northern Railroad Company for the death of his decedent. Judgment for the plaintiff, and defendant brings error.

Palmer & Palmer, for appellant. *Andrew Hanson*, for appellee.

CHAMPLIN, J. When this case was before us the first time, upon the testimony introduced on the part of the plaintiff, we held that the question of defendant's contributory negligence was not free from doubt, and that the court did right in submitting the case to the jury. *Mynning* v. *Railroad Co.*, 59 Mich. 259, 26 N. W. Rep. 514. When the case came before us again, we held that, by the plaintiff's own showing, the deceased was chargeable with such contributory negligence as precluded a recovery, (*Mynning* v. *Railroad Co.*, 31 N. W. Rep. 147,) and the case was sent back for a new trial. Ordinarily, where the plaintiff had failed to make a case by reason of its affirmatively appearing that the deceased was himself guilty of contributory negligence, a new trial is not ordered; but it appeared in the record in this case that another person, by the name of Coburn, witnessed the catastrophe, who was not called as a witness, and whose testimony might possibly have aided plaintiff in showing due care on the part of the deceased, and therefore we ordered a new trial. Upon the last trial, this person was not called as a witness, and it may be presumed, either that his attendance could not be pro-

[1] As to the province of court and jury in considering questions of negligence, see Dwyer v. Railway Co., (N. J.) 7 Atl. Rep. 417; Iron Co. v. Fanning, (Pa.) 6 Atl. Rep. 578; Canal Co. v. Webster, Id. 841; Moynihan v. Whidden, (Mass.) 9 N. E. Rep. 645; Railroad Co. v. O'Connor, (Ill.) Id. 263; Burns v. Railroad Co., (Iowa,) 30 N. W. Rep. 25; Barbo v. Bassett, (Minn.) 29 N. W. Rep. 198, and note; Hoye v. Railway Co., (Wis.) Id. 646; Rush v. Railway Co., (Kan.) 12 Pac. Rep. 582; Nichols v. Railroad Co., (Ky.) 2 S. W. Rep. 181; Railroad Co. v. Howard, (Ga.) 3 S. E. Rep. 426; Walton v. Ackerman, (N. J.) 10 Atl. Rep. 709; Rayburn v. Railway Co., (Iowa,) *ante*, 606; Lilly v. Railroad Co., (N. Y.) 14 N. E. Rep. 508.

cured, or that his testimony would not shed any new light upon the transaction. The case has again been tried upon substantially the same testimony as that which came under our review in the last trial, and has resulted in a verdict for the plaintiff. When the case was here last, we laid down the rule of law that must control the decision upon the facts then appearing upon the record before us. So long as the facts remain the same, the rule of law applied by this court in the decision of the cause remains the law of the case in all subsequent proceedings therein.

It appears from the record before us that, upon the last trial in the court below, a stipulation was entered into between the parties as follows: "No witnesses to be sworn on the coming trial of this cause except those which were sworn on the last trial; and either party may read such of the testimony given upon said last trial, as reported by the stenographer, as he may desire." Under this stipulation, the plaintiff's attorney read in evidence to the jury such of the testimony given upon the trial of the case as he desired. He refused to read to the jury the testimony of the witness McLaughlin, mentioned in the opinion when the case was last here. Thereupon counsel for defendant offered to read the testimony of this witness as testimony in plaintiff's behalf. The plaintiff objected, and the court ruled that defendant might read the testimony of any witness in his own behalf, but he could not introduce it as the testimony of the plaintiff's witness. The defendant's counsel excepted to the ruling, and then read the testimony of the witness McLaughlin in evidence. The ruling was in accordance with the stipulation. Plaintiff's attorney complained, upon the trial in which the witness McLaughlin testified, that he was surprised at the testimony given by him, and intimated that he had been deceived by the witness. The witnesses Trafford and Wakeman were sworn and examined on the behalf of the plaintiff. Their testimony was not materially variant from that given on the preceding trial. They testified as before to seeing the train approaching from the north; to seeing the deceased approaching the crossing, and coming towards them; that their eyes did not leave him from the time they first saw him, when he was within about 30 feet of the railroad crossing, until he stepped upon the track, and was struck by the train; that he was walking fast, his head down; and that they did not see him stop, or look towards the approaching train, and that they were looking at him the whole time. The only legitimate inference that can be drawn from their testimony is that Mynning was aware of the approaching train, and purposely went in front of it; or, which is more probable, that he was unaware of its proximity, and without paying attention, or giving the subject a thought, without taking any caution whatever, carelessly and negligently pursued his way, and in consequence was hit by the train and killed. We have before us upon this record the same testimony and the same facts established that were present in the record when the case was last before us, and, unless we erred in that opinion, the decision in that case must rule this. This is not a case where there was no living witness of the accident; consequently there is no room for the presumption arising from the natural instinct of self-preservation that the deceased was exercising due care to preserve his life or person from injury. Here, then, is no conflicting testimony upon the question of the contributory negligence of Mr. Mynning. There is no conflict between the testimony of Trafford and Wakeman, introduced by the plaintiff, and that of McLaughlin, introduced by the defendant. There is perfect harmony between them, and, if the testimony of McLaughlin is laid entirely out of view or disbelieved, the plaintiff's case is not improved, nor contributory negligence disproved. Giving full faith and credit to the testimony introduced for the purpose of proving that the deceased was in the exercise of ordinary care at the time of the accident, and giving to the plaintiff the benefit of all legitimate inference to be drawn from such testimony, it becomes a question of law, for the trial court to determine, whether the testimony, conceding its truth, es-

tablished the fact that Mr. Mynning was in the exercise of ordinary care. Upon this question, acting upon the testimony given in this case upon the last and preceding trial of the cause in the court below, there was no room for unbiased, reasonable minds to come to a different conclusion than that Mr. Mynning was not in the exercise of ordinary care in approaching and entering upon the railroad crossing in question. It is needless to recapitulate the testimony. We did so in the opinion filed when the case was here last, and the testimony is no different now from what it was then.

The defendant's counsel requested the court to instruct the jury that, under the evidence in the case, the plaintiff was not entitled to recover; which the court refused. This request raised the question of law, and it was the duty of the court to pass upon it. He refused to so instruct the jury, but, on the contrary, gave them the following instructions, which, to say the least, are certainly unique. After reading to the jury from the opinion of this court a statement of the facts, from which we held that, as a question of law, the defendant was not liable, because of the want of ordinary care of Mr. Mynning, he said: "Now, gentlemen, if you should find the testimony in this case to correspond with what has been read to you as narrated by Justice CHAMPLIN, in delivering this opinion, then you must come to the conclusion that the deceased was guilty of contributory negligence, and you must find against the plaintiff and for the defendant. If, on the other hand, you should find that the testimony changed, or that any reasonable mind can come to a different conclusion than that the plaintiff was guilty of negligence, if there is any doubt on the subject, or a reasonable mind can form an opposite opinion, instead of the one which is stated here, and which the court has stated to you, then it would be for you to deliberate on this testimony, and ascertain if, from from all of it, you can come to the conclusion that the plaintiff was not guilty of contributory negligence, and hence ought to recover." The jury is not only told that they are at liberty to come to a different conclusion upon the law of the case than that at which this court arrived, but he puts the question of contributory negligence to them as if the burden of proof was upon the defendant to show contributory negligence, and that it must be shown beyond a reasonable doubt; instead of telling them that the burden of showing that the plaintiff's intestate was exercising due care, and did not contribute to the injury by his own negligence or want of care, was upon the plaintiff. And this error is further emphasized in the concluding sentence of the following portion of his charge: "It is claimed that there is testimony which conclusively shows that the deceased did not use ordinary care. If you find that to be the fact, if you find from the testimony that Mr. Mynning, the deceased, walked upon the railroad track knowing it to be there, and finding from the testimony that he was familiar with the surroundings, and knew that the track existed, which is of itself a notice of danger,—a railroad track being a notice of danger in itself,—I say, if you should find that he was familiar with the premises, and knew that track existed, and he walked upon the track, paying no attention to its existence,—went there blindly, with his head down, and treating the highway as being continuous, without any railroad track crossing it at all, and paying no attention to anything,—then you should find a verdict for defendant of no cause of action. And this testimony must be such as to drive you to that conclusion,—to prevent your arriving at any other conclusion." Further comment is unnecessary. The law laid down by the court in these portions of his charge was wrong, and would call for a reversal of the judgment were the other point to which attention has been called not conclusive.

The judgment is reversed. As it is not probable that a different case can be made upon another trial, one will not be ordered.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

PANGBORN *v.* CONTINENTAL INS. CO.

(*Supreme Court of Michigan.* January 5, 1888.)

1. COMPROMISE—PROCUREMENT BY FRAUD—TENDER OF AMOUNT PAID NECESSARY BEFORE SUIT.
In an action on an insurance policy, plaintiff claimed that an alleged compromise was effected by defendant's fraud. *Held*, that plaintiff cannot recover unless he shows repayment, or tender, of the compromise money before suit brought.

2. PLEADING—AMENDMENT—WHEN PARTY ENTITLED TO.
In an action on an insurance policy, an appeal having been taken and the case sent back for a new trial, defendant, at the first opportunity, asked leave to amend so as to make plaintiff's title to the property material, the defect in the answer, in this respect, having been brought out on appeal. *Held*, that it was error to refuse such leave.

Error to circuit court, Huron county; WATSON BEACH, Judge.

Action of *assumpsit*, by John C. Pangborn against the Continental Insurance Company, on a fire insurance policy. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant brings error.

For decision on a former appeal, see 29 N. W. Rep. 475.

F. A. Baker and *Chas. L. Hall*, for appellant. *Wisnor & Snover*, for appellee.

SHERWOOD, J. This action is upon a policy of insurance dated August 21, 1882. The defenses are—*first*, misrepresentations relative to the title and incumbrances upon the plaintiff's property, made in his application; *second*, an accord and satisfaction. In the application for insurance, the plaintiff represented that he owned the property in fee-simple, which consisted of 160 acres; that it was incumbered to the amount of $500 only, which would be due in 1883; and that the cash value of the land was $4,500.

The case was in this court once before. See 29 N. W. Rep. 475. The plaintiff had, on the first trial, been allowed to recover. That judgment was reversed in this court. In that case we held: "If the representation of quantity was relied upon as a warranty, and its falsity as a defense, defendant should have set it up in its notice;" that "under the rules established by this court, the defendant must confine itself to the fraud or falsehood alleged in its notice;" and that, under the defendant's notice, it was immaterial whether the plaintiff owned any other land than the 40 acres upon which the buildings insured stood.

Defendant, wishing to avail itself of its whole defense in the premises, at the first term of the circuit court after cause was sent back for a new trial, by its counsel, upon proper notice and showing, made a motion for leave to amend the notice of defendant in such manner as to make the plaintiff's title to the 160 acres of land described in the application material. This motion was denied by the court, and the defendant was not permitted to avail himself of one of its principal defenses, one which had existed from the moment the policy became operative, and must have been known to the plaintiff. It was not a new defense, nor a technical one, but went to the merits and very foundation of his claim. The amendment was offered at the earliest opportunity after it was found to be necessary by defendant's counsel, and denying the motion was equivalent to depriving the defendant of his right to make his defense altogether. Ordinarily, the granting of motion to amend pleadings is a matter within the discretion of the court, and cannot be reviewed here; but when, in a case like this, where a party is deprived of a meritorious defense to the plaintiff's entire claim in suit by the ruling, the action of the court becomes so prejudicial to the rights of the party affected thereby, that he may allege error, and have the case reviewed in this court for its correction. Where, in the trial of a cause at the circuit, involving only a common-law issue, the application of a rule of practice becomes so oppressive as to de-

prive a party of his just rights irrevocably, as in this case, error will always lie to this court, to redress such grievance. The defendant should have been allowed to make the proposed amendment to his pleadings.

On the trial, the plaintiff obtained a verdict for the sum of $1,087.16. The testimony of both parties tended to show a settlement of the plaintiff's claim, and it appears that he signed a receipt, on the back of the policy, for the amount paid by the company, and accepted a draft for the amount, when he surrendered the policy, and signed the contract for the compromise, which was attached to the same. It further appears that the plaintiff indorsed the draft and received the money on the same; he, however, alleges that the settlement was brought about by deceit and fraudulent practices of the defendant's agent, who did the business. This allegation the defendant denies. The plaintiff did not tender back, or pay to the defendant, the money he received of the company upon the compromise, before bringing this suit. The sum received was $100.

Under these circumstances, the following request of defendant's counsel should have been given as requested: "If the jury find from the evidence that there was a settlement and compromise of the claim of the plaintiff against the defendant in the case, and that the plaintiff received, either in cash or by draft, the amount to be paid on such settlement and compromise, but has not repaid or tendered back the same to defendant, before the commencement of this suit, the plaintiff cannot recover in this case." This request is within several decisions of this court. *Wilbur* v. *Flood*, 16 Mich. 40; *Jewett* v. *Petit*, 4 Mich. 508; *De Armand* v. *Phillips*, Walk. Ch. 186; *Galloway* v. *Holmes*, 1 Doug. (Mich.) 330; *Dunks* v. *Fuller*, 32 Mich. 242; *Martin* v. *Ash*, 20 Mich. 166; *Lumber Co.* v. *Bates*, 31 Mich. 159; *Railroad Co.* v. *Dunham*, 30 Mich. 128; *Crippen* v. *Hope*, 38 Mich. 344. The plaintiff's right to recover is based upon the theory that the settlement was obtained through the fraud of defendant's agent. The plaintiff cannot claim the benefit he has received through the fraudulent contract, and at the same time repudiate its binding force. *Railroad Co.* v. *Dunham*, 30 Mich. 128; *Crippen* v. *Hope*, 38 Mich. 344; *Gray* v. *St. John*, 35 Ill. 222; *Mann* v. *Stowell*, 3 Chand. 243. This is an action of *assumpsit* upon the contract, and not a suit for fraud.

Other points are made, but most of them will hardly recur upon another trial, and therefore we do not think it profitable to consider the case further.

The judgment must be reversed, and a new trial granted.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

PRICE v. STAGRAY, Commissioner of Highways, *et al.*

(*Supreme Court of Michigan.* January 5, 1888.)

1. HIGHWAYS—DISCONTINUANCE—POWER OF COMMISSIONERS TO ADJOURN PROCEEDINGS.
How. St. Mich. § 1300, provides that the commissioner may adjourn proceedings to discontinue a highway no longer than 20 days. *Held*, that such proceedings had on June 6th, pursuant to a 20-days adjournment from May 18th, are irregular and void.

2. SAME—NOTICE OF PROCEEDINGS TO DISCONTINUE.
How. St. Mich. § 1298, provides that proceedings to discontinue a highway must be after 10 days' notice. *Held*, that such proceedings, at a hearing on June 6th, pursuant to notice given June 1st, are irregular and void.

Certiorari. On petition of Mortimer Price to revise the proceeding of William Stagray, commissioner of highways, and William Felker, clerk of Hampton township, Bay county, in discontinuing a certain road in said township.

Lindner, Porter & Haffey, for petitioner.

SHERWOOD, J. This case is a *certiorari* to the commissioner of highways, and the clerk of the township of Hampton, in the county of Bay. The proceedings we are asked to review were taken by said commissioner, for the purpose of discontinuing a certain highway running on the east and west quarter line, between the centers of sections 25 and 26, in said township. It appears from the record that an application was made to the commissioner to discontinue the highway on the third day of May, 1887. On the seventh day of May, a notice was given for the hearing upon said petition on the eighteenth of said month. This notice was addressed to "Mr. Price." Petitioner appeared on that day, at the place appointed for the hearing, and took some objections to the proceedings; and the commissioner announced that the hearing would be adjourned 20 days, within which time new notices would be made and served upon the parties interested. Nothing further appears to have been done until the first day of June, 1887, when the commissioner made and served upon the petitioner the following notice:

"COUNTY OF BAY, TOWNSHIP OF HAMPTON.

"*Take Notice.* To Mr. Patrick Borgan, M. F. Price, Peter Van Erp, Michael Ingelhartt, John Callahan, Mrs. Linderman, Mary Meagher, Dennis Gallagher, Patrick Toohey, Phillip Webber, and John Carnel: You are hereby notified that the undersigned commissioner of highways will meet at the house of Peter Van Erp in said township, at nine o'clock in the forenoon of the sixth of June, 1887, for the purpose of discontinuing the Webber road.

"*Dated June* 1, 1887. WILLIAM STAGRAY,

"Commissioner of Highways for the Township of Hampton."

The return, continuing, gives the following as the final action of the commissioner:

"*Discontinuing a Highway.* To discontinue the highway known and described as follows: 'Webber road, commencing at a point twenty-five feet and twenty-five hundredths feet (25 25-100) north of the center of section twenty-five, (25,) in town fourteen (14) north, of range five (5) east; thence running in a westerly direction to a point seven feet north of the center of section twenty-six, (26,) in town fourteen (14) north, of range five (5) east.' The said commissioner did, after due notice, given according to law, proceed on the sixth day of June, 1887, to view the premises described in said application and notice, and ascertain and determine the necessity of discontinuing said highway; and he doth further return that he considers and determines that the said described highway shall be, and the same is hereby, discontinued, and that he does not find any damage sustained by said discontinuance.

"Given under my hand this ninth day of June, 1887.

"WILLIAM STAGRAY,

"Commissioner of Highways of the Township of Hampton."

The petitioner claims the proceedings are erroneous for the following reasons: *First*, that the commissioner erred in adjourning the hearing for 20 days to give new notices; *second*, that, if such adjournment could be had legally, the hearing should have been on the seventh instead of the sixth of June, 1887; *third*, that the notice, given for the hearing on the sixth of June, to petitioner was defective and insufficient.

In cases of this kind the record must show affirmatively that the requirements of the statute have been complied with, and that the commissioner has obtained jurisdiction in the matters, in order to sustain his proceedings. *People* v. *Scio*, 3 Mich. 121; *Ross* v. *Commissioners*, 32 Mich. 301; *Moetter* v. *Commissioners*, 39 Mich. 726. Whatever may be thought of the first point made by the petition, we think the second and third must prevail. Under the statute, the commissioner could adjourn the hearing but 20 days, and that day should have been upon the seventh of June, and not upon the sixth, as was done in this case. How. St. § 1300; *People* v. *Highway Com'rs*, 16 Mich. 64; *Van Auken* v. *Highway Com'rs*, 27 Mich. 415.

The notice for the sixth of June was the one relied upon by the commissioner, and given on the first day of June. The statute requires 10 days' previous notice to be given, which was not done. How. St. § 1298; *Platt* v. *Commissioners of Clay*, 38 Mich. 247; *Detroit Sharpshooters Ass'n* v. *Hamtramck*, 34 Mich. 38; *People* v. *Highway Com'rs of Nankin*, 14 Mich. 528; *Dupont* v. *Commissioners of Hamtramck*, 28 Mich. 362; *Names* v. *Commissioners*, 30 Mich. 490.

The action of the commissioner must be set aside, and the proceedings quashed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

FLYNN v. FLYNN.

(*Supreme Court of Michigan.* January 5, 1888.)

1. MORTGAGES—AGREEMENT TO DISCHARGE—ASSIGNMENT.
Complainant deeded a portion of his farm to his son, for an expressed consideration of $1, but alleged that it was agreed that the son should pay a mortgage on the whole farm; the son paid it, but had it assigned to him, claiming that his father had driven him from the other part of the farm, which they were to work in common, and from the crops of which he was to get money to pay the mortgage. *Held* that, under the evidence, complainant was entitled to have the mortgage discharged of record.

2. SAME—REFORMATION OF DEED NOT NECESSARY TO RELIEF AGAINST ASSIGNMENT.
Complainant filed a bill to reform a warranty deed, to show that the consideration was the payment of a certain mortgage, instead of $1, as expressed, and to have the mortgage, which the grantee had paid and had assigned to himself, discharged of record. *Held*, that it was not necessary to reform the deed, nor change its covenants, and the bill was properly drawn to obtain the discharge of the mortgage.

Appeal from circuit court, Clinton county, in chancery; V. H. SMITH, Judge.

Bill in equity by John Flynn, against Jason H. Flynn, to rectify a deed, and decree a mortgage paid, and to be discharged. Decree for complainant, and defendant appealed.

Fedewa & Lyon, for complainant. *Perrin & Baldwin*, (*A. L. Spaulding*, of counsel,) for defendant.

CHAMPLIN, J. The bill of complaint is filed by a father against his son, praying that a certain deed, executed by the father to his son, may be rectified so as to express the true consideration, and that a certain mortgage be decreed paid, and for a discharge thereof from the record. On the fourteenth day of May, 1879, John Flynn was the owner of the E. ½ of the S. E. ¼, and the N. W. ¼ of the S. E. ¼ of section 14, township 6 N., range 2 W., Michigan, being in the town of Olive, Clinton county, Michigan. On that day he executed a mortgage of the premises above described, to secure the payment of a certain promissory note, of even date, for $314.79, on or before three years from the date thereof, with interest at 7 per cent., to J. R. Lounsbury, of Pontiac, Michigan.

The complainant claims that the defendant agreed to pay this mortgage as a consideration for his deeding to his son the east half of the south-east quarter of the section. The deed was drafted, and the consideration expressed therein is $1. It is a warranty deed, and contains a covenant against incumbrances. The defendant claims that the consideration of the deed, as agreed upon at the time, was his promise and undertaking to pay certain indebtedness which his father owed to different persons in Oakland county, amounting to about $200, which he paid, and he says that, in addition to the deed, he was also to have certain personal property, consisting of two cows, one horse, one wagon, one harness, constituting, substantially, all the personal property his father owned, aside from his household furniture. He

further testifies that, at the same time the agreement was made to deed the farm to him, he agreed with his father that he should live with him, in the house upon his father's 40, and they should work both parcels, and that he would pay the aforesaid mortgage out of the proceeds of the crops raised.

He moved into the house with his father, and occupied it with his wife; his father being the only member of the family living with him, although another son appears to have been there for a time. He put in the land to wheat, and received two-thirds of the crop, giving to his father one-third. The 80-acre tract conveyed to the son was mostly a tamarack swamp, having only from 8 to 10 acres arable land upon it at the time of the conveyance. The father's 40 contained from 20 to 30 acres of tillable land. It appears that, during the first year the parties resided upon the premises, the complainant instigated a quarrel with defendant's wife, and in consequence left the house, and went to reside with a neighbor. The defendant erected thereafter a house upon his land, but before it was completed the complainant returned, and the parties lived together, without further trouble, until defendant's house was completed, when he removed thereto.

The next season but one, the defendant again worked complainant's land upon shares, dividing the crop, share and share alike. When the mortgage matured, defendant paid the money to the mortgagee, and, instead of taking a discharge, took an assignment to himself, and refuses to discharge the same. He gives as a reason therefor that, instead of permitting him to work the land belonging to his father, so as to obtain the means to pay the mortgage, his father drove him off of the place, and refused to let him work it. He testifies to this, and is corroborated by the testimony of his wife. I am not satisfied that this excuse is made out. Mrs. Flynn testifies that, except the one time, she had no further trouble with complainant. He came back and resided in the family with defendant and his wife. He had no team or farming implements to work his farm with. The defendant did work complainant's farm afterwards, and it does not seem to me that the statement that his father drove him off of the place, and refused to let him work it, is borne out by the testimony. The testimony shows that the 80-acre tract was worth from $300 to $600; the personal property, from $96 to $160. It does not seem probable that complainant should convey to defendant all this property, upon his undertaking to pay a few debts, less than $200 in amount; especially as Mr. Lounsbury testifies that he considered complainant "financially bursted" at the time. It is true, that no great reliance can be placed upon complainant's testimony where it is not corroborated. His memory appears to be very defective in regard to his indebtedness at Oakland county, and his whole testimony is indefinite and unsatisfactory. But the testimony of the defendant is not much better. He is quite unable to tell, with three or four exceptions, to whom he paid debts, and the amounts. The debts he does recollect foot up about $160, nearly the same as the value placed upon the personal property by his father.

Samuel W. Smith, the attorney who drew the deed, testifies that the deed was drawn as directed, was read over to John Flynn, and was satisfactory to him. He testifies, further, that Jason M. Flynn was to have this land, free and clear, and was to pay certain debts of his father's. He understood at the time that there was a mortgage on the 120 acres of land, and that Jason was to have the 80 acres, free and clear from the mortgage, and that he was told so by John Flynn. Mr. Smith undoubtedly testifies candidly to his recollection of the transaction. Nevertheless, in order to reconcile it with the testimony of Jason M. Flynn, the defendant, wherein he testifies that he was to pay the mortgage, but was to have the use of his father's farm, to enable him to do so, and that this agreement was made at the same time that the land was agreed to be conveyed, we must conclude that Mr. Smith was not informed of the manner, nor by whom, the mortgage debt was to be paid, in

order to free the land from the incumbrance. It must be remembered that this was an arrangement between father and son; and, on account of the mutual confidence naturally arising out of that relation, the parties would not be as likely to be so exact, or particular, in having all the details and understanding between them stated or reduced to writing, as if the parties did not occupy that relation.

Robert J. Lounsbury testified that John Flynn said to him that he was going to deed to Jason 80 acres of the Clinton county farm, and that Jason had paid his claim against the wheat, and had or was to pay certain other claims, and was to furnish him money, or the means, to move on to the Clinton county farm. He further testified that a deed was made out of the Clinton county farm to Jason, and his recollection is that nothing was said about this 80 acres being subject to this mortgage, but he would not swear positively as to that. In view of Jason's testimony it is clear that he was not informed of the agreement between Jason and his father above referred to.

Abel Haddrill testified that he heard a conversation between these parties in 1879. He says: "Mr. Flynn told Jason he would deed him eighty acres of land up there if he would pay his debts down here, and give him the privilege of working the whole of it, and living in his [John's] house till he could build a house of his own, and that he would help work the place." This testimony is consistent with that of Jason, if it includes "in the debts down here" the mortgage debt. Blakelee's testimony shows that his first conversation with complainant was had before the bargain was made between the parties, and has a bearing only upon the inducement influencing complainant to deed the 80 acres to Jason. He says he heard John say he would like to get his son Jason to go out there and live with him, and didn't want to go alone, and told him that he thought it would be a good thing for him. He further testified that a day or two afterwards, John told him that he would deed, or was going to deed, 80 acres of land out there—Clinton county—to Jason, and he was going to live with Jason.

Jason M. Flynn, the defendant, after testifying about some conversation with his father which led up to the agreement, proceeds to state what the agreement was, as follows: "And then he made me an offer, that if I would pay them debts down there for the eighty acres of land, that he would let me work his forty, and live on it; he would let me live with him,—live as one family, and work with me; I would pay this $314 and some odd cents on that mortgage, and—well, we talked on that, and I—I think I told him I would do that, providing he would turn me out his horse, cows, and a wagon, and the things he had there to work his land with; to take onto the farm such things as I need on the farm,—what things he had; well, I did not want to do it at first; finally I done it; said he would do that; he could help; we could all live together, and work the place, until I would get my own fixed up, and was able to build a house on it; and I was to work his place, and pay that mortgage for the use of his place, until I was able to build a house on my place. *Question.* You say he worked with you? *Answer.* Yes, he worked with me when he was able to work; was to work with me. I was not to pay him for the work; was to live as one family. I was to have the proceeds of the two places, and he was to live on the place with me; him and I together was to work the place, and pay the mortgage off. *Q.* Out of what? *A.* Off from his place and mine; proceeds of the two places." He also testifies that the reason he did not carry out the agreement was that the complainant drove him off the place, and refused to let him work it. This is denied by complainant in his testimony. It appears that defendant did work the place two seasons upon shares, after defendant claims he was driven off, and it does not appear either that complainant worked the place himself, or rented or let it to any other person to work, before the mortgage was paid. I am not satisfied from the testimony that defendant was driven off the place, or that complain-

ant refused to let him work it. In support of complainant's claim as to the consideration of the conveyance to defendant, is the testimony of Joseph Bates and William M. Stocker, who testify, in substance, that defendant stated to each of them, but not in each other's presence, that John Flynn conveyed the land to him in consideration of his paying this mortgage. Complainant's witnesses, Conrad Burkhardt, Henry Schroemer and John H. Fedewa, support the agreement as stated by the defendant.

If, as defendant states, he considered that he was under no obligation to pay off this mortgage debt, because his father had driven him from his place, and refused to let him work it, why did he proceed and pay it? Defendant says he did it to save his own land from a sale under a foreclosure. But this reason is insufficient. The 40 acres covered by the mortgage, and owned by the father, are shown to be worth from $700 to $800. In case of foreclosure, this parcel the defendant could oblige the mortgagee to sell first, and there can be no doubt that it would have brought enough to satisfy the mortgage debt, and leave defendant's 80 free and clear of the incumbrance. The inference, from the fact that he voluntarily took up the mortgage, is quite strong that he paid the mortgage debt in pursuance of his agreement. From the whole testimony, I conclude that the consideration for the conveyance of the land was, in part, at least, that defendant should pay off the mortgage debt, and that he might have the use of both places to enable him to do so; that the complainant has not broken this agreement, or prevented its execution by defendant; that the agreement has been executed by defendant, and the debt paid off by him; that, having paid the debt, according to the agreement, he ought to have discharged the mortgage from the records; that, by refusing to do so, and asserting it as an existing indebtedness, the mortgage is a cloud upon complainant's title to the 40 acres owned by him, which he is entitled to have removed.

The defendant's counsel insists that relief in this case ought to be denied because—*First*, the allegations in the bill as to a mistake in the deed are not supported by the proofs; and, *second*, that to grant the relief would, in effect, be to reform a contract on a collateral issue, and annex an exception to the covenant against incumbrances, not on parol evidence, but against the balance of parol evidence, and change the contract in writing to an entirely different one. The counsel very truly says that "the covenant against incumbrances is not affected by the testimony as to the consideration."

The bill of complaint prays for a reformation of the deed, so as to express the true consideration; but this was unnecessary, as the true consideration may always be shown where it becomes material to do so, without reforming the deed. *Strohaner* v. *Voltz*, 42 Mich. 444, 4 N. W. Rep. 161. It also prays that the mortgage may be decreed paid, and that the same be discharged. This is the important relief asked for, and the bill is properly framed for this purpose. No change is required or necessary in the covenants of the deed. These stand unaffected by the decree asked for, and granted in the court below. The object is to remove the effect of the mortgage as a cloud upon complainant's premises, the mortgage having been paid.

The decree of the circuit court is affirmed with costs.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

FERGUSON v. GLASSFORD *et al.*

(*Supreme Court of Michigan.* January 5, 1888.)

1. MORTGAGES—LIEN—EQUITABLE RULE.
It is an elementary rule that equity will consider an incumbrance in force if the ends of justice can thereby be obtained.

2. SAME—DISCHARGE OF, BY MISTAKE—RESTORATION OF LIEN.
Where a mortgage has been discharged from the record through mistake, it may be restored in equity, and given its original priority as a lien, when the rights of innocent third parties will not be affected.

3. SAME.
A discharge upon the record of a mortgage is not an absolute bar to a foreclosure, unless there has been actual satisfaction. The facts still may be investigated. Such discharge of record is evidence of a high character, and sufficient to sustain the rights of all persons interested, unless the person setting up the discharged mortgage shall show some accident, mistake, or fraud; and this must be shown satisfactorily, and, if not, the discharge is conclusive proof of payment in favor of third persons, who have a right to look to the record for protection.

4. SAME—RIGHTS OF PURCHASERS AFTER DISCHARGE.
Purchasers or incumbrancers, who become such after the discharge of mortgage is placed upon record, are entitled to the same protection which the recording laws afford to subsequent purchasers and incumbrancers in good faith, as against unrecorded conveyances, who can be affected only by actual notice, or notice of such facts as should have put them upon inquiry.

5. SAME—NOTICE TO PURCHASER.
Where it is conceded that the discharge of a mortgage was placed upon record by mistake, and the testimony satisfactorily shows that the mortgage debt has not been paid, a purchaser of the premises covered by the mortgage, who is informed by the mortgagor that the mortgage is still outstanding, and held by a person, naming him, is affected with notice that the discharge was recorded by mistake, and is not protected by an abstract showing the mortgage to have been discharged.

(*Syllabus by the Court.*)

Appeal from circuit court, St. Clair county, in Chancery; HERMAN W. STEVENS, Judge.

This is an action for the foreclosure of a mortgage, brought by Charleg Ferguson against George Glassford, Archibald Maxwell, and Ann Maxwell. January 6, 1879, Maxwell and wife made and delivered to John Allen a note and mortgage to secure the payment of $295, with interest payable January 6, 1884. The note and mortgage was afterwards sold to James Thompson. December 5, 1877, Maxwell and wife made and delivered to Charles Ferguson another note and mortgage for $300, with interest, payable December 5, 1880. Ferguson also sold this note and mortgage to James Thompson, who died, leaving a will, of which Hallock and Kennett were executors, and to whom letters executory were duly given on proof of the will. Ferguson bought the two notes and mortgages of the Thompson executors; and for convenience in carrying out the agreement with Maxwell, instead of assignments, had them make formal discharges, to be held by him with the notes and mortgages until they should be merged in a new mortgage, or paid. On August 5, 1881, the Ferguson mortgage for $300 being then past due, and the Allen mortgage for $295 being not due, and yet having over two years to run, Maxwell concluded not to take up the Allen mortgage, but to let it run till due by its terms, and to take up the Ferguson mortgage, and to give a new mortgage in its stead. The Ferguson mortgage, with some other money then advanced, amounted to $400; for which amount, and to take up the Ferguson mortgage, (of date of December 5, 1877,) he gave a new mortgage to Ferguson, dated August 6, 1881; thus paying and obtaining the discharge of the mortgage dated December 5, 1877, and leaving the Allen mortgage for $295 unpaid, and not entitled to discharge. By mistake or oversight, the formal discharge of the unpaid Allen mortgage was recorded. March 10, 1883, the Allen mortgage still not being due, Maxwell and wife conveyed, by warranty deed, the land covered by the several mortgages, to the defendant George Glassford, subject to the $400 mortgage given to Ferguson, August 6, 1881, which Glassford in the deed agreed to pay.

Complainant, Ferguson, in his bill, states and charges the above facts, and that Glassford, at the time he purchased the land and took the deed, knew, and had been fully informed, that there were two unpaid mortgages upon the place,—one for $300 or $295, and one for $400; in all $700,—and his bargain

to purchase subject to the two mortgages, amounting to $700, and some back interest, and which formed a part of the price of the land; but on learning, after the verbal bargain, and before the making of the deed, that the Allen mortgage for $295 appeared of record to have been discharged, he at the same time knowing it had not been paid, and that there was an error and some mistake in its being discharged of record, had it arranged in some way that the deed should be made subject to the one mortgage for $400 only. As to Maxwell and wife the bill is unanswered, and is taken as confessed. The defendant Glassford alone answers, and denies all knowledge of the facts stated and charged; and particularly denies that he had any knowledge or information other than that obtained by the record; or that he had been in any way informed, or that he had any knowledge, that there was more than $400 incumbrance on the land; or that the Allen mortgage, or a mortgage for about $300, besides the $400 mortgage, had not been paid or satisfied; or that he agreed to buy subject to the payment of that amount, as well as the $400 mortgage. Judgment was rendered for defendants, and plaintiff appealed.

Mitchell & Wellman, (*Atkinson & Vance*, of counsel,) for appellant. *D. C. Walker*, (*E. G. Stevenson*, of counsel,) for appellee.

CHAMPLIN, J. In this case it is conceded that the written discharge of the mortgage bearing date the sixth day of January, 1879, executed by Archibald Maxwell and Ann Maxwell to John Allen, was placed upon record by mistake. The defendant George Glassford purchased the land from Maxwell on March 10, 1883, and the only question is whether he had actual notice that the mortgage was an existing incumbrance notwithstanding the record. To this question of fact most of the testimony was directed. The burden of proof was upon the complainant to establish the fact of notice; and to the better understanding of the testimony, a short history of the antecedent facts will be given. On the sixth day of January, 1879, defendants Maxwell made, executed, and delivered to John Allen a note and mortgage to secure the payment of $295 five years from that date, with 10 per cent. interest. Afterwards Allen sold this note and mortgage to James Thompson. Prior thereto, and on the fifth day of December, 1877, the Maxwells made, executed, and delivered a note and mortgage to Charles Ferguson to secure the payment of $300, payable in three years from date, with interest at 10 per cent. This note and mortgage was sold by Ferguson to the same Thompson, who afterwards died testate, and Zaddock Hallock and Charles Kennett, Jr., were appointed his executors, and qualified. Maxwell, not being able to meet these obligations as they should mature, arranged with the complainant, Ferguson, to purchase and hold them; agreeing to execute new mortgages, when they should mature, at a further length of time to pay. Ferguson accordingly purchased the notes and mortgages from the executors, which were delivered to him; but, instead of taking an assignment in the usual form, the executors executed formal discharges of the mortgages, and delivered them to Ferguson, to be held by him until the mortgages were paid, and then to be delivered as discharges. This unbusiness-like method was adopted to save the expense of drafting and recording two assignments. The expenses of drafting and recording the assignments has been saved, but the expense of a chancery suit has not been saved, and the hazard of a total loss of his mortgage lien has been incurred. The Ferguson mortgage matured December 5, 1880, and was not paid. On August 6, 1881, the defendants Maxwell executed a new mortgage to complainant, Ferguson, for $400. This mortgage was to take up the $300 mortgage, then past due, with the accrued interest, and some money at that time advanced to Maxwell. This mortgage was not recorded until the thirteenth day of December, 1881. The discharge of the Ferguson mortgage of $300 was not discharged of record until the ninth day of January, 1882, and the discharge was effected by recording the discharge executed by the executors.

Prior to this time, the other discharge executed by the executors had been placed upon record, on the thirteenth day of October, 1881. The recording of this discharge is conceded to have been a mistake. The witnesses introduced by complainant refer to the mortgage of $295 as the $300 mortgage. Mr. Allen testified that, prior to the purchase of the farm by Mr. Glassford, he had a conversation, in which he said to Glassford that he had heard that Maxwell was offered $2,400 for his farm; that Glassford replied: "That is correct. I am the man." On the sixth of March the defendant Glassford was at Maxwell's place, and made him an offer for his farm. The conversation was had both in the barn and in the house, in the presence of several persons. All agree that the agreement was that Glassford was to pay $1,650, and a horse, valued in the trade at $150; and the point the witnesses do not agree upon is the incumbrances he was to assume and pay off. Maxwell and his wife both understood at that time that Ferguson held the two mortgages, —one for $295, and the mortgage for $400,—and they both regarded them as existing liens upon the property; and at that time the defendant Glassford knew nothing to the contrary. He had not at that time examined the records, and the Maxwells were not aware that a discharge of the $295 mortgage had been recorded. In examining the weight to be given the testimony of the witnesses whose testimony conflict, we must bear in mind what at that time was the understanding of the Maxwells as to the incumbrances then on the place, and the want of knowledge of Glassford as to what incumbrances there were upon it, or what the record showed. Maxwell testified that he sold the place subject to the mortgages which Glassford was to pay as part of the purchase price; that he told Glassford that there were two mortgages upon the place, both held by Ferguson,—one for $300 and one for $400,—besides some back interest, making $700 which Glassford was to pay; that in his talk with Glassford he referred to the $295 mortgage as being a $300 mortgage. In this statement as to informing Glassford that there were two mortgages on the place which he was to pay,—one of $300, and one of $400,—held by Ferguson, he is corroborated by Mrs. Anna Maxwell, his wife, Alexander Drummond, and George Drummond. They are contradicted by defendant Glassford, who testified: "I then made him an offer of $1,650 and the white-faced mare; that was the first offer. Says he, 'No.' 'Well,' says I, 'I will make you one more offer, and I will never make you another. I will give you $1,650 and the white-faced mare, subject to that one mortgage, drawing eight per cent. interest.' He told me the amount of the mortgage, $400. He says, 'The place is yours.' And then we went to the house and had our supper." In this statement he is corroborated by George Lammerman, his son-in-law, who was also present on that occasion, who in his testimony also uses the expression "subject to that one mortgage."

If we strive to arrive at what was the bargain talked up at that time, we should place ourselves in the position the parties occupied, and consider the facts and surrounding circumstances. Maxwell understood that Ferguson held two mortgages,—one of $295, drawing 10 per cent. interest; and another of $400, drawing 8 per cent. interest. He was offering his farm for sale subject to the incumbrances. There is no reason why he should not include both mortgages in his offer, and the expression made use of by Glassford in his version contains within it a strong inference that he had been informed of an outstanding 10 per cent. mortgage, viz: "Subject to that one mortgage, drawing eight per cent. interest." It must be borne in mind that neither of the parties at that time knew that the Allen mortgage had been discharged of record. It is likely that he was informed of all the incumbrances there were on the place, or that Maxwell understood there were on the place. Common prudence would have led Glassford to inquire as to the incumbrances. It is not to be presumed that he would blindly pay the full value of the land, and leave incumbrances thereon which he might be called upon to discharge.

I conclude, therefore, that the probabilities are that Maxwell informed him of the fact that Ferguson held two mortgages, which were then liens upon the property. Indeed, by Glassford's own testimony, Maxwell referred him to Ferguson to get his abstract, which Ferguson held, but he preferred to procure one himself. Other corroborative testimony was introduced to prove notice. One Lewis Presley testified that, two or three weeks after Glassford moved on the place, he told him that he paid in the neighborhood of $2,500 for the place, subject to a mortgage or mortgages amounting to $700; that he paid $1,650 in money, a mare worth $150, and there were two mortgages, amounting to $700, and some back interest. Testimony was introduced tending to impeach this witness, and in the disposition of this case Presley's testimony may be laid out of view. Alexander Drummond testified to a conversation which he had with Glassford before he purchased, in which he asked him what mortgages there were upon the place; and he told him all he knew about it was what Maxwell said, and that was that there was one of three hundred and one of four hundred dollars. Glassford testified to having a conversation with Drummond, but says that Drummond told him he could get the place for $1,400, subject to the mortgage there was against it, and how much the mortgage was he did not say. He also testified that, only a short time after that, the first offer he made Maxwell for his farm was $1,600, and then an offer of $1,650; and, when that was refused, he increased it by the offer of the white-faced mare, and the payment or assumption of the 8 per cent. mortgage. If Drummond told him he could get the place for $1,400, it is a little singular that his first offer should be $1,600. Testimony was introduced for the purpose of impeaching the witness Alexander Drummond by attacking his reputation for truth among his neighbors. I do not think they succeeded in doing so.

Charles Ferguson, the complainant, testified as follows: "The first time I went to Mr. Glassford;—it was in the spring of the year after he got possession of the place,—I went to his place to see him about this mortgage,—to see what he was going to do about it; see whether he would pay it. And I asked him if he didn't want to pay it, and he said, 'No;' that he had a bargain with Maxwell; that he said something about it expressed in the deed that he wasn't only to pay the one mortgage. I asked him if Maxwell didn't tell him about two. Well, he admitted that Maxwell told him that there was two mortgages, but he wouldn't take his word for it. He found on the records that one of them had been paid, and he said he made his bargain according to the abstract, and he wasn't going to pay the mortgage. Still, he admitted they told there was two, and it amounted to $700. At first Glassford admitted to me that Maxwell told him about the two mortgages of $700, but he was not going to take his word for it; the record was what he was going by. Glassford said he was not bound in law by what Maxwell paid. He bought it according to the abstract. I told him he was in law bound by the information that Maxwell gave him about the two mortgages. He said he wasn't going to take Maxwell's word; he was going to go by the records. I said to him, if the mortgage was never recorded, he could not find it on the records. He said that the records was the only means of information he was bound by. After he went and searched, and found that one of the mortgages was discharged, he made a bargain to pay the mortage according to the abstract, and that he was not bound by what Maxwell told him; he would not take no man's word."

After Glassford had made the verbal offer for the farm which had been accepted by Maxwell, he went to Port Huron, and procured an abstract of the title. This disclosed but one mortgage upon the premises; namely, that of $400, running to Mr. Ferguson. This abstract bears date on the sixth of March, 1883. On the tenth of March, 1883, the parties met in Mr. Walker's law-office to have the deed prepared and trade closed. Mr. Glassford produced his abstract, and requested Mr. Walker to examine it. He did so, and pro-

nounced the title in Maxwell, and incumbered only by a mortgage of $400 given by Maxwell to Ferguson.

Mr. Walker testified, in behalf of defendant, as follows: "I will state that on the tenth day of March, 1883, (I should not be able to locate the date only by reference to the deed that I made on that day, and which I will introduce here,) Mr. Glassford, the defendant here, and Mr. Maxwell came to my office, and wanted to know if I was at leisure. I told him I was; and Mr. Glassford said, if this abstract is all right, they wanted a deed made; and produced this paper which was called an abstract. I should judge from what they say they wasn't hardly able to figure it out to know exactly what it read, and they wanted me to examine it, and, if it was all right they wanted a deed made. Then I took the abstract; run it through carefully. I told them that the title seemed to be straight in Mr. Maxwell; it passed through but one or two hands, and the title seemed to come straight to Maxwell; that Mr. Maxwell had given several mortgages, but they were all discharged except one of $400, drawing 8 per cent. interest, and read the date of that mortgage to both of them. Says I, 'Is that as both of you understand it?' and both assented to it, and says, 'If that is the shape of it, go on and draw the deed.' They came there alone. In drawing the deed, I saw it was a curious description. 'the south part;' but I had drawn some deeds before of fractional lands, and knew it was meandering. I saw it said in the abstract, 'supposed to be 100 acres.' Says I, 'Is that correct?' Mr. Maxwell says it is 128½ acres,—it had been surveyed and contained 128½ acres; so I placed that in there. They stated their bargain; how much he was to pay down, and that it was to be subject to that mortgage. They wanted to know how long it would take me to draw it. Says I, 'Not over half an hour.' Says I, 'Is your wife down here?' They said she was. Says I, 'You can go and get her, and probably by the time she gets here I will have the deed finished.' When she came in I had drawn up this deed, which I here offer in evidence, and is marked in 'Exhibit 3.' They stated what the consideration was to be,—that he was to pay $1,800, and pay that mortgage of $400, and interest; and something was said about the interest. Says I, 'Is it all the interest from that time, or has any of it been paid?' Maxwell said something like this: 'If it is over a certain amount (I can't tell you what it was) of interest. I think he conveyed the idea he had paid some interest on it, but, if it was over a certain amount, he would make it good. 'Well,' says I, 'we will call it subject to the amount of the mortgage.' I wasn't certain whether he paid any or not. He made the remark, 'I have paid at different times to Mr. Ferguson moneys, and I don't know much of anything about it; only have trusted to his honesty; have taken up a mortgage and given a new one,' etc. No allusion was made at the time in their instructions to me, nothing said, about any other mortgage than the one that was said; and that was all that was said in relation to the consideration. I drew the deed according to those instructions, and, before I had got quite through with it, Mrs. Maxwell and some others, (I can't identify them, but two or three) came in, and they both said they didn't write; so I had them, after reading it to them carefully, so there should be no mistake about it. I read it carefully to them, and distinctly, and no objection was made to it. Says I, 'If it is right, sign it.' They said, 'We make our marks; we don't either of us write our names.' I knew Mr. Maxwell didn't before, but I didn't know as to his wife. Mr. Glassford (I can't say whether that was in the first conversation, or after returning in there) says, 'I shan't pay any money over until I know that nothing has taken place since that abstract was made.' Well, I rather laughed at the idea. Says I, 'I don't think there is any danger in you paying over your money.' 'Well,' says he, 'it is all the money I have, and I don't want to hazard it at all.' Says he, 'I have known of deeds and mortgages to be made and put on record before another deed that should have gone on record first,'—something of that kind. He alludes to

a transaction of that kind; and says he, 'I will put the money in any one's hands to keep until I can go down, and see whether anything else has gone on since that abstract was made; and I don't know whether Mr. Broker was spoken of or not, but he was sent for, and came in, and the money was counted out, $1,650, corresponded to the amount, reckoning the horse $150, named in the consideration; and it was warranted to be free and clear of all incumbrances except the mortgage of $400, bearing such a date as the agreement on Glassford's part to pay that which he assumed and agreed to pay; and Mr. Broker came in and witnessed the instrument, and witnessed the putting of the marks there, and took the money; and Mr. Glassford said he would go to Port Huron, and, if it was all right, he would telegraph right to us, so they could get the money that day and go home. That is all I know about it. Mr. Broker came in before I had got quite completed; he came in about the time I had commenced to read it before it was signed. I think all of them had left while I was making the deed, and I sat there at my desk and wrote it alone; but a number of them came in before I got it complete, and there was no conversation,—they all sat still there. I said to them, 'I have got this nearly finished;' and nothing was said until it was done, and I read it, and it was signed, and the money counted out and given to Broker."

The testimony of Mr. Walker is given in full, as the defendants place great reliance upon it, as tending to establish the entire want of knowledge or information that there were two mortgages upon the premises at the time of sale. It may be granted that Mr. Walker states what occurred and was said in his office with entire accuracy; and yet it is consistent with the fact that, when Glassford made the verbal agreement at Maxwell's on the Monday before, he was informed that Ferguson held two mortgages against the place, —one for three hundred and another for four hundred dollars. Nothing was said in his presence relative to any previous talk between the parties. The most that can be said from his testimony is that, had there been no previous colloquy between Glassford and Maxwell, there was nothing in what was said or done in his presence that would tend to prove that Glassford had actual notice that the $300 mortgage was still an existing incumbrance upon the property. There were present before the deed was finally executed, Mr. Walker, Mr. Glassford, the brother of defendant, Mr. Maxwell, his wife, Annie Maxwell, Mrs. Hoffman, Sidney Brooker, and defendant Glassford. Mr. and Mrs. Maxwell and Mrs. Hoffman each testified that both mortgages were mentioned on that occasion, and the other persons named testified that only the $400 mortgage was mentioned. We may conclude that the mortgage in dispute was not there mentioned; still, from a consideration of the whole testimony, and the impression it makes upon my mind, I cannot escape the conviction that defendant Glassford had information which, at the least, should have put an ordinarily prudent man upon inquiry that Ferguson held two mortgages upon the premises, and such information as amounted to actual notice of the existence of the mortgage in question. The testimony introduced tended to show that the farm was worth $2,500, and I do not understand that this evidence is contradicted by defendant Glassford; and this fact has a bearing upon the probabilities regarding the question of his being informed of the two mortgages, aggregating $700. It is an elementary rule that equity will consider an incumbrance in force if the ends of justice can thereby be obtained. *Lowrey* v. *Byers*, 80 Ind. 448. And, where a mortgage has been discharged from the record through mistake, it may be restored in equity, and given its original priority as a lien, when the rights of innocent third parties will not be affected. *Sidener* v. *Pavey*, 77 Ind. 241; *Hanlon* v. *Doherty*, 9 N. E. Rep. 782. The courts of New Jersey hold, and I think correctly, that the simple cancellation of a mortgage on the record is not an absolute bar to a foreclosure, unless there has been actual satisfaction. It is not conclusive evidence. The facts may still be investigated. But it is evi-

dence of a high character, and sufficient to sustain the rights of all persons interested, unless the party setting up the discharged mortgage shall show some accident, mistake, or fraud, and this must be shown satisfactorily on his part. If not so shown, the discharge is conclusive proof of the payment; especially in favor of third persons, who have a right to look to the record for protection. *Banta* v. *Vreeland*, 15 N. J. Eq. 103, 107; *Freeholders, etc.*, v. *Thomas*, 20 N. J. Eq. 42; *Harrison* v. *Railroad Co.*, 19 N. J. Eq. 488; Jones, Mort. (3d Ed.) § 966; *Banking Co.* v. *Woodruff*, 2 N. J. Eq. 117; *Lilly* v. *Quick*, Id. 97; *Miller* v. *Wack*, 1 N. J. Eq. 214. In *Banking Co.* v. *Woodruff*, *supra*, the court said: "It has been settled in this court that the cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and leaves it open to the party making such allegation to prove that it was made by accident, mistake, or fraud. On such proof being made, the mortgage will be established, even against subsequent mortgagees without notice;" citing *Miller* v. *Wack* and *Lilly* v. *Quick*. The statement as laid down is too broad. What the learned court meant by subsequent mortgagees were those who were subsequent to the mortgage which was discharged, but who became mortgagees before the discharge was placed upon record. This is evident from the cases cited by the court. If they become mortgagees or purchasers after the discharge is placed upon record, they are entitled to the same protection which the recording laws afford to subsequent purchasers and incumbrancers in good faith, as against unrecorded conveyances, who can be affected only by actual notice, or notice of such facts as should have put them upon inquiry. The rule was applied by this court in *Sheldon* v. *Holmes*, 58 Mich. 138, 24 N. W. Rep. 795. In this case it is conceded that the discharge of the mortgage in question was placed upon record by mistake. The mortgage, then, appears to be an existing lien as between the parties, and those in privity with them, with notice that the holder claimed it to be an existing lien.

My conclusion from the whole testimony, disregarding the testimony of the witnesses claimed to have been impeached, is that defendant Glassford had such notice. It follows that the decree of the court below must be reversed, and a decree made in accordance with the prayer of the bill. The complainant having, by his negligent method of doing business, made it necessary to resort to these proceedings, will not recover any costs in this court, and neither party will recover costs in the court below. The record will be remanded to the circuit court for the county of St. Clair for further proceedings in the execution of the decree.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

MONTFORT *et al.* v. STEVENS.

(*Supreme Court of Michigan.* January 5, 1888.)

DEED—CONSTRUCTION—RESERVATION—ACTS OF PARTIES.

A deed conveyed certain lands, "excepting and reserving therefrom sixty-eight feet of land off from the east end of said described premises." The vendor retained possession of a lot 68 feet wide along the whole east side of the lands, and put the purchaser in possession of the remainder. They built a fence and dug a well on the line thus fixed. The vendor built a house and barn on the portion held by him, and, after many years, conveyed it as 68 feet wide. *Held*, from the acts of the parties immediately after making the deed, and the surrounding circumstances, that the exception was meant to reserve 68 feet in width along the east end of the lot, and not 68 square feet, which would be a strip but six inches wide.

Error to circuit court, Calhoun county; FRANK A. HOOKER, Judge.

Ejectment by Elvira M. Montfort and Elvira C. Winchell against Wells J. L. Stevens. Trial to the court, and judgment for defendant. Plaintiffs bring error.

M. D. Weeks, (*Frank Monfort*, of counsel,) for appellants. *N. B. Gardner*, for appellee.

CHAMPLIN, J. In this action of ejectment both parties claim through Samuel Huxford. The cause was tried before Hon. FRANK A. HOOKER without a jury, who made a written finding of facts and law as follows: "*First.* On the first day of November, 1865, Samuel Huxford was seized in fee of the following-described premises, viz.: Commencing at a stake one hundred feet west of the north-east corner of block number fifty-seven, in the village of Albion, running thence south, parallel with the east line of said block, to the north line of railroad lands; thence northwesterly, along said railroad lands, to the west line of said block; thence north to the south line of Porter street; thence east to the place of beginning. *Second.* Said Huxford, being so seized, afterwards, on the said first day of November, 1865, conveyed the said premises by good and sufficient deed of conveyance to Otis D. Weston. *Third.* Afterwards, on the twelfth day of November, 1866, said Weston executed and delivered to one Gardiner W. Davis, a deed of said premises, with the following exception, viz.: Excepting and reserving therefrom sixty-eight feet of land off from the east end of said premises. *Fourth.* Said Davis was at once put into possession by his grantor of the premises understood by the parties to have been conveyed to him, said Weston continuing in the possession and occupation of the portion understood to have been excepted. They agreed upon a line between their respective parcels, and dug a well and built a fence upon said line, sharing the expense. Said line cut off a strip of land sixty-eight feet wide from the east side of said premises, which was thereafter occupied by said Weston until the first day of November, 1872, or thereabouts. During such occupancy, he erected on said land a dwelling and a barn, worth in the neighborhood of $1,300. *Fifth.* Said house and barn were completed in the spring of 1867. *Sixth.* On October 1, 1872, said Weston executed and delivered to Lurany Barker a deed of the following-described premises, viz.: All that part or parcel of land situated in block fifty-seven in the village of Albion, county of Calhoun, state of Michigan, bounded as follows, viz.: Commencing at a stake one hundred feet west of the north-east corner of said block, running thence west sixty-eight feet, along the south line of Porter street; thence south to the north line of lands owned by the Michigan Central Railroad; thence, south-easterly, along the north line of said railroad, to a point south of the place of beginning; thence to the place of beginning,—and put her in possession thereof, the same premises mentioned in the fourth finding of fact. *Seventh.* Said Barker has continued in the peaceable possession of said premises, in person or by tenant, until the present time, the defendant being a tenant of hers, and in occupancy of said premises before and at the time this action was begun. *Eighth.* On the first day of October, 1867, said Davis, for a valuable consideration, made and delivered to Samuel V. Irwin his promissory note for the sum of $1,000, together with a real-estate mortgage, to secure the payment of the same. The premises were described in the same manner that they were in the deed he had previously received from Weston. *Ninth.* On the thirty-first day of March, 1883, said Irwin sold and duly assigned in writing said note and mortgage to the plaintiffs, for a valuable consideration, said assignment being properly acknowledged, and duly recorded in the register's office for the county of Calhoun, on the twenty-sixth day of April, 1883. *Tenth.* The plaintiffs proceeded to foreclose said mortgage by advertisement, and the premises were sold, by virtue of said proceedings, on the sixteenth day of July, 1883, to them; in pursuance of which sale, the sheriff of said county, on the same day, executed to them a deed of said premises, which deed was duly recorded in the proper office on the same day. The description in said deed was the same as that in the mortgage. All of the foreclosure proceedings were regular. *Eleventh.* In February,

1885, the plaintiffs demanded the surrender of the possession of the premises, by the defendant, at the same time exhibiting to him the sheriff's deed aforesaid. Defendant refused to yield possession."

From the foregoing facts, the circuit judge found, as a conclusion of law, that a piece of land, 68 feet in width, off from the east end of the parcel described, was excepted in both the deed from Weston to Davis, and mortgage from Davis to Irwin, and that defendant should have judgment. The contention of the plaintiffs is that the exception contained in the deed from Weston to Davis should be construed as reading as follows: "Excepting and reserving therefrom sixty-eight square feet of land off from the east end of said premises," which would make a strip of land extending along the east end of the premises about six inches wide. We think this construction wholly inadmissible. There was nothing in the situation of the parties, the subject-matter, or the surrounding circumstances, which would render such construction at all reasonable. The only object of construing a contract is to arrive at the intention of the parties. What the parties did, immediately after the execution of the deed, affords a safe criterion of their intention of the meaning of the language used in the conveyance. Those facts are embodied in the fourth finding, and they render it certain that the 68 feet excepted was to be a strip 68 feet in width off of the east end of the lot. The testimony of the witness to prove these facts was properly admitted in evidence.

The case is so plain that it does not call for any extended discussion. The judgment is affirmed.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

McCLURE v. THORPE.

(*Supreme Court of Michigan.* January 5, 1888.)

1. TENANTS IN COMMON—ACTION OF TRESPASS AGAINST CO-TENANT—CONVERSION.
A tenant in common may maintain an action of trespass against a co-tenant where there has been a wrongful conversion of property.[1]

2. LANDLORD AND TENANT—CONVERSION OF CROPS BY LANDLORD—MEASURE OF DAMAGES.
In an action of trespass, brought by a tenant against his landlord, for the wrongful conversion of the crops raised on the leased premises, the measure of damages is the value of the crop, less the proportionate share to which the landlord is entitled by the terms of the lease, after deducting the value of the defendant's labor, after the conversion, in bringing the crops to maturity, and for harvesting and gathering them; and, if they have been negligently cared for, plaintiff would be entitled to recover for the amount of the depreciation.

Error to circuit court, Saginaw county; C. H. GAGE, Judge.

Action of trespass *quare clausem*, brought by Joseph McClure against George W. Thorpe. Verdict and judgment for plaintiff. Defendant brings error.

William H. Sweet, for appellant. *Trask & Smith*, for appellee.

SHERWOOD, J. In 1886, and for several years previous thereto, the defendant owned 80 acres of land in the county of Saginaw. He resided in Canada. The plaintiff in the spring of 1886 rented the property of one Bolt, who claimed to act in the premises as the agent of the defendant. The plaintiff, under the terms of the lease, was to have the use of the farm for the year, and crop the same. He was to furnish seed, and teams, and do all the work, and was to give the defendant one-third of what he raised for the use of the farm. The plaintiff entered upon the farm, and took possession thereof, under the

[1] A tenant in common may maintain trover against his co-tenant for his share of the common property consumed by the latter; but the sale of a chattel by one tenant in common is not such a destruction of it as to enable the co-tenant to maintain trover. Lewis v. Clark, (Vt.) 8 Atl. Rep. 158.

lease, in good faith, and put in a quantity of spring crops. He did not live upon the farm, but not far therefrom. The latter part of May, after the plaintiff had put in his crops, as stated, the defendant came from Canada, and, with his family, against the consent of the plaintiff, and without his knowledge, entered upon the premises, took possession of the house, and moved therein with his family, and has continued his occupancy of the house, and possession of the farm and crops, ever since, against the protest of the plaintiff, and harvested the crops put in by the plaintiff. This suit is brought by the plaintiff to recover his damages for such alleged invasion of his rights, and conversion of his property. The declaration is somewhat peculiar in some of its features, but was not demurred to; neither was there any objection to the plaintiff's proving his case thereunder, and we think it states the facts of the case sufficiently to admit of a recovery, if they are proved. The defendant's plea was the general issue.

The cause was tried before Judge GAGE, with a jury, and the plaintiff recovered, to the amount of $109.50, and the defendant brings the case here and asks a reversal of the judgment, on the ground of alleged misdirection in the charge of the court, and misapprehension as to the character and scope of the plaintiff's declaration. The last three requests relate to subject of the pleadings, and the plaintiff's rights thereunder, and have been disposed of in what has already been said. There were four other requests to charge, which were refused by the court, and upon which error is assigned. The first asks the court to charge that, upon the undisputed proofs, the defendant did not break and enter the premises, but in a quiet and peaceable manner. This was not a question for the court, but for the jury. Whether the entry was peaceable or not, was a question depending upon the solution of several other facts in the case. Under the facts stated, it was a mixed question of both law and fact, and proper for the jury; but, under the declaration, the question is one of no consequence. The declaration states a case which would entitle the plaintiff to recover, and the jury, by the verdict, have found he proved it upon the trial, and as the record shows, by testimony not objected to. The second request of the four, asks the court to charge that the lease was for a share of the crops, and, conceding its validity, the parties were tenants in common, and therefore the plaintiff cannot maintain this action. There is nothing in this. A tenant in common has a right of action against his co-tenant whenever there has been a wrongful conversion of the property of the co-tenant, and that is what the testimony in the case shows, without controversy, when the validity of the lease is admitted. *Sutherland* v. *Carter*, 52 Mich. 471, 17 N. W. Rep. 780, and 18 N. W. Rep. 223; *Webb* v. *Mann*, 3 Mich. 139; *Wilson* v. *Reed*, 3 Johns. 175; *Weld* v. *Oliver*, 21 Pick. 559; *Bray* v. *Bray*, 30 Mich. 479; also Cooley, Torts, 455; *Grove* v. *Wise*, 39 Mich. 161. The third and fourth of these requests are substantially the same as the second, and all four were properly refused by the court.

Exception is taken by defendant's counsel to that portion of the charge relating to damages. The court charged upon that subject, if they found the lease valid and as claimed, and that the defendant entered upon the land, and deprived the plaintiff of the use of it, and of his crop, as claimed by the plaintiff, he would be entitled to recover the value of the crop harvested, less one-third going to the defendant. If the crop was negligently cared for by defendant, and thereby depreciated, he would be entitled to recover for the amount of the depreciation also; but would have to deduct from these two items the value of the labor of the defendant, in caring for and bringing the crops to maturity, and also "for harvesting and gathering the crops." We think this charge was unobjectionable.

We find no error in the record, and the judgment must be affirmed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

CILLEY *et al.* v. VAN PATTEN.

(*Supreme Court of Michigan.* January 5, 1888.)

1. JUSTICE OF THE PEACE—JURISDICTIONAL AMOUNT—PLEADING—EVIDENCE.
In an action of *assumpsit*, before a justice, the amount claimed in the *ad damnum* determines the jurisdiction, and plaintiff may remit part of the amount proven, or abandon and omit proof of part of the amount claimed.

2. ASSIGNMENT—ASSIGNEE COMPETENT TO TESTIFY AS TO OWNERSHIP.
An assignee of a chose in action is presumed to know whether or not he is the owner of the property, and may testify to the fact, when material.

3. EVIDENCE—PAROL—LOST RECORDS.
Where the files of the court are lost, parol evidence is admissible to prove their loss and contents.[1]

Error to circuit court, Ottawa county; DAN. J. ARNOLD, Judge.

The plaintiffs, James Cilley and Lafayette Hatch, brought *assumpsit* against the defendant, Barney Van Patten, in justice's court, and recovered a judgment. The cause was taken to the circuit court, on appeal by defendant, where there was a trial, and judgment for plaintiff, and an appeal taken from the circuit court to the supreme court, by defendant, and the case sent back to the circuit court for new trial. 25 N. W. Rep. 326. On the second trial in the circuit court, plaintiffs recovered judgment, against defendant, from which defendant Van Patten brings error.

C. C. Howell, for appellant. *George E. Farr*, for appellee.

SHERWOOD, J. The plaintiffs brought this suit in *assumpsit* against the defendant in justice's court and recovered a judgment of $300. On appeal to the circuit, the plaintiffs recovered a like judgment. The proceedings and judgment in the circuit came to this court on error, where the judgment was reversed, at the October term, 1885, (25 N. W. Rep. 326,) on the grounds that certain proofs made of plaintiffs' claim were not admissible under his declaration, and that the defendant was allowed to make proofs of certain items which he should not have been permitted to do. The plaintiffs were allowed a new trial, which has been had, and the proceedings upon that trial are now before us for review.

It appears from the record that the plaintiffs amended their declaration before the last trial, in order to avoid the objections upon the former trial, and which proved fatal, and they then succeeded, recovering the same amount as before. The items claimed for under the declaration now before us are: (1) A note, given by the defendant, for $33, dated November 15, 1879, and owned jointly by the plaintiffs. (2) A personal account of plaintiff Cilley against defendant, owned by the plaintiffs. (3) A personal account of Hatch against the defendant, owned by the plaintiffs. (4) A claim for a quantity of slabs owned by plaintiffs and sold by defendant. The plea was the general issue with notice of set-off.

The trial was before Judge ARNOLD, and a jury, in the Ottawa circuit. The defense claimed against the note was, that it was given to the payee (one Nelson) for work and labor to be performed by him, and which he never did; and, further, that defendant is entitled to set off against the note such claim as accrued to him against Nelson while the latter owned it. To the claim made by plaintiffs for the Cilley account, the defendant urges, as a defense, that the account was originally due to the plaintiff Cilley, and that a portion of the services, charged for by him against the defendant, were never performed, and, as to certain other services, defendant never employed Cilley for that pur-

[1] As to the admissibility of secondary evidence to show the contents of public records, see Mobley v. Watts, (N. C.) 3 S. E. Rep. 677, and note.

pose, and that he has paid Mr. Cilley more than $33.79, and claims an offset of about $40, against the plaintiffs' claim. In regard to the item for slabs, the plaintiffs claimed that plaintiff Hatch and one Thirkettle, owned a quantity of slabs at Port Sheldon, in the county of Ottawa, to the amount of about 200 cords; that plaintiff Cilley sold the same, or rather Thirkettle's interest, on an execution against Thirkettle, and that the former became the purchaser at the sale, and the plaintiffs became the owners thereof; afterwards, without any authority, the defendant sold a large quantity of these slabs, and received the money therefor, at seventy-five cents and a dollar per cord. The defense claimed against this item is that Thirkettle and Hatch had no such amount of slabs; that he never sold any slabs belonging to the plaintiffs; that he never got any money for the slabs plaintiffs claim that he sold; and that the plaintiffs cannot recover upon any demands in which they are not joint owners. No proof was offered in support of the plaintiffs' third claim, and it will not be regarded in the further discussion, unless referred to in connection with one of the other three claims, in support and against which testimony was offered on both sides.

We shall notice only those errors assigned, and which were argued on the hearing, or in the brief of defendant's counsel. It was the plaintiffs' right to offer proof of such of their claims as they chose, or none as to some of the items, and it is no ground of error that they did so. The aggregate sums to which the several claims of the plaintiffs amounted exceeds the sum of $300, but the *ad damnum* in the declaration is within the jurisdiction of the justice. This, however, furnished the defendant with no ground for an objection to the jurisdiction of the court. It is the amount claimed in the *ad damnum* that determines the jurisdiction of the justice in *assumpsit*. It is the privilege of the plaintiff, in any case, to forgive so much of his proved claim, upon the trial, to the defendant as he may choose. It appears he did not, in this case, prove one of his claims, but had it stricken from the declaration, and abandoned it as outlawed. The defendant was not prejudiced by this course. It was not improper to allow Hatch to testify that he and Cilley owned the Cilley claim for services against the defendant. A party owning property consisting of chattels or choses in action, is presumed to know it, and I think he may testify to the fact where it is material. The means of his knowledge can be very easily disclosed upon cross-examination, if the defendant desires. There was no error committed in receiving this testimony. The note sued upon was a negotiable note, and put in evidence without objection, and the proof showing joint ownership of the same was unobjectionable. Hatch testified that he and Cilley bought the note of the payee in 1880. There was proof tending to show that Cilley purchased the Thirkettle interest in the slabs at an execution sale thereof, and we find no error in the admission of the evidence to prove the validity of the judgment and the execution sale. When the files of the court are lost, as in this case, the next best evidence attainable may be resorted to in proving their contents, and that was done in this case, and the testimony upon the subject was proper to be submitted to the jury, both as to the loss and contents. There was testimony tending to show the ownership by the plaintiffs of each of the claims which were allowed to remain in the plaintiff's declaration, and that such ownership was joint, and the value of the claims; and we find no error in the admission of the testimony offered for the purpose of proving the same, and the finding of the jury thereon is against the defendant, and conclusive, unless the charge of the court misled them in applying the law.

The charge has been looked into, and we have failed to discover any fault in it. It is full upon every legal phase of the case, and upon every point is clear and correct. It gives all that was proper for the jury to know of the defendant's seven rejected requests, and it is not easily seen how the defendant's, as well as the plaintiffs', rights could have been better guarded, or the jury

better informed upon the law of the case, than was done in the charge of the learned circuit judge.

The judgment must be affirmed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

HATCH v. CHRISTMAS.

(*Supreme Court of Michigan.* January 5, 1888.)

1. CERTIORARI—TO JUSTICE OF THE PEACE — AFFIDAVIT — PRESUMPTION IN FAVOR OF JUSTICE.
   The affidavit for *certiorari* to a justice, because of an improper continuance, failed to allege that the affidavit for continuance required by How. St. Mich. § 6899, had not been filed; but the justice's return stated that the continuance was "upon showing made." *Held*, that the action of the justice must be deemed regular.
2. JUSTICE OF THE PEACE—CONTINUANCE.
   Suit was brought before a justice October 28th; the writ being returnable November 8th. On the return-day the cause was continued to January 28th. *Held*, that the continuance dates from the return-day, and under How. St. Mich. § 6899, providing that a justice may continue a case for three months, it was not beyond the lawful time.
3. REPLEVIN—BOND—FAILURE OF SURETIES TO JUSTIFY—WAIVER.
   In replevin before a justice, the sureties on the bond failed to justify as required by How. St. Mich. § 6856. *Held*, that such failure was not a jurisdictional fact, and was waived by the absence of any objection.

Error to circuit court, Ottawa county; D. J. ARNOLD, Judge.

Replevin before a justice by Celia Hatch against Charles Christmas, a deputy-sheriff, to recover certain goods taken under execution. The justice gave judgment for the plaintiff, which was affirmed by the circuit court, and the defendant brings error.

C. C. Howell, for appellant. *Geo. A. Farr*, for appellee.

CHAMPLIN, J. This suit originated in justice's court, and was removed to the circuit court by writ of *certiorari*, where the judgment of the court below was affirmed. The assignments of error contained in the affidavit for *certiorari* are all rendered unimportant by the return of the justice to the writ, excepting the fifth, which reads as follows: "That the justice erred in adjourning said cause to the twenty-eighth day of January, 1887." The reasons alleged why such adjournment was erroneous are (1) that no showing was made for an adjournment, by the oath of the plaintiff or otherwise, that the plaintiff could not safely proceed to trial for the want of some material testimony or witness; and (2) that the cause was adjourned more than three months, and therefore the justice lost jurisdiction.

1. The statute provides: "If either party to a suit shall make it appear to the satisfaction of the justice by his own oath, or the oath of any other person, that he cannot safely proceed to trial for the want of some material testimony or witness, the justice shall postpone the trial," etc. The return of the justice to the writ of *certiorari* upon the question of adjournment is that C. C. Howell appeared before him specially on the return-day, and moved to quash the writ of replevin for an alleged defect in the affidavit, which was overruled; "and that immediately thereupon the said plaintiff, Celia Hatch, by her said agent, duly applied, upon showing made, for an adjournment of said cause without pleading to the twenty-eighth of January, in the year 1887, at one o'clock in the afternoon; which application I granted, and ordered that the said cause stand adjourned until the twenty-eighth day of January, in the year 1887, at one o'clock in the afternoon, at my said office, and that said plaintiff at the last said time and place did declare in said suit." His return further shows that defendant did not thereafter appear. The defendant, in his affidavit for *certiorari*, did not allege or point out that the ad-

journment was had without any showing made upon oath or affidavit; he merely states "that said cause was then, at the request of the plaintiff, and without the consent of the defendant, adjourned to the twenty-eighth day of January, 1887, at one o'clock P. M., and without even pleading in the case." I do not think, upon this return, the objection now raised upon this ground is open to the defendant. When there is no specific allegation that no showing was made on oath as a basis of the application for adjournment, and where the return shows that the adjournment was duly applied for upon showing made, the presumption is that the showing was legally made, and upon sufficient grounds. *Deitz* v. *Groesbeck*, 32 Mich. 303. The defendant applied to the circuit court for a further return upon certain specified facts, but did not ask a further return upon the facts he now seeks to impeach the legality of the adjournment upon. The return must therefore be held to be a sufficient answer to the point now made.

2. The return-day of the writ of replevin was the eighth day of November, 1886. The three months in which postponements may be had, dates from the return-day. The case was not therefore adjourned beyond the authorized period.

The fact that the sureties did not justify their responsibility in writing indorsed upon the bond in the replevin suit was not jurisdictional. The statute permits a new bond to be filed where such objection is seasonably made. How. St. § 7046. The justice returns that no such objection was made before him.

There being no other errors available to defendant, the judgment is affirmed.

MORSE and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

WALLACE *et al.* v. BAHLHORN *et al.*

(*Supreme Court of Michigan.* January 5, 1888.)

LANDLORD AND TENANT—LEASE—RESERVATION OF RIGHT TO SELL.

Defendants leased a farm for one year, the lease to be renewed, "if both parties are suited, for eight years, reserving the right to sell," and occupied the farm for six years, when plaintiffs bought it. *Held*, that the sale terminated the lease.

Error to circuit court, Wayne county; F. H. CHAMBERS, Judge.

Action by James F. Wallace, Lucy A. Wallace, Jacob L. Wallace, Sarah L. Wallace, Charles H. Crane, and Emma W. Crane against John and Frederick Bahlhorn, to recover possession of a farm. The cause was tried before a circuit court commissioner, and judgment was given for the defendants. The circuit court, on appeal, reversed the commissioner's decision, and the defendants bring error.

F. A. Baker, for appellants. *Palmer & Palmer*, for appellees.

MORSE, J. In this case a complaint was made, before a circuit court commissioner, to recover possession of a farm, situated in the township of Brownstown, Wayne county. Complainants alleged the relation of landlord and tenant existing between the parties, and an unlawful holding by the defendants. Defendants pleaded not guilty. Upon a trial, the commissioner gave judgment for the defendants. Upon appeal to the Wayne circuit court, Circuit Judge F. H. CHAMBERS entered the following findings of fact and conclusions of law, and entered judgment for complainants:

FINDINGS OF FACT.

"David Wallace entered into a contract in writing with defendants on the sixteenth day of December, 1879. The clause in dispute in this lease reads as

follows: 'For the term of one year from the first day of April next, with the privilege of longer lease, (if both parties are suited,) for a term of eight years, *reserving the right to sell part or all.*'

"That, under said contract, said defendants entered into possession of the premises therein described, and cultivated said farm, and paid the rent, in accordance with its terms, and have remained in possession of said farm ever since, and were holding the same at the commencement of this suit, to-wit, April 7, 1887.

"David Wallace and his wife signed and executed a quitclaim deed of said premises to the plaintiffs, a copy of which deed is hereto attached, marked 'Exhibit B,' and delivered the same to the grantees, who are the plaintiffs in this suit, on the seventeenth day of November, 1866; and, at the same time, grantees paid David Wallace therefor the sum of three dollars, and promised to give their sympathy and good will to grantors. The grantees were nephews and nieces of grantors; said grantors had no children.

"That, after said deed was delivered to the grantees, and on the eighteenth day of November, 1886, plaintiffs, James F. Wallace, Jacob Wallace, and Charles H. Crane, who were the agents of the other grantees, gave notice to defendants that they, the grantees, had bought and owned the farm on which the defendants were living; and that their lease or tenancy would terminate at the close of the year, which ended April 1, 1887; and that they would be required to surrender the said premises to them at that time.

"The defendants admitted that they were to leave the farm when it was sold; and agreed to move off from it in the spring. The defendants refused to quit or deliver up said premises at the close of the year, or in the spring. And the grantees in said deed commenced this suit on the seventh day of April, 1887, to recover the possession of the premises described in said deed, which are the same as those described in said contract or lease of David Wallace to defendants.

"The court finds, also, that the defendants agreed that if David Wallace sold said premises, such sale should terminate said lease; said premises were sold by David Wallace to plaintiffs, and, by said David Wallace and wife, conveyed to them by said deed, 'B.'

"The court finds as conclusions of law: (1) That the contract of which Exhibit A is a copy was a lease of the premises therein described, for one year only, and a conditional contract for a future letting. (2) That the holding over after the first year by the defendants, on the same conditions, and the acceptance of the rents by the lessor, constituted a tenancy at will, from year to year. (3) That the notice given by the plaintiffs on the eighteenth day of November, 1886, terminated the defendant's tenancy and lease of said premises before the commencement of this suit, and the defendants were holding the same after the termination of their lease, when this suit was commenced. (4) If the contract from David Wallace to defendants constituted a lease for eight years, under its conditions, said sale of said premises terminated it.

"The court therefore finds, from the facts as above stated, and the conclusions of the law as above set forth, that the plaintiffs are entitled to recover a judgment of restitution of said premises and costs, against the said defendants. F. H. CHAMBERS, Circuit Judge.

"*Detroit, July* 19, 1887."

The judgment entered in the case by the circuit judge is correct, and must be affirmed. We think the fair construction of the lease is that it should terminate upon a sale of the premises, or a portion of them, as to the part of the farm sold. A sufficient sale is found by the court. It seems, also, from the finding of facts, that the defendants understood the lease as we construe it, and promised, when notified of the sale, to move off the farm in the spring of 1887.

It is not necessary to discuss or decide the question whether the instrument was a lease for the whole term of eight years, or nothing more than an agreement to execute a new lease for the longer term. As the court properly concluded, if it was an agreement to execute a lease, the defendants, at the time of the sale, were holding as tenants at will from year to year, and the notice to quit was sufficient.

The judgment of the circuit court for the county of Wayne is affirmed, with costs.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

BAKER *v.* FLINT & P. M. R. Co.

(*Supreme Court of Michigan.* January 5, 1888.)

1. RAILROAD COMPANIES—INJURY TO CHILD AT CROSSING—CONTRIBUTORY NEGLIGENCE.
In an action against a railroad company for a personal injury incurred by being struck by one of its trains at a highway crossing, the evidence showed that plaintiff, at the time of the accident, was seven years old, ordinarily bright, active, and intelligent; had been playing with other boys about the track before the accident; had shortly before crossed at the same place; and that, when struck, he was still playing, and running to overtake his comrades; that he did not look for a train, or hear any warning, or know of this one's approach, or that one was due; and that he was accustomed to play there, knew the danger, tried to get off the track before being struck, did not see the train, but could have seen it over 400 feet away, and, if he had, would not have tried to cross. Plaintiff testified on the trial. *Held*, that the evidence did not show want of due care on plaintiff's part.

2. SAME—INSTRUCTIONS—PROVINCE OF JURY.
Defendant asked an instruction that if plaintiff did not, before going upon the track, look and listen, the omission was negligence; and that if he saw the train coming and tried to cross ahead of it, he was negligent in so doing. *Held*, that the instruction was improper, as making the court the judge of plaintiff's capacity to appreciate the danger, and his manner of exercising it.[1]

3. SAME—SPECIAL FINDINGS—CONTRIBUTORY NEGLIGENCE.
The jury found specially that plaintiff could have seen the train over 400 feet away, that he was ordinarily bright, active and intelligent, that he knew the danger of crossing before an approaching train, and that he did not see the train, but would have seen it if he had looked in the proper direction. The jury also found a verdict for plaintiff. *Held*, that the findings were consistent with the verdict.

Error to circuit court, Bay county; C. H. GAGE, Judge.

Action by Oscar F. Baker, by James Baker, his next friend, against the Flint & Pere Marquette Railroad Company, to recover for a personal injury incurred while crossing the company's track at a highway crossing. Verdict and judgment for plaintiff. Defendant brings error.

Wisner & Draper, for appellant. *W. C. Green*, (*J. E. Simonson*, of counsel,) for appellee.

SHERWOOD, J. The plaintiff in this case, a boy seven years and three months old, brings this action to recover damages for personal injuries received by him from being run over by the defendant's train of cars on the evening of the fifth day of November, 1886, at Eleventh street, in Bay City, whereby he was seriously injured, and from the effects of which amputation of one of his legs became necessary. The cause was tried in the Bay circuit

[1] Respecting the question of contributory negligence of children, see Muehlhausen v. Railway Co., (Mo.) 2 S. W. Rep. 315; Huff v. Ames, (Neb.) 19 N. W. Rep. 623; Benton v. Railroad Co., (Iowa,) 8 N. W. Rep. 330; Power v. Harlow, (Mich.) 28 N. W. Rep. 606; Strong v. City, (Wis.) 22 N. W. Rep. 425; Masser v. Railway Co., (Iowa,) 27 N. W. Rep. 776; Trust Co. v. Railway Co., 31 Fed. Rep. 246; Railway Co. v. Dunden, (Kan.) 14 Pac. Rep. 501; Cassida v. Navigation Co., (Or.) 13 Pac. Rep. 438; Mackey v. City, (Miss.) 2 South. Rep. 178; McCarthy v. Railway Co., (Mo.) 4 S. W. Rep. 516; Kunz v. City of Troy, (N. Y.) 10 N. E. Rep. 442; Ecliff v. Railway Co., (Mich.) 31 N. W. Rep. 180; Huckshold v. Railway Co., (Mo.) 2 S. W. Rep. 794; Miller v. Railroad Co., (Pa.) 8 Atl. Rep. 209.

court, and the plaintiff recovered a verdict and judgment for the sum of $5,000 damages. The defendant brings error.

The defendant's road enters Bay City near its most southern limit, and runs in a northerly direction, through the central portion of the city, several miles, to its northern boundary. The train doing the injury was going north, and in passing from Twenty-third street to Thirteenth street the road runs due north on James street. Leaving Thirteenth street on a curve to the east, and running about 100 feet, the track enters Jefferson street; and running upon this street to a point within three or four feet of the north-west corner of it and Twelfth street, and about 100 feet south of the north line of Eleventh street, the place is reached where the plaintiff, in crossing the track, was struck by the train and injured. There is a depot here, where all passenger trains make short stops, but the principal depot of the company in the city is about 3,200 feet further north on Jefferson street. On either side of the track there were buildings, fences, and structures of various kinds, and also trees between Eleventh and Twelfth streets. From the point where the boy was struck, in Eleventh street, the train could be seen crossing Twelfth street,—a distance of over 400 feet.

This is a sufficient statement of the surroundings for the further consideration of the case. There was testimony showing that the boy was a bright, active, intelligent lad for one of his age. This was among the five special findings of the jury, which are given in the record, as follows: *First.* Do you find from the evidence that the train was in sight for a distance of 400 feet, being when it was crossing Twelfth street, before it reached the place of the accident; and that it could be seen approaching the whole of that distance from any point between the south-east corner of the depot platform and the main track at the place where the accident occurred? *First Answer.* We will answer that, for ourselves, we can see the engine as it approaches the intersection of Twelfth and the railroad track. *Second.* Do you find from the evidence that the plaintiff was a bright, active, intelligent boy at the time he was injured? *Answer.* Yes; as an ordinary boy." And in answer to the third question: "Do you find from the evidence that the plaintiff had sufficient intelligence to know that it was dangerous to run upon or across a railroad track in front of an approaching train?" they say: "Yes; between Eleventh and Twelfth streets." And in answer to the fourth question: "Do you find from the evidence that plaintiff saw the train approaching before he went on the track?" they say: "No." And in answer to the fifth question: "If you answer 'No' to the 4th, then do you find from the evidence that plaintiff would have seen the train, if he had looked in the direction from which it was coming, before he ran upon the track?" they say: "Yes; between 11th and 12th streets."

The declaration contains two counts. The first count charges the defendant with negligence in running its trains faster than six miles per hour, contrary to a by-law of Bay City, and that it is therefore liable. The second count charges the defendant with negligence in running its train at the time the boy was injured at an unusual and dangerous rate of speed, by which the plaintiff was injured, while he himself was using due care in crossing the track at Eleventh street. So that it will be seen that the only negligence charged against the defendant in either count of the declaration was running its train at too high a rate of speed.

The testimony shows, and it is not controverted, that the plaintiff had been playing about the depot and track, some little time before the train came in, with two other boys; and that the boy, in his play, with the others, had, but a short time before he was injured, crossed the track at the same place; and that, at the time the train struck him, the two boys with him had just crossed the track, and he was running when crossing it to catch up with his young comrades in their play; that he did not look for the train, or in the direction

from which it was coming, neither did he hear any signals of its approach until it struck him; that he knew the cars would hurt him, and tried to get back off the track, but failed before he was injured; and that he could have seen the train at Twelfth street if he had looked, and if he had seen the train he would not have gone upon the track. This was the uncontradicted evidence given by the boy most favorable to the defendant.

There is no question but that it was this boy's right to cross the railroad track at any time when he would not be injured by teams, wagons, cars, or other things going upon or across the street; and this right is accompanied with the duty to use reasonable and at least ordinary care on the part of the child,—his age, experience and intelligence being taken in consideration with the other circumstances existing at the time the accident occurred. If, when these things have all been properly considered by the jury, they shall find that the child has sufficient intelligence (and experience, if it shall be found necessary) to know of the danger, of the signals and warnings against it, and the manner in which injury may be produced by failure to observe such signals and warnings, they are then warranted in taking the subject of contributory negligence under consideration; and when the child has been injured by a failure to observe such warnings, signals and indications of danger, and neglected the duty they impose upon him to avoid the danger, and injury ensues, his negligence will be such as to prevent a recovery therefor. This I understand to be the rule in this court, as settled by our own authorities, as well as by decisions in other states. *Railway Co.* v. *Bohn*, 27 Mich. 503; *Daniels* v. *Clegg*, 28 Mich. 40; *Hassenyer* v. *Railroad Co.*, 48 Mich. 209, 12 N. W. Rep. 155; *Powers* v. *Harlow*, 53 Mich. 515, 19 N. W. Rep. 257; *Hargreave* v. *Deacon*, 25 Mich. 1; *Railway Co.* v. *Smith*, 46 Mich. 504, 9 N. W. Rep. 830; *Downey* v. *Hendrie*, 46 Mich. 501, 9 N. W. Rep. 828; *Eckleff* v. *Railway Co.*, 31 N. W. Rep. 180; *Coops* v. *Railroad Co.*, 33 N. W. Rep. 541. Ordinary care has relation to the situation and condition of the parties, and varies according to the exigencies which require vigilance and attention, and, when contributory negligence is sought to be attributed to a child, the child can only be held to that degree of care which may reasonably be expected from one under the same conditions, of the same age, sex, intelligence, and judgment. *McGovern* v. *Railway Co.*, 67 N. Y. 417; *Powers* v. *Harlow*, 53 Mich. 515, 19 N. W. Rep. 257.

When the testimony in the case was closed, counsel for the defendant asked the court to charge—*First.* "Under the pleadings and proofs in this case, the plaintiff has failed to make a case. The verdict must therefore be for the defendant." *Second.* "The plaintiff has failed to show that he was free from negligence which contributed to the accident. The verdict therefore must be for the defendant." *Third.* "There is no evidence in the case tending to show that plaintiff was not careless or negligent in attempting to cross ahead of an approaching train, which was in plain sight. The verdict must therefore be for the defendant." *Fourth.* "There is no evidence in the case which would warrant the jury in finding that plaintiff did not know the danger of crossing the track ahead of an approaching train." *Fifth.* "Under the evidence in the case, the jury must find that the plaintiff was of sufficient age and intelligence to understand the danger of attempting to cross the track ahead of an approaching train; and that, so understanding, he made the attempt, either thoughtlessly or carelessly, without seeing the train, or because he thought he could get over before the train reached him. These facts preclude a recovery, and your verdict must be for defendant,"—as requested by defendant. *Sixth.* "It is undisputed, and you must find as a fact, that the train which run over the plaintiff could be seen from any point east of the depot platform, and the place where the accident occurred, 400 feet from the place of the collision, and all the way from Twelfth street, and was in plain sight for the whole of that distance; that the plaintiff knew that to be in the

way of a moving train was dangerous; that he knew he was about to cross the railroad, and that it was a place of danger. It was therefore his duty before going upon the track, to look and listen, to ascertain whether or not a train was approaching, and, if he did not, such omission was negligence, and precludes a recovery; and if he did look, and saw the train coming, and undertook to cross ahead of it, and was injured, such conduct was negligence, and prevents a recovery by plaintiff."

These six requests present all the exceptions in the case. It will be noticed that, if the first request should have been granted, no others need be considered. This request requires an examination of all the testimony in the case which is undisputed. In addition to what has been hereinbefore stated, it thus appears that the plaintiff did not know that there was any train due at that time, and heard none of the signals, nor was in any manner aware of the approach of the train; that he was used to being about the cars, and playing about them, and near the track, and, without the knowledge of the conductor, had occasionally caught on the cars and ridden to the depot in the city; and we must also have regard, to some extent, to the facts found by the jury in the case, viz.: "That the train could be seen a distance of more than 400 feet before reaching the place where the accident occurred; that plaintiff was an ordinarily bright, active, intelligent boy; that he knew it was dangerous to attempt to cross in front of an approaching train; that he did not see the train, but could and would have seen it before going upon the track if he had looked in the direction from which it was coming." When we have considered them all, I do not think the case was one wherein the court should have directed the verdict. It was still left for the jury to say, under proper instructions from the court, whether or not the evidence satisfied them that this lad had such judgment and such comprehension as enabled him to appreciate the danger, and subject him to the consequences of negligence if he failed to use his reason and senses in efforts to avoid it. This question, I think, clearly remained for the jury to pass upon, and they have done so. There was no error in refusing the first request, and this ruling disposes of the defendant's second request in the same way. The jury had the plaintiff before them. He was sworn in the case, and subjected to a long examination, both on direct and cross. This furnished the jury with additional evidence of his capacity, his intelligence, reason, and judgment. His carelessness depended entirely upon his ability to use these; and I think the defendant's third request went too far when it asked the jury to find that there was no evidence before the jury tending to show plaintiff was not guilty of negligence. They certainly had their own observation to aid them upon this subject. There was no error in the refusal of this request. The defendant's sixth request has this fault: it makes the court judge of the capacity and ability of the plaintiff, and the manner in which he used the same on the occasion when the injury occurred; and whether he was of sufficient age and judgment to have used them otherwise, so as to have avoided the calamity which overtook him. This, under all the circumstances, was the province of the jury, and there was no error in allowing them to pass upon the question.

Upon the points raised by the defendant's counsel upon this record, we have examined with care the charge of the court, and have been impressed with its clearness and fairness, and, however much we might have felt inclined to differ with the jury as to the verdict rendered, fail to discover any action on the part of the court which could have possibly misled them. Finding no error in the record, the judgment will be affirmed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

MONTAGUE *v.* DOUGAN.

(*Supreme Court of Michigan.* January 5, 1888.)

1. EVIDENCE—WEIGHT AND SUFFICIENCY.
In an action, tried without a jury, to recover for goods delivered to one on the promise of another to pay for them, plaintiff and two other witnesses testified to the obtaining of the goods from plaintiff, and that defendant directed them to be charged to him, and the court found for plaintiff. *Held*, that the evidence supported the finding.

2. SAME—ACCOUNT-BOOKS.
In an action to recover for goods delivered to one on another's promise to pay for them, plaintiff offered in evidence, to show to whom the credit was given, his ledger, journal, and another book called a "blotter," and testified that the journal was kept "in regular order," that, as a rule, all sales made by him were, by him or his employes, entered on the blotter at the time of sale, and on the same day transcribed to the journal. *Held*, that the books were admissible.

3. PRINCIPAL AND AGENT—RATIFICATION—ORIGINAL AUTHORITY.
In an action to recover for goods sold and delivered, plaintiff claimed that some of them were ordered by an agent of defendant. The evidence tended to show a ratification of the alleged agent's acts. *Held* that, on appeal, the extent of his original authority would not be inquired into.

4. WITNESS—COMPETENCY OF PARTIES—CORRECTNESS OF BOOK-ACCOUNTS.
In Michigan, the parties to a suit are, by statute, made competent witnesses to show that others have made settlements with such parties upon their books of account, and that the books have been correctly kept.

Error to circuit court, Berrien county; ANDREW J. SMITH, Judge.

Assumpsit by John A. Montague against George W. Dougan, to recover for goods delivered to a third person, on Dougan's promise to pay for them. Plaintiff's evidence was, *inter alia*, that, in his business, there were kept, among his books of account, a ledger, a journal or day-book, and another called a "blotter;" that the journal was kept "in regular order;" that, as a rule, all sales made in his business were entered, either by him or his employes, at the time of sale, on the blotter, and on the same day transcribed to the journal. Plaintiff's attorney offered the books in evidence to show to whom credit was given. Verdict and judgment for plaintiff. Defendant brings error.

Theo. G. Beaver, for appellant. *George F. Edwards*, for appellee.

SHERWOOD, J. This case is an action of *assumpsit*, originally brought before a justice of the peace in the city of Niles. The plaintiff declared under the common counts, adding thereto a bill of particulars of his demand. The defendant pleaded the general issue, with notice of set-off, and of money tendered and deposited with the court, the amount tendered being $16.32; costs $1.75 The plaintiff recovered judgment before the justice for $93.75, and on appeal by the defendant to the circuit court for the county of Berrien, the plaintiff recovered $101.78. It was tried in the circuit, before Judge SMITH, without a jury, and, at the close of the testimony, the defendant's counsel presented to the court 31 written requests to find upon the facts, and 9 upon the questions of law, which he deemed applicable to the facts in the case.

The following is the defendant's sixteenth request to find upon the facts: (16) "That this suit was commenced in justice court; that on October 18, 1884, such justice taxed all the costs that had been made up to that time in said suit at $1.75; that on the same day defendant, by his attorney, tendered to George F. Edwards, who was the attorney for the plaintiff, the sum of $1.75, the costs made and taxed, and also the sum of $16.32, as sufficient to pay plaintiff's demand; that said attorney refused the same; that on the same day defendant filed his plea and notice of tender with said justice, and deposited the sum of $1.75, as costs, so taxed, and the sum of $16.32, as sufficient to pay plaintiff's demand, with said justice, who returned the same to the cir-

cuit court on the appeal herein; that said sums are still with the clerk of this court as such tender in said cause."

Upon the several requests, both of law and fact, the circuit judge made the following findings, upon which judgment was rendered: "The answer of the circuit judge to the request of the defendant to find the facts and the law in this case. As to the request to find the facts, I find as follows: (1) As to the 1st and 15th requests to find, I find that they are immaterial to the issue in this cause. That as to the 2d, 3d, 4th, 3½, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, and 17th, requests to find are incorrect and untrue. As to the 16th request to find, I find as requested. As to the 18th, 19th, and 20th requests to find, I find that they are statements of the defendant as to what he claims to be the evidence, and not of facts in the case. And to all his requests to find conclusions of law, I find them all not applicable to this case. I find, as matters of fact in this case, that the defendant purchased of the plaintiff in the year 1879, goods, wares, and merchandise, and delivered by his order to one Jacob K. Brown, amounting to the sum of seventy-three dollars and 29 cents, as set forth in a bill of particulars filed by plaintiff in this cause, and that, as a conclusion of law, the plaintiff is entitled to recover the amount, with interest, from the eighth day of August, 1880, amounting to one hundred and one and 72-100 dollars."

We have looked through this record, which purports to give all the evidence in the case, and think that the circuit judge came to the right conclusions in the case. We cannot disturb his findings of the facts, if there was any evidence to support them; and, as to the credibility of the testimony, his advantages for arriving at correct conclusions were far superior to ours. *Edwards* v. *Nelson*, 51 Mich. 121, 16 N. W. Rep. 261. Of course the tender, being insufficient in amount, was of no avail. The plaintiff, and two witnesses, testified to obtaining the goods sued for, of the plaintiff, and that the defendant directed the goods to be charged to himself. We do not think any of the defendant's exceptions can be sustained to the rulings of the court in receiving and rejecting testimony.

Some stress is laid upon the fact that the plaintiff's books were allowed to be put in evidence, without proof by other persons that they had settled accounts with the plaintiff upon the books, and that he kept correct books. Such proof is unnecessary, since the statute allows parties to testify, generally, in the case. They can testify as well to the keeping of their accounts, and the correctness of their books, as to any other facts. *Brown* v. *Weightman*, 29 N. W. Rep. 98.

The question of the agency of a Mr. Brown, who purchased, and gave directions for the charging of, a large number of articles, was strongly challenged upon the trial; but, so long as there were facts upon the subject of ratification of his agency to be found by the court, it is of little account what was the extent of his original authority. *Webster* v. *Wray*, 24 N. W. Rep. 207, 208. The plaintiff's books were offered to show to whom goods were charged, and to whom the credit was given; for this purpose, under the facts stated in the record, the proof was properly received. *Winslow* v. *Lumber Co.*, 20 N. W. Rep. 145; *Larson* v. *Jensen*, 53 Mich. 427, 19 N. W. Rep. 130.

The record fails to disclose any error prejudicial to the defendant, and the judgment at the circuit must be affirmed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

PLANO MANUF'G CO. v. ELLIS.

(*Supreme Court of Michigan.* January 5, 1888.)

1. CONTRACTS—CONSTRUCTION.

A cardinal axiom, in the construction of written contracts, is that all the parts must be examined, and effect given to every word and phrase, if practicable.

2. SAME.
The language used, if unambiguous, must be held to express the intention of the parties.

3. SAME—UNCERTAINTY—CONDITION OF PARTIES—CIRCUMSTANCES.
It is only when the language employed is not free from doubt or uncertainty, that resort may be had to the condition of the parties, the subject-matter of the contract, and the circumstances surrounding the transaction, and connected therewith, to aid the court in arriving at the intention.

4. SAME—CONTRACT FOR SALE OF MACHINE—SATISFACTORY WORK.
The written contract, relied upon in this case, reads as follows: "We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at same price that Mr. Ream has his for, and the binder is to do good work, and give satisfaction; and, if not, the said Ellis is to pay for use of same." *Held*, that the agreement that the binder was to do good work, and give satisfaction, embraced independent conditions; and, unless the binder gave satisfaction to Mr. Ellis, as well as doing good work, he was not obliged to keep and pay for the machine. *Held, further*, that a proper construction of the contract clearly brings it within the first class of such contracts, referred to in the case of *Machine Co.* v. *Smith*, 50 Mich. 565, 569, 15 N. W. Rep. 906, and is governed by the decision in that case.

(*Syllabus by the Court.*)

Error to circuit court, Berrien county; ANDREW J. SMITH, Judge.

This is an action of *assumpsit*, commenced in the recorder's court of the city of Niles, Michigan, by summons issued September 26, 1885. Plaintiff declared, orally, on the common counts, in *assumpsit*, and filed this bill of particulars: "Plaintiff's declaration: Common counts in *assumpsit* for the price and value of one Plano Manufacturing Co. binder, sold and delivered to the defendant by the plaintiff for the sum of $120." Defendant pleaded the general issue, with notice. The recorder rendered judgment for the defendant, and plaintiff appealed to the circuit court, Berrien county, where judgment was rendered for plaintiff. Defendant appealed.

Theo. G. Beaver, for appellant. *Geo. F. Edwards*, for appellee.

CHAMPLIN, J. On the eighth day of July, 1885, the plaintiff, through its agents Harder & Haynes, entered into an agreement with defendant in writing, as follows: "NILES, MICHIGAN, July 8, 1885.

"We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at same price that Mr. Ream has his for, and the binder is to do good work and give satisfaction; and, if not, the said Ellis is to pay for use of same.

"HARDER & HAYNES.
"PETER ELLIS."

Plaintiff, by its agents, delivered a Plano binder at defendant's farm, and set it up, and put it in operation. Defendant used it in cutting about 95 acres of grain, and claims that it did not do good work, and did not give to him satisfaction; and, on July 27, 1885, he served written notice on Harder & Haynes, as follows: "NILES, MICH., July 27, 1885.

"*Messrs. Harder & Haynes*—GENTLEMEN: The sample Plano binder, that you let me have on trial, does not do good work, and does not give satisfaction. I am not satisfied with it. It is at my place, where you left it, subject to your order; you can come and take it. I am willing to pay for the use of the same, and hereby offer so to do. Yours, etc., PETER ELLIS."

On the trial, testimony was offered to show how the machine worked. The defendant's counsel objected to its introduction, as being immaterial. The circuit judge overruled the objection, and admitted the testimony, saying: "My opinion of the construction of this contract is this: that it is to be a satisfactory machine, not to him, but such as people knowing the quality of machines would be satisfied with; it is to do satisfactory work."

Under this ruling a large amount of testimony was received as to the working of the machine while in defendant's possession, and the circuit judge, construing the instrument, in his charge to the jury, instructed them as follows: "As I said in the outset, this word 'satisfaction' has no further

significance than the fact that it should be a good machine, and do good, reasonable work, which would be satisfactory to intelligent, reasonable men using machinery." And again: "The question for you to determine is, was this machine capable, with proper management, of doing as good work as those that are called good, first-class machines, working through the country, under the same circumstances, and in the same kind of grain? Was it a good machine, and did it do good work, under proper management, and proper conditions; did it do that kind of work so it should have been satisfactory to a man of intelligence in relation to this kind of machines; did it do that? That is the question."

We are of opinion that the circuit court erred in the construction which he placed upon the contract. A cardinal axiom, in the construction of written contracts, is that all the parts must be examined, and effect given to every word and phrase, if practicable. *Vary* v. *Shea*, 36 Mich. 388; *Norris* v. *Showerman*, Walk. Ch. 206, 2 Doug. (Mich.) 16; *Paddock* v. *Pardee*, 1 Mich. 421; *Howell* v. *Richards*, 11 East, 643. The object is to arrive at the intention of the parties; and this is to be deduced from the language employed by them to express their intention. If the language employed is not free from doubt or uncertainty, resort may be had to the condition of the respective parties, the subject-matter of the contract, and the circumstances surrounding the transaction and connected with it, and everything except the contemporaneous and previous declarations of the parties, for the purpose of enabling the court to ascertain the intention of the parties. *Mills* v. *Spencer*, 3 Mich. 127, 136. Applying the above principles of construction to the writing introduced as the basis of plaintiff's claim, it is clear that the binder was not only to do good work, but it was to give satisfaction to defendant. Unless he was satisfied with the machine, although it did good work, he was not bound to purchase. The construction placed on the instrument by the circuit judge completely nullify the words "and give satisfaction." He construed them as synonymous with, to do satisfactory work, such as people knowing the quality of machines would be satisfied with; or, to use his own language, "this word 'satisfaction' has no further significance than the fact that it should be a good machine, and do good, reasonable work, which would be satisfactory to reasonable men using machinery."

This, certainly, is not the usual signification of the word, and there is nothing in the context, or in the subject-matter, which indicates that the word was used in any other than its ordinary meaning. The vendor had already agreed that the binder should "do good work," and if the learned judge had defined that phrase in the same way he did the word "satisfaction," it would have been applicable and proper. No one can read this writing, and give to the words their ordinary meaning, without understanding that something more was required than that the binder should do good work before defendant was obliged to keep and pay for the machine. He was not obliged to do so unless, also, it gave satisfaction to him. We may not take judicial notice of the fact, but we may well suppose that there is a choice between machines for reaping and binding that do good work. It may be that a machine which will do good, satisfactory work in reaping and binding, may, at the same time, have more side-draught than another, or it may be so geared as to require much more power to propel it than another, or its machinery may be complicated, and so constructed as to easily get out of repair, or require greater care and skill in operating it. All these things may not be impossible, or even improbable. How, then, can it be said that, although it does good work, nevertheless it may not give satisfaction? Or why should it be said, when the bargainer has reserved the right to elect whether he be fully pleased or not, that he is bound to be pleased if another reasonable or intelligent man is pleased with the work of such machine? There is another clause in the contract which has a bearing upon the question. It is stipu-

lated that if the machine does not do good work, and give satisfaction, the said Ellis is to pay for the use of the same. It cannot be contended, with reason, that Ellis agreed to pay for the use of a machine that did not do good work. This clause implies that it may do good work, and yet not give satisfaction so that he will be willing to keep and pay for it. He agreed that, if it did not do good work, and give satisfaction, he would pay for the use of the binder. He was entitled, under the agreement, to give the machine a thorough, practical trial; and then, if he was not satisfied with it, he was to pay for the use of it. This provision entitles the writing to a liberal construction in his favor. It shows that he had an option to accept or reject the binder, according as it gave him satisfaction or not. A proper construction of the contract clearly brings it within the first class of such contracts referred to in *Machine Co.* v. *Smith*, 50 Mich. 565-569, 15 N. W. Rep. 906, and is governed by the decision in that case.

The judgment must be reversed and a new trial granted.

SHERWOOD and MORSE, JJ., concurred. CAMPBELL, C. J., did not sit.

MITCHELL *v.* MITCHELL *et al.*

(*Supreme Court of Michigan.* January 5, 1888.)

DESCENT AND DISTRIBUTION—AMICABLE DIVISION AMONG HEIRS—ESTOPPEL.

In an action of partition brought by one of the heirs of an intestate against the others, where it appears that the plaintiff has acquiesced in and received the benefits of an amicable division made 20 years before, he will be estopped to claim a redistribution of the property.

Appeal from circuit court, Oakland county, in chancery; WILLIAM W. STICKNEY, Judge.

Action for partition, brought by David Mitchell against Daniel W. Mitchell and others. A decree of partition was rendered, and defendant Daniel W. appeals.

Charles F. Collier, (*F. A. Baker*, of counsel,) for appellant. *Aaron Perry* and *Aug. C. Baldwin*, for appellee.

MORSE, J. George Mitchell, the father of David and Daniel W., the main parties in this litigation, died in the township of Holly, Oakland county, July 10, 1852, leaving a widow, Eleanor S. Mitchell, and seven children, named, respectively, William, John C., David, Daniel W., Hannah, Sarah, and Margaret. At the time of his father's death, the defendant Daniel W. was 10 years of age. George Mitchell left no will, and at his decease was the owner of 300 acres of land, constituting a farm, upon which he resided, in said township of Holly. He also had a few hundred dollars of personal property. He held a lease, having about three years to run, upon 120 acres of land, adjoining his premises, known as the "Caton Farm." His estate was never administered upon in the probate court. After his death, the widow and children remained upon the farm; the widow and the older boys taking charge of the same, and the personal property. William was the eldest of the children. In 1855, he sold out his interest in the farm to John C. and David; the deed, however, running to John C. alone. From that time until 1863, John C. and David ran the farm together in copartnership. In 1857, they purchased the Caton farm, and it was deeded to them jointly. When Daniel W. came of age, in 1863, John retired, in accordance with an agreement made between the three brothers. John received 60 acres of the home farm, and quitclaimed his interest, which consisted of his share and William's, to the other children. The deed contained a clause that it was understood by all the parties to the same that David was to have 21⅓ acres of the land over and above his equal and undivided share in the same, because of his interest in William's share.

David and Daniel W. then began to work the place as copartners, and continued to do so up to about the time of the filing of the bill of complaint in this cause. At the time of this arrangement between John, David, and Daniel W., the elder boys divided the Caton farm between them; John taking 70 acres, and David, 50. In 1867, David and Daniel W. purchased the 60 acres of the home farm of John; David deeding, in part payment of the same, 40 acres of the Caton farm. In September, 1868, a partition was amicably made of the home farm between David and Daniel W., of the one part, and the three girls, Sarah, Hannah, and Margaret, upon the other. By this partition the girls received in severalty certain portions of the premises, amounting to 140 acres in all; leaving in the possession of David and Daniel W. the 60 acres they had bought of John, and 100 acres beside. Quitclaim deeds were executed and delivered between the parties to carry out this agreement. In the deed of the girls, conveying their interest in the 100 acres to David and Daniel W., it was expressly stated that three-fifths was to be the property of David, and Daniel W. was to have two-fifths of the premises. Subsequently, the boys bought out the girls, and when this bill was filed they owned together the old farm as their father left it. Differences arose between David and Daniel W. in 1884, and the complainant filed his bill for a partition of the lands, a dissolution of the copartnership, and an accounting. The defendant Anna Mitchell is the wife of Daniel W., and Mary A. is the wife of David. They are made parties defendant because of their dower-rights in the premises.

There is no dispute as to the division of 200 acres of the old farm. It is conceded that each of the boys have an equal one-half interest in the same. David claims three-fifths of the 100 acres, while Daniel insists that it should be divided equally. Ten acres of the Caton farm, the legal title of which stands in David, is also in dispute. Daniel claims half of it, while David denies that he has any interest in it. The court below found in favor of David on both claims, and a partition of the land has taken place on that basis, and the case referred for an accounting. The defendant Daniel W. appeals. He finds no fault with the partition as it has been made, in case his claim is not sustained here. He asks this court to decree him a half interest in the 100 acres of the home farm, and also in the Caton 10 acres. The widow of George Mitchell lived on the place with the children and helped manage the farm and property until she died in 1862. There was $500 or $600 of personal property at the father's death. He was owing about $100. It is claimed by the defendants' counsel that the Caton farm was purchased almost wholly from the proceeds of the home farm; that William's interest was purchased in the same way; that John C. and David occupied a fiduciary and confidential relation towards the defendant and the other children, especially those who were under age; that, when they took charge of the estate and managed it, the profits of the property inured to the benefit of all; and although they took the legal title of the Caton farm in their own names, and also William's interest in the home farm, they must hold the same in trust for all the children.

We listened with pleasure and profit to a most able and interesting argument from defendants' counsel upon the duties of these older children, under the circumstances, to the younger, and as to the latters' rights to their full share of the proceeds of this farm of their father's; but we do not consider it necessary, in adjusting the equities between these two brothers, to investigate or discuss what might be, under other circumstances or in other cases, the duties or rights of older and younger children in a case like the present. Here, all the parties have been satisfied with the arrangements made between all the children for 17 years since the last division in 1868, and the defendant has acquiesced in the deeds of William and John since 1863, when he became of age. When he was 21 years old, and presumably a man of ordinary intelligence,—at least, the law presumes that he was capable of transacting business

for himself,—he, in common with David, took possession of William's and John's shares under a deed that gave in effect David's three-fifths to his two-fifths of such interest. And in 1868, when the partition with the girls was made, he accepted a deed from them conveying their interest in the 100 acres in the same proportion as between him and David. He knew, also, from the beginning that he had no part in the legal title to the Caton farm, and he made no claim for any share therein until he and David disagreed about their partnership matters. His claim as to the 100 acres is that he was not aware of the clause in the deeds giving David's three-fifths of the same. We think his claim cannot be sustained from the evidence. We are satisfied that he knew all about it, and concurred with the rest of the children in the arrangement. When he became of age he admits that he received one-third of the personal property then on the place, which amounted, according to the testimony, to about $500. This, David claims, was given him for his work upon the farm while a minor. It would appear from the evidence that Daniel W. received more benefit from the working of his father's place by his older brothers that he would had the farm and property been divided at once upon George Mitchell's death. Between such death and the majority of the defendant, houses and barns were built upon the place, an orchard set out, and 40 acres or more cleared and converted into plow land. Of these improvements all the children in the partition of 1868 received their full share in the division of the farm. But, be this as it may, the defendant must be considered to have been fully acquainted with the arrangement by which David became entitled to three-fifths as against his two-fifths of the 100 acres, and also possessed of the whole title to the 10 acres of the Caton farm. In this arrangement and division he has acquiesced for over 20 years. It is too late now for him to disturb or impeach it.

The decree of the court below was right, under the proofs, and must be affirmed, with costs. The record will be remanded to the circuit court in chancery for the county of Oakland for further proceedings under its decree.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

MERKLE *v.* TOWNSHIP OF BENNINGTON.

(*Supreme Court of Michigan.* January 12, 1888.)

1. EXECUTORS AND ADMINISTRATORS—FAILURE OF EXECUTOR TO BRING ACTION FOR WRONGFUL DEATH—APPOINTMENT OF WIDOW.
   The personal representatives of a testator had a right of action against a municipal corporation for the death of the testator, resulting from defects in a bridge. The executor appointed by the will refused to commence suit, but closed his administration and procured his discharge. *Held* that, under How. St. Mich. § 5843, providing that if an executor dies, or is removed, or his authority shall be extinguished, administration, with the will annexed, may be granted of the estate not already administered, letters of administration were properly granted to the widow, to permit her to prosecute the action.

2. DEATH BY WRONGFUL ACT—PLEADING—VARIANCE.
   In an action by an administratrix for her intestate's death, the declaration alleged that the planks in the bridge, where the accident occurred, were loose, and the stringers uneven, the planks liable to slip off, turn over, and tip up, and thereby trip horses, and that the horses did become entangled in the loose planks, and thereby tripped. The jury found, and the proof showed, that one of the horses driven by the deceased had stepped into a hole in the bridge, whereby the team became frightened, resulting in the injury alleged. *Held* no variance.

3. SAME—OBJECTION CANNOT BE MADE AFTER JUDGMENT.
   Where evidence showing that the injury resulted from a defect in the bridge, different from that alleged in the complaint, is introduced, not only without objection, but by the defendant, from the minutes of the testimony given upon a former trial, an objection thereto, made after judgment, on the grounds of variance, will not be regarded by the court.

4. TOWNS—LIABILITY FOR DEFECTIVE BRIDGES—REPEAL OF LAW—RE-ENACTMENT.
How. St. Mich. § 1442, which declares the liability of a township for damages to persons by reason of defective bridges, though repealed by act Mich. No. 264, 1887, was substantially re-enacted by that act, so that an action brought under said section before the passage of the latter act is not affected thereby.

5. SAME—REPAIR—NOTICE OF DEFECTS—INSTRUCTIONS.
Defendant in an action for personal injuries, resulting from defects in a bridge, requested the court to instruct the jury that unless they should find that, between the date when repairs were made thereon and the date of the accident, the bridge became defective, in the absence of testimony bringing knowledge thereof home to defendant, plaintiff could not recover, as the defect had not been of long enough standing to charge defendant with notice thereof. The charge was given, with this addition: "But this depends upon whether the repairs covered the place where this alleged accident occurred, by reason of defects in the bridge." *Held*, that the amendment was proper.

6. SAME—EVIDENCE—HARMLESS ERROR.
Where, in an action for personal injuries, resulting from a defective bridge, the testimony of a witness that, from his personal knowledge, the bridge was in good repair, is improperly stricken out, but is followed by testimony showing, in detail, the facts upon which his opinion is based, it is error without prejudice.

7. SAME—EVIDENCE.
In an action for personal injuries, resulting from defects in a bridge, the testimony of a witness that "it was a very poor, shackly bridge," is admissible.

8. APPEAL—OBJECTION MUST BE RAISED BELOW.
On objection made to the admission of evidence, where no reason is assigned, the appellate court will not reverse the ruling of the court admitting it.

Error to circuit court, Shiawassee county; WILLIAM NEWTON, Judge.

Action for damages, brought by Augusta Merkle, as administratrix, etc., against the township of Bennington, under section 1442, How. St., declaring the liability of a township for damages to persons by reason of defective bridges. Verdict and judgment for plaintiff. Defendant brings error.

S. F. Smith, (*Isaac Marston*, of counsel,) for appellant. *G. R. Lyon* and *Hugh McCurdy*, for appellee.

CHAMPLIN, J. When this case was heard, the court called attention of counsel to the repeal of the statute, contained in act No. 264, Sess. Laws 1887, under which the action in this case was planted. The repeal is in express terms, and without any saving clause. Supplemental briefs have been furnished us upon this point. The repealing statute, however, substantially re-enacts the law repealed, with some slight modifications so as to include in the remedy afforded by its provisions damages for injuries received in consequence of the negligence of municipal corporations to keep sidewalks in repair, and to abolish the common-law liability to actions for negligence against such corporations. Upon consideration of the matter, we have concluded that the plaintiff's right of action is not affected by the act of 1887.

The injury for which the plaintiff seeks a recovery occurred July 5, 1881. The declaration contains two counts. The first alleges that a bridge had been constructed across Maple river, of timber and planks, laid upon stringers, in the usual manner of building bridges, and was built by the township for the purpose of being used as a bridge by the public traveling along the highway; that it was the duty of defendant to keep the highway and bridge in good repair, and in a safe and convenient condition for public travel at all times; that it did not keep the bridge in good repair, but suffered the same to become dangerous, and unfit for public use and travel, "said planks being loose, never having been fastened to said stringers, and the stringers uneven, so that said planks became loose, and were liable to slip off of said stringers, turn over, and tip up, and trip horses, and make them stumble, and obstruct wagons and vehicles when passing over said bridge; and said planks did slip off, the stringers became displaced, and did tip up, and trip horses, and obstruct wagons and vehicles while passing over said bridge."

The declaration then charges that while George Merkle was driving over this bridge in a careful and prudent manner, and without fault on his part, "the said horses which he was driving became entangled in the loose planks of said bridge, and thereby tripped, stumbled, and became frightened and unmanageable, and ran away, and threw said George Merkle out of the wagon." The second count charges that the bridge was dangerous, and unfit for public travel and use, "the planks on the bridge loose, and were liable to slip off the stringers, topple, and tip up, and trip horses and obstruct wagons, and said planks did topple, slip off the stringers, become displaced, and did tip up and trip horses, and obstruct wagons in crossing said bridge;" that as said George Merkle was riding in his wagon, and driving his wagon and horses over said bridge, in a careful and prudent manner, and without fault, his horses became entangled in the loose planks of said bridge, and thereby tripped, stumbled, and became frightened and unmanageable, and ran away, thereby throwing said George Merkle out of his wagon upon a pile of stones, by said public highway, whereby he was injured so that he died. The defense was the general issue. The cause was tried before a jury, who gave a verdict for the plaintiff.

The defendant submitted four special questions to the jury, which, with their answers thereto, were as follows: "(1) Did Mr. Fisher, as overseer of highways in the district where this bridge was situated, repair the same in a proper manner, between the twentieth and thirtieth day of June, 1881? *Answer.* No. (2) Was the fact that one of Mr. Merkle's horses stepped into a hole in the bridge, as testified to by Anna Merkle, the direct cause of the injury? *A.* Yes. (3) Did Mr. Merkle see this hole on his way to Owosso that morning, and consider it dangerous? *A.* Yes. (4) Could Mr. Merkle, on his way back, by the use of ordinary care in driving on the east side of the bridge, have passed over the same with safety? *A.* No." Anna Markle, referred to in the second special question, is the daughter of George Merkle, who was injured by the accident, and is the only living witness who was present when it occurred. She testified respecting it as follows:

"We were coming from Owosso; we drove over the bridge to this plank, and one of the horses got scared, acted as though he got caught in the plank, and gave an awful jerk, and I heard something break, and something fall onto the bridge. The wagon run on the west side, down this bank, and threw my father out onto a pile of stones, and I jumped out, and the horses got away. *Question.* Did you see, then, anything in relation to the situation of the planks on the bridge? *Answer.* Yes, sir. *Q.* When the horses went upon them, how were they as to rattling? *A.* They rattled. *Q.* As the horses walked over them, they rattled as they walked? *A.* Yes, sir. *Q.* Now, you stated to the jury that when they came to this plank— What do you mean by that? *A.* That was the plank where the horse acted as though he got caught. I turned around to see what was the matter, and the plank—it was slipped out from the west end of the bridge, west side rather, and it left a hole, and it looked as though it was cut cornerwise, angling of the board; it looked as though it was slipped back over the other one. *Q.* That was where the difficulty occurred? *A.* Yes, sir; that was the difficulty in the bridge; yes, sir. *Q.* Where the difficulty occurred with the horse? *A.* Yes, sir. *Q.* How did the horse jump, suddenly? *A.* Yes, sir; he acted as though he got caught pretty tight. *Q.* What did your father do then; when the horse jumped, what did he do? *A.* He looked over the dash-board to see what was the matter. He didn't say anything. *Q.* What did he do with reference to trying to hold them? *A.* He had hold of the lines and pulled them back with all his might, but it seems as though he could not manage them. *Q.* State to the jury just how the horses acted there? Did they at once jump into a run? *A.* No, sir; the off horse, that is the horse on the west side, gave an awful jerk as though he was caught, and then they tried to get away from the wagon; they jerked and pulled, but didn't get away from the wagon on the bridge. *Q.* As you recol-

lect it, when did the horses finally get loose from the wagon? *A.* After they had gone down the bank and threw my father out. I jumped out. I fell. As I got up, the first thing I saw was the horses just turning, I guess it is what you call the turnpike."

On her cross-examination, she testified that on the way going to Owosso with her father, in the morning, she did not notice anything on approaching the bridge; that she did while crossing; that her father said there might be an accident happen there some time. He was looking to the west side of the bridge. It attracted her attention, and she saw there was a plank bowing upon the west end. "*Question.* Was it a plank bowing up or was there a hole? *Answer.* I didn't notice a hole. I didn't notice at that time. I noticed the plank being bowed up. *Q.* Didn't your father make the remark there was a hole there, and somebody might get injured? *A.* No, sir; he simply said there might an accident happen there some time."

The witness was then cross-examined as to the testimony given upon a former trial of the case, from which it appeared that she testified that, when going north with her father towards Owosso, that morning, she observed a broken plank, that was loose, between the south end and middle of the bridge, on the west side, which was the place where the plank flew up when they came back; that it was broken from the corner crosswise; there was a piece broken angling off the end, and there was a hole there. "*Question.* Which side of the bridge did your father drive upon, on his way back, the east or west side? *Answer.* I don't know; I guess he drove through the center of the bridge. *Q.* Don't you remember he drove on the west side, so the horse got his foot caught in that hole, the hole being on the west side? *A.* This hole was on the west side. *Q.* He drove on the west side, so the horse put his foot in that hole? *A.* No, sir, you are mistaken; I didn't say that. *Q.* Where did he put his foot and get caught? *A.* I don't know. *Q.* It was at this same plank where there was a hole and it broken, was it not? *A.* I didn't say he put his foot in that hole on the west side of the bridge. *Q.* It was that same plank where he got caught? *A.* Yes, sir. *Q.* There was not anything else that you observed but the hole that he could get caught in? *A.* No, sir; I couldn't see anything else. *Q.* So that defect, or that hole, at that particular place was the only thing you noticed on the bridge, and that being the place where the horse made this jump? *A.* That is what I saw when looking back. *Q.* You didn't notice any other place? *A.* No, sir."

Further extracts were read in evidence to the jury from the testimony given on a former trial, in which she stated that the "horse got his foot caught in that hole." And the attorney for the plaintiff also read from the stenographer's minutes of the testimony of the witness, given upon such former trial, to show that the witness stated that she did not see the horse's feet caught, but that she knew he got caught by his giving an awful jerk; that she looked back and saw the plank; that it was lying over the other one; that it had moved out of position.

After the jury had rendered a general verdict for the plaintiff, defendant entered a motion in arrest of judgment, for the reason that the jury, by their answers to the special questions, found that one of the horses of the deceased stepped into a hole in the bridge, as testified to by Anna Merkle, and that such was the direct cause of the injury, and that no such cause was, or is, alleged in the plaintiff's declaration. The motion was overruled, and counsel for defendant insists that such ruling was erroneous, and he further insists that there was a fatal variance between the declaration and the evidence offered to sustain it, viz.: (1) That the declaration alleges that, because the planks were loose, and the stringers uneven, the planks were liable to slip off, turn over, and tip up, and thereby trip horses; that the horses did become entangled in the loose plank, and thereby tripped; (2) that the direct and only evidence upon the subject showed that there was a broken plank, and a hole in

consequence thereof; that the off horse stepped into this hole, and then stumbled or jumped, causing the wagon tongue to fall; hence the injury.

The case of *Batterson* v. *Railway Co.*, 49 Mich. 187, 13 N. W. Rep. 508, is cited in support of the objection here taken. There is no analogy between the two cases. In the *Batterson Case*, this court held that the intention of the pleader, as appeared from the averments of the declaration, was to complain of defects which existed in the main line of defendant's railroad which caused the injury to the plaintiff, when his proof showed that the defect which occasioned the injury was not upon the main track, but upon the side track, or switch. "The testimony fixed the theater of the imputed negligence, and the place of the injury, on an unballasted side track," where a different measure of duty rested upon the defendant, as regarded its employes, from that which would have been imposed upon it if the scene of the accident had been the main track. *Batterson* v. *Railway Co.*, 53 Mich. 125, 18 N. W. Rep. 584. In this case, the theater of the injury is the same, whether the primary cause was occasioned by a hole caused by a piece having been broken out of the plank, which had become warped, and bowed up, or by a hole caused by the horse hitting the plank with his hoof in such manner as to get caught between the plank. In either case, the defect was due to the condition of the planking of the bridge, rendering the same unsafe and unfit for public travel.

The object of a pleading is to apprise the court and opposite party of the pleader's claim. Certainty to a common intent is all that is required in the declaration, and this is attained in actions of trespass on the case for negligence, when the neglect of duty relied on, and resultant injury, are described with substantial accuracy. In this case, the declaration was sufficiently specific, and the proofs were not so variant as to the particular defects which caused the injury as to be fatal to a recovery. The testimony introduced by plaintiff by the mouth of many witnesses fully sustained the declaration as to the defective condition of the planking upon the bridge. The testimony of Anna Merkle, bearing upon this point, is given above. She says she did not see the horse's foot when it got caught in the bridge. She saw him jerk very hard to get it loose, and looked back, and saw the plank displaced and slipped back across the other plank. But the objection of variance is disposed of in this case upon well-recognized principles. The testimony, when introduced, was not objected to on the ground that it was not the case alleged in the declaration. On the contrary, the evidence as to the horse being caught in a hole was introduced by defendant from the stenographer's minutes of the testimony given upon a former trial. Under such circumstances, the objections raised, ought, after verdict, to be disregarded; or if the variance was substantial, the declaration ought to be treated as amended to meet the proofs made. Here there was no surprise to the defendants of what they were called upon to meet. The variance alleged was more a matter of detail than of substance. The defendant introduced a large number of witnesses to controvert the evidence that there was any hole in the bridge, or that it was out of repair, and, under the principles laid down in *McHardy* v. *Wadsworth*, 8 Mich. 349, and *Stone* v. *Covell*, 29 Mich. 359, the objections taken on the ground of variance must be overruled.

We should notice here the requests of counsel for defendant, based upon the question of variance. These were requests numbered 7 and 8. They are embodied in the bill of exceptions, but the circuit judge certifies that he has no recollection that such requests were presented to him, or brought to his attention. There appears to be some mistake about these additional requests; and, under the record as it stands, we do not think the counsel for defendant is in a position to predicate error upon the fact that they were not given. It was held in *Stone* v. *Covell*, *supra*, that where testimony was introduced, and the party relying upon variance made no objection on that ground until his request to charge, when it was brought to the attention of the court for the

first time, it was too late, and the objection would be deemed waived. Had these requests been brought to the attention of the court, he might have refused them for the reasons stated in *Stone* v. *Covell*.

It is further insisted that as the jury, in answer to the second special question, found as a fact that one of Mr. Merkle's horses stepped into a hole in the bridge, as testified to by Anna Merkle, and it was the direct cause of the injury, and this cause not having been alleged in the declaration, the motion in arrest of judgment should have been granted. What we have said covers this point.

Mary Deer, a witness on the part of the plaintiff, added to one of her answers: "It was a very poor, shackly bridge." Defendant's counsel asked that this be stricken out. The court refused. George Rowell, a witness on the part of the defendant, in answer to a question said: "From my personal knowledge the bridge was in good repair." This, on motion of the plaintiff's attorney, was stricken out. To each of these rulings counsel for defendant excepted. Counsel insists that both of these rulings cannot be correct. In this we agree. The first ruling was correct, and the latter erroneous. The error was one, however, which did not prejudice the defendant we think. The witness was next asked: "What did you notice,—what defects, if any? Point them out. *Answer*. I didn't notice any defects. *Q*. How did you find the plank, as to whether they were sound or not? *A*. As far I know, they were; I saw no defective plank. *Q*. What holes did you discover in the bridge, if any; what parts or places? *A*. Nothing but the usual cracks between the planks." The witness further testified as to what kind of planks were used, their thickness, the way they were fastened, and what and when repairs were made prior to the accident. It thus appeared from his testimony, the weight and credibility of which were for the jury, that the bridge was in good repair. The facts upon which his opinion would have been based were all placed before the jury; and, while his opinion was admissible for such weight as the jury chose to give it, its rejection could not have had a prejudicial effect upon the minds of the jurors. *Chambers* v. *Hill*, 34 Mich. 523.

The ruling seems not to have been very rigously adhered to, as the witness Robert Wilcox, introduced and examined on behaif of defendant, when asked as to the condition of the bridge answered without objection: "Well, I thought it was in good repair;" and again he was asked: "What had you noticed upon these occasions? *Answer*. I thought it was in good shape." Likewise, the witness Milton E. Fisher was asked, by counsel for defendant: "After making those repairs, what condition did you then leave the bridge in?" To which he answered, "In good condition."

Error is assigned upon a question asked the witness Fisher, as follows: "Don't you remember, when you started down to fix that bridge, the doctor was there, fixing this boy's hand that got hurt, and didn't Mary say to you: "You town officers are a nice set of men; you shut the barn-door after the horse has got away. Now you will fix the bridge after the man has got hurt?" The question was objected to, but the ground of objection was not stated. The witness was permitted to answer and said: "I don't recollect of hearing of any such thing." As no reason was assigned for the objection, we cannot say that the court erred in allowing the question. *Wheaton* v. *Beecher*, 49 Mich. 348, 13 N. W. Rep. 769; *Young* v. *Stephens*, 9 Mich. 507; *Snyder* v. *Willey*, 33 Mich. 483, 490; *Ward* v. *Ward*, 37 Mich. 259, and cased cited.

The sixth request made by defendant reads as follows: "If you find that the overseer of highways, Mr. Fisher, repaired the bridge carefully and properly, and that such repairs were made on or after the twenty-seventh day of June, 1881, and you further find that, between the date of such repairs and the time of the accident, one of the planks became broken, or slipped to one side, thus leaving a hole in the bridge where the horses stumbled, I charge you, in the absence of testimony bringing home to the proper township of-

ficers knowledge of such defect, the plaintiff could not recover, as the defect, under such circumstances, was not of such long standing, or of that character, that knowledge thereof could be charged against the township." This instruction was given by the court to the jury, with this addition: "But this depends upon whether the repairs on the thirtieth of June covered the place where this alleged accident occurred by reason of defects in the bridge." Counsel for defendant claims that there was certainly evidence tending to show that the bridge had been repaired; that there was also evidence tending to show that this hole was caused by a broken plank; and that the request was, if the jury found that, between the date of the repairs and the time of the accident, the plank became broken, or slipped to one side, and that, under the addition made by the court, unless the jury could say that the particular plank which broke had been put in or something done to it by the overseer on the thirtieth of June, the township would be liable, although on that date it appeared to be sound, properly secured, and safe. We do not draw the same inference from the addition made by the court that the learned counsel does. Under the testimony in the case, it was a disputed question whether, for a a long time prior to the accident, the bridge had been out of repair at the place where the accident occurred; namely, the loose and warped condition of the planks, and the hole caused by one of the planks being broken. Defendant's witness Fisher had testified that he repaired the bridge between the twentieth of June and the first of July; that he traveled across the bridge in the forenoon of the day of the accident, and the bridge was then in good repair; that, in the afternoon after the accident, he examined the bridge, and found the ribbon broken a short distance from the south end, and found a plank had been turned over right where he had repaired the plank that was broken off by replacing it with a new plank; that the plank was not broken, but simply warped up. We think it was proper for the court to direct the attention of the jury to the precise place in controversy, and to the disputed question whether it had been repaired.

One further objection remains to be noticed. The deceased left a last will and testament, which, upon petition of Mrs. Merkle, was admitted to probate September 12, 1881, the executor named therein qualified, the estate was administered and closed, and the executor discharged. It is admitted that Mrs. Merkle requested the executor to commence suit against the township, and he refused. After the executor was discharged, Mrs. Merkle, on November 3, 1883, filed a petition in the probate court, setting forth that George Merkle had died, leaving a last will and testament; that he was possessed of real and personal estate, etc.; and praying that administration be granted to her. Due notice of the application was given, and on the third day of December, 1883, letters were issued to said Augusta Merkle, with the will annexed, under which she has done nothing but to commence and prosecute this suit. It is claimed that the probate court had no jurisdiction to make this appointment. The objection is without force. The liability created by the statute in cases of this kind is a chose in action which is assets belonging to the personal representative; and if the executor named in a will refuses to prosecute, or, in other words, refuses to enforce collection, and reduce the assets to a chose in possession, for the purpose of distribution under the statute, and proceeds and closes his administration of the estate, and procures his discharge, disregarding the rights of the widow and children of the deceased, another person may be appointed to complete the administration of the estate so left unadministered, under section 5843, How. St. It would be a sad failure of justice if the executor or administrator could defeat the right of the widow and children, and deprive them of the rights secured to them by the statute, by refusing to prosecute the suit and resigning his office. The judgment is affirmed.

(The other justices concurred.)

MUTUAL BENEFIT LIFE INS. CO. *v.* WAYNE SAV. BANK *et al.*

(*Supreme Court of Michigan.* January 12, 1888.)

1. INSURANCE—LIFE—ASSIGNMENT OF POLICY—FRAUD ON WIFE.
Action was brought by a life insurance company to determine as between two claimants, the title to money due on two policies upon the life of the husband of the beneficiary. The other claimant, a bank, asserted title by virtue of an assignment of the policies. It appeared that the wife was peculiarly ignorant of business matters; that for a number of years her husband had been doing business with the bank in his wife's name, and was in the habit of borrowing large sums of money on their joint notes. He would procure her signature to blanks, and as occasion required, fill them out. She did not know what papers she signed, nor what use was made of them. It was thus that her signature was obtained to the assignments of the policies, which were given to the bank as security for a large debt, evidenced by these notes, and of the existence of which the wife was ignorant. She never knew of her husband's dealings with the bank, nor that he was in any way indebted to it. She never had any property of her own, and she never received any benefit from these notes or assignments. *Held*, that the assignments were invalid.

2. SAME—EVIDENCE OF ASSIGNMENT.
Action was brought by an insurance company to determine, as between the two defendants, the title to money due on a policy. Complainant alleged that one claimant claimed under an assignment from the assured, which fact was also alleged in the answer of such claimant, and was nowhere denied by the pleadings of the other. Claimant testified that an assignment was made, and the policy delivered to her, and offered in evidence a copy of the original assignment which she testified she had been unable to find. *Held*, sufficient evidence of the assignment.

Appeal from circuit court, Wayne county, in chancery.

Bill of interpleader, filed by the Mutual Benefit Life Insurance Company to determine, as between the Wayne County Savings Bank and Alice H. Curtis, the right to a sum of money due on two policies of insurance on the life of George E. Curtis. A decree was rendered in favor of the bank. Alice H. Curtis appeals.

Duffield & Duffield, for appellant. *Moore & Canfield*, for appellee.

SHERWOOD, J. Both defendants in this case claim the amount of moneys due upon two policies of insurance issued by the complainant upon the life of George E. Curtis, who was the husband of Alice H. Curtis, one of the defendants. On November 28, 1864, the company issued the first policy, in the sum of $3,000, to Mrs. Curtis, by the terms of which it was made payable to her if she survived her husband, and, if not, then to be paid to their children, or to their guardian. December 31, 1866, the company issued the second policy, in the sum of $5,000, to George E. Curtis, payable to the assured, his executors, administrators, or assigns; and, the eighteenth day of May, 1876, he assigned this policy over to his wife. Both of these policies, it is claimed by the complainant and the other defendant, were duly assigned by George E. Curtis and his wife to the defendant bank,—the $5,000 policy, on the twenty-third day of July, 1884; and the $3,000 policy, on the twenty-ninth day of the same month. These assignments, Mrs. Curtis claims, are void. On the thirteenth day of August, it appears that George E. Curtis and his wife executed to the bank a promissory note for the sum of $7,936.20, payable on or before six months after date. This note recites that the said policies of insurance were deposited with the bank as security for the payment of said note. This note Mrs. Curtis also claims to be void as against her. George E. Curtis died on the twenty-third day of September, 1885. The bank, as assignee of the policies as above stated, on the third day of November, 1885, presented proofs of loss; and on the sixth day of January, 1886, Mrs. Curtis presented to the company the usual proofs in such cases, showing the death of her husband; and each party claims the right to receive the amount due on the policies, assured to the proper owner. The insurance company makes no contest against the claim of the party legally entitled to the money, and, for the purpose of determining the question, it has caused to be filed the bill in

this case in the circuit court for the county of Wayne in chancery, and, under the order of the court, has deposited the amount due upon the policies with the register thereof, for the legal owner of the same. To the complainant's bill setting forth the above facts, and that complainant cannot ascertain to whom it can with safety make payment, and that the bank threatens to bring suit at law to compel payment of the amount it claims under the policy, the defendants filed their several answers.

The answer of the bank sets forth the assignments of the policies, and avers, among other things, that, prior to their date, the bank had loaned George E. Curtis and Alice H. Curtis large sums of money, to secure the payment of which the assignments of said policies were made. That, subsequent to the assignments, the bank also loaned certain other moneys upon the same security; and that on or about August 13, 1884, an accounting was had between the parties, and there was then found and agreed to be due to the bank the sum of $7,936.20, for which sum Curtis and wife executed the note before referred to. That, subsequent to the giving of the note, the bank also loaned Curtis and wife on December 31, 1884, $390; on January 26, 1885, $190; on March 7, 1885, $190; and on September 26, 1885, $70,—making the entire indebtedness due to the bank, $8,776.20. That the consideration for the assignment of said insurance policies as aforesaid was money loaned by the defendant to the said George E. and Alice H. Curtis prior to and at the date of the assignment, and that the same was intended as security to the defendant for the money so loaned as aforesaid, and for any other moneys which the said defendant might thereafter loan to the said George E. Curtis and Alice H. Curtis, or either of them; and that there is now due and unpaid to this bank, for moneys by it loaned as aforesaid, the sum of $8,776.20, besides interest, as security for which this bank holds the aforesaid policies of insurance. The defendant bank further says that "this defendant has no knowledge that the said Alice H. Curtis claims that the said assignments to this defendant are void as against her, or that she is entitled to said money, and leaves complainant to its proofs in regard to said allegation. But it shows that any such claim on the part of said Alice H. Curtis is without any just foundation; that, the said insurance policies being due and payable to this defendant, this defendant insists that it has a right to collect the same, and, if necessary, to bring suit therefor against the said complainant; and that said defendant, upon information and belief, denies that the said complainant cannot safely pay over said moneys, due as aforesaid, to this defendant, or that it is in any danger of being harassed if it should make such payment."

Mrs. Curtis, in her answer, admits the procuring of the policies as stated in the bill, and the assignment of the $5,000 policy by her husband to her. She avers that she "never sold or transferred the same, for value to her accruing, or knowingly parted with or assigned the legal title to the same, to any other person or party, but claims to be the sole, true, and lawful owner thereof, and of all moneys due and payable thereon." She admits the claim of complainant on the first of said policies for the amount due on the premium note, and is ready and willing to allow the same on payment to her of the balance admitted to be due thereon. And, further answering, denies that she ever made or entered into any contract or agreement with said bank on the thirteenth of August, 1884, or at any other time, or since, by which she became indebted to or chargeable with any liability to pay money to said bank or its assigns; and that she never received any money or valuable consideration from said bank in connection with any such alleged contract or contracts; and that she was never holden in any way or individually liable to any extent, to said bank. She further says that she never intended to assign her interest in said policy to the bank, for any purpose or in any manner; and if such an assignment in fact exists bearing her signature, which she does not admit, it was obtained wrongfully and fraudulently, and without

any knowledge on her part that the same was attached to any instrument of assignment, or any knowledge on her part that said bank ever claimed that she was indebted to the bank, and it was therefore inoperative and void; and that the same is true with regard to the $3,000 policy. That she never had any treaty with the bank or its agents by herself or otherwise by which she assigned said policies, or either of them, to the bank, as security, or in any other manner. That by the death of her husband the last-named policy became hers absotutely, and she is the sole owner of the same, and entitled to the amount due thereon from the complainant. She, further answering, says she never, by herself or agent, borrowed or received any sum of money from the bank, and that she never gave her note to said bank. That, if said bank made loans as stated, they were to her husband alone, and on his credit; and, if he assumed to use her name and signature to the notes and assignments mentioned in the answer made by the bank, it was done without her knowledge or consent, and that she never received anything for or on account of said alleged loans; and that, if her signature was obtained to any paper held by said bank by her said husband, it was done by misrepresentation and deception, and not with her assent, knowledge, or understanding of the same. The answer further proceeds as follows: "And this defendant submits and avers that said George E. Curtis, as she has since his death been advised and believes, was in the habit of indulging in various speculations in grains, stocks, and other articles on his own account, and without any knowledge or participation therein on the part of this defendant, but with full knowledge on the part of said Wayne County Savings Bank, or one or more of its officers, who furnished him the means for such operations; and, when said George E. Curtis was unsuccessful, he resorted to certain misrepresentations and deceptions to and upon this defendant to procure the signatures (if such were in fact obtained) of this defendant, in order to carry out those individual operations and schemes of his own; and that said bank consented and co-operated with him in this endeavor, well knowing that this defendant was in nowise interested in or had knowledge of his said operations. And this defendant, further answering, says that the means thus used in procuring her signature to said papers, if such were obtained, were wholly fraudulent and void; and that the notes held by said bank bearing defendant's signature, if any such there are, were all the individual debts of said George E. Curtis, and not of this defendant, who was neither personally, nor in her estate, benefited or advantaged thereby; and she is therefore in nowise chargeable therewith or holden thereon, and she asks this court so to decree. And this defendant, further answering, says that at no time during the life of said Curtis was she ever advised, either by him or by said bank, that any moneys had been furnished by said bank, either to said George E. Curtis or any one else, on her name, credit, or security; and she expressly avers that none such were ever furnished to her. And she also avers and declares that not long before the death of said George E. Curtis, and subsequent to the date of said alleged assignment, he expressly informed her, in the presence of third parties, that said policies of insurance were still maintained for her benefit, and would be sufficient, in case of his death, to take care of herself and her children, and she never knew anything to the contrary until after his death, when claim was made by said bank against this defendant on said policies." The defendant asks that a decree may be entered in her favor, declaring said notes and assignments, if any are held by the bank as claimed, void as against her, and that the bank be required to surrender up to her the two policies of insurance, and that complainant be decreed to pay to her the amount equitably due to her thereon.

Considerable testimony was taken in the case, which was heard before Judge SPEED, in the Wayne circuit, and who entered a decree that the register of the court pay to the bank the money deposited, and that said bank recover its costs

in this suit against the defendant, Alice H. Curtis. From this decree Mrs. Curtis appeals to this court.

After a careful examination of the record, and review of briefs of counsel for the respective parties, I have been unable to arrive at the conclusion reached by the learned circuit judge in this case. The undisputed testimony in the case shows that Mrs. Curtis, at the time of her marriage, had no property or estate of her own, and that she never before or after her marriage carried on any business herself, or in company with any other person or corporation, but devoted herself exclusively to the care and management of her own household and domestic duties. That she never gave her husband any written power of attorney to do business for her, and that previous to her husband's death she never did any business personally with the bank, or any of its officers. That her husband, in his life-time, was a reticent man, and never gave his wife any information in regard to his business or his manner of doing it; and that she was extremely ignorant in regard to all business transactions, and of the ways and manner of doing business, and entirely uninstructed in regard to the form of contracts and effect of legal instruments. That her husband failed in business in Detroit in 1879, and that since that time Mrs. Curtis consented to the sale of their homestead, which was placed in her name, and which she held under a contract of purchase, her interest therein being only about $2,000, which her husband received; and with the exception of this, and some compensation for assistance given to the assignee, on a salary and some moneys received on the sale of an interest in some heirship property in other states, and collections made upon sundry old claims bid in for him at an auction sale made of his bankrupt estate,—in all, amounting to a few thousand dollars,—were the only means for the support of his family. His business, after making his assignment, seems to have been little known to any one except the defendant bank, and its officers and clerks. It does, however, appear, that he had something to do in buying and selling stocks. And it further appears that he procured from the bank, in the shape of loans in various sums, money amounting to over $8,000; and in so doing used or procured his wife's signature with his own to paper upon which most of the loans were made, and even obtained her signature to assignments of the two policies of insurance which she held upon the life of her husband, as collateral security for the payment of said notes running to the bank which it held at the time of his death. And it is the money now due upon these policies for which the bank makes the contest in this suit. These facts, thus far, are all undisputed. It also appears that Mr. Curtis was married to Mrs. Curtis on the twenty-third day of September, 1864, and that the dealings of her husband with the bank, out of which the claim made by it arose, commenced in 1880, and that the account which was kept by the bank was under the name of Alice H. Curtis, and consisted entirely of notes and discounts, and that all the transactions relating to the account were had between S. D. Elwood, who was secretary and treasurer of the bank, and G. E. Curtis. Counsel for the bank agree that from the record the following facts appear: "(1) That, for a series of years before the policies were assigned to the bank, George E. Curtis had dealt with the bank in his wife's name; during which time the bank had loaned large sums of money upon notes executed by Mrs. Curtis. Some of these notes were paid; others renewed. At other times new loans were made, and new notes given. (2) That at the date of the assignment of the policies there was actually due the bank for money thus actually loaned and paid, and for interest thereon, $7,936.20, for which the bank then held some twenty notes, all of which were signed by Mrs. Curtis. (3) That on or about August 13, 1884, a statement of account showing the amount of indebtedness was rendered to Mr. Curtis, and the note Exhibit A, signed by himself and by Mrs. Curtis, for the amount of indebtedness, was given to the bank, and the original notes were surrendered up by the bank; that this was done in a settlement. (4)

That the $800 paid to Hubbard & Farmer, with interest thereon, is included in Exhibit A. (5) That Mr. Curtis had repeatedly promised to give the bank security, and that, relying upon this promise, the debt had been permitted to accumulate. (6) That the policies were assigned to the bank by Curtis and wife in compliance with his oft-repeated promises. (7) That, subsequent to the assignment, the bank, relying upon the security, loaned other sums of money, which, with the note Exhibit A, exceed $8,000. (8) That Mrs. Curtis knew of the existence of the indebtedness to the bank; that she executed the note Exhibit A, and the assignments of the policies; that the same were delivered to the bank, and have remained in its possession ever since, and that the bank thereby became the legal and equitable holder of the policy. (9) That there is no evidence of any assignment of the $5,000 policy to Mrs. Curtis, or that she ever had any title to that policy. (10) That the assignments executed by Mr. and Mrs. Curtis to the bank were in all respects legal." Exhibit A, referred to, is as follows:

"DETROIT, MICH., August 13, 1884.

"On or about six months after date, we promise to pay the Wayne County Savings Bank, or order, seventy-nine hundred thirty-six and 20-100 dollars, for value received, with interest at the rate of (8) eight per cent. per annum, payable monthly; having deposited with said the Wayne County Savings Bank, as collateral security, with authority to sell the same at public or private sale or otherwise, at its option, on the non-performance of this promise, and without notice, insurance policies covering $8,000.

"GEO. E. CURTIS.
"ALICE H. CURTIS."

It appears that Mr. Curtis had, before the assignment of the policies to the bank, assigned the small policy to Hubbard & Farmer as security for the payment of $800, which the bank had to pay before it could get the policy into its possession.

Counsel for the bank claim that by the "production of the note and policies, and assignments thereof, with proof of the signatures thereto, the bank has made a case which *prima facie* entitles it to a decree for the money called for by these policies and paid into court. Exhibit A, being a promissory note, is *prima facie* evidence of consideration; and the burden of proof is upon Mrs. Curtis to show a want of consideration, or some invalidity in the assignments of the policies." That the defendant Alice H. Curtis was the lawful wife of George E. Curtis, when the note and assignments of policies under which the bank claims were made, is not questioned in the record; and it nowhere appears in the case that the transaction related to the wife's separate estate or property, or that the note and assignments were made for her, or on her account, or that they were intended for her benefit, or that she ever received any consideration or valuable thing whatever upon said note. Her husband received the money; it was negotiated for by him, and, when obtained, used by him. The place the wife's name appears upon the note is quite as consistent with her character as surety as that of principal upon the paper. It is only upon the ground that she can be in some way made liable for the payment of the note that the bank can claim to be entitled to the avails of the collaterals transferred by her to secure its payment. I do not think, under the authorities of this court, that the introduction of the papers, with the proof of the signature, made out a *prima facie* case against the defendant, Mrs. Curtis. Article 6, § 5, Const.; How. St. § 6295. In *De Vries* v. *Conklin*, Mr. Justice COOLEY, in speaking for the court, said: "The statute neither in terms authorizes a married woman to make herself liable personally for the debt of another, nor, where no consideration moved to her, can it be presumptively for her benefit." 22 Mich. 255. In that case the suit was brought to recover on a note made by the husband and wife, on a demand created without any reference to her ownership of property. Chief Justice CAMPBELL, in *West* v.

Laraway, 28 Mich. 466, said, in speaking upon this subject: "The contract, in order to bind her, must be a contract on behalf of her sole property. It should appear to have been made with the intent, as well as upon a consideration that would sustain it for that purpose, as we have always held the burden of proof is on the plaintiff to show for what purpose she contracted, and to prove it clearly;" and, further: "Those who deal with her on her personal responsibility must be prepared to show that she acted within her legal powers." *Insurance Co.* v. *McClellan* was the case of a married woman who denied that the consideration of a note given by her was such as would bind her; and it is said in that case: "It has been held uniformly by this court that our statutes do not authorize a married woman to become personally liable on an executory promise, except concerning her separate estate. * * * It has also been settled that there is never any presumption of validity of such an undertaking, whether negotiable or not, and that proof must always be given of such a consideration as will bind her. We think that the rule must apply whether the value is expressed or not, because the power is not general, but statutory, and cannot be extended beyond the constitutional and statutory limit." 43 Mich. 564, 6 N. W. Rep. 88. To the same effect are the following authorities: *Barnes* v. *Brown*, 32 Mich. 153; *Emery* v. *Lord*, 26 Mich. 431; *Ross* v. *Walker*, 31 Mich. 120; *Jenne* v. *Marble*, 37 Mich. 319; *Kitchell* v. *Mudgett*, Id. 81; *Carley* v. *Fox*, 38 Mich. 387; *Johnson* v. *Sutherland*, 39 Mich. 579; *Russel* v. *Bank*, Id. 671; *Rickle* v. *Dow*, Id. 91; *Powers* v. *Russell*, 26 Mich. 179; *Gantz* v. *Toles*, 40 Mich. 725; *Buhler* v. *Jennings*, 49 Mich. 538, 13 N. W. Rep. 488; *Wilson* v. *Coolidge*, 42 Mich. 112, 3 N. W. Rep. 285; *Richards* v. *Proper*, 44 Mich. 96, 6 N. W. Rep. 115; *Harvey* v. *Galloway*, 48 Mich. 532, 12 N. W. Rep. 689; *Edwards* v. *McEnhill*, 51 Mich. 160, 16 N. W. Rep. 322; *Reed* v. *Buys*, 44 Mich. 80, 6 N. W. Rep. 111; *Tompkins* v. *Hollister*, 27 N. W. Rep. 651.

In regard to the testimony in the case confirming the nine propositions of fact, as claimed by counsel for the bank, above stated, I am unable to agree with him in that conclusion. If what Mrs. Curtis says is true, she never knew that her husband ever had any dealings in her name with the bank, or that she ever signed a note to the bank with her husband, or in any other manner; nor that she ever, with or without her husband, made an assignment of the policies of insurance to the bank; nor that she ever knew, previous to the death of Mr. Curtis, that he owed the bank anything; nor that the bank ever paid Hubbard & Farmer any money to redeem said policies for her; nor that Mr. Curtis ever promised to give to it any securities for moneys he owed, or to be thereafter obtained by him at the bank, or that any was afterwards obtained on such securities, or that said policies were ever delivered to the bank; and, finally, that she knew nothing of her husband's dealings with the bank until informed by her brother-in-law, Mr. Penney, several days after the death of her husband, and while she was lying upon the bed, too sick to do any kind of business; and that when she was first informed he had been doing business in her name, and that her name appeared to the large note, and to the assignments of the policies of insurance, she was startled and astonished, and very emphatically denied that she had ever signed the notes or the assignments, and not until confronted with them could she be made to believe that the signatures were hers. It further appears from her testimony that for several years Mr. Curtis had been in the habit of procuring his wife's signatures to blank notes without her knowing what the instruments were, and without any knowledge on her part for what purpose they were to be used, if at all, by him, and that in this manner were the signatures procured to the instruments used as assignments of the insurance policies; that she never knew that she was signing a note, or the assignments of these policies; that the signatures to the several instruments as they appear were never obtained, and were never given, with her knowledge or consent. I think the

circumstances surrounding these various transactions, all tend to corroborate Mrs. Curtis' testimony; and so far as that of Mr. Penney, and the testimony of the subscribing witnesses to the assignments of the policies, is concerned, it fully sustains hers. It appears from the testimony that of all the signatures she made to the blanks, which subsequently turned out notes in the bank against her and her husband,—and there were about 20 of them,—no person ever saw her sign one of them, unless it was her husband. The signatures to the assignments alone are witnessed, and both these witnesses swear they did not see her make them. Mr. Elwood, who had the dealings with Mr. Curtis in all these matters, says he never said a word to her about any of these transactions, from the beginning to the end, previous to the husband's death, and knew nothing of Mr. Curtis' authority to use the name of his wife as he did, except what Mr. Curtis told him, and never had any correspondence with her previous to the death of Mr. Curtis; neither did he know whether she had any property or not. The entire correspondence and business was had with Mr. Curtis. He presented the papers at the bank, and received the money thereon; and neither the bank nor Mr. Elwood ever knew whether she ever received any of the money or not. She herself testifies that she never received a farthing. That these policies were assigned in compliance with the "oft-repeated promises" of Mr. Curtis to the bank I have no doubt, but I find nothing in the record satisfying me that it was done with the knowledge or consent of his wife.

The fourth, fifth, and seventh propositions of counsel for the bank are sustained by the evidence, but these cannot change the result.

It is claimed in the ninth and tenth propositions of defendant's counsel that there is no evidence of any assignment of the $5,000 policy to Mrs. Curtis, or that she ever had any title to that policy, and that the assignments executed by Mr. and Mrs. Curtis to the bank were in all respects legal. I do not take this view upon these questions. It would seem that the bank did not take this view when the assignment of the $5,000 policy was made to it. That policy is made payable to the assured or his assigns. And it was entirely unnecessary for his wife to join with him in making the assignment he did to the company if she was not interested in it. The complainant avers in the bill, upon information and belief, that George E. Curtis, in May, 1876, assigned the policy for $5,000 to his wife. Mrs. Curtis also, in her answer, admits and affirms the assignment of the large policy to her by her husband; and the bank does not in its answer deny that George E. Curtis assigned the policy to his wife. It would seem that good pleading, as well as the importance of the matter, should have received some attention in the answer of the defendant bank, if the complainant's averments were not true. If the assignment existed and was good, it constituted an indisputable link in the chain of testimony necessary to establish the bank's title. Mrs. Curtis testifies that the large policy was assigned and delivered to her by her husband; that afterwards Mr. Curtis left them for her with his other papers. She stated that she had looked for the assignment, and could not find it; that the assignment was made on the eighteenth day of May, 1876, and that she had a copy of it, which was then put in evidence. I think the facts herein stated, and the testimony offered, was sufficient proof of the assignment of the large policy to her, and that it was properly received in evidence. As bearing upon the question of delivery, and sufficiency of the proofs and pleadings, I think the wife's case is brought within our own authorities. *Young* v. *McKee*, 13 Mich. 554; *Shook* v. *Proctor*, 27 Mich. 349, per CHRISTIANCY, J., 357–361, same at 377; *Manley* v. *Saunders*, Id. 348; *Ellis* v. *Secor*, 31 Mich. 185; *Davis* v. *Zimmerman*, 40 Mich. 24; *Crittenden* v. *Insurance Co.*, 41 Mich. 442, 2 N. W. Rep. 657; *Bostwick* v. *Mahaffy*, 48 Mich. 342, 12 N. W. Rep. 192; *Thatcher* v. *St. Andrew's Church*, 37 Mich. 264; *Latham* v. *Udell*, 38 Mich. 238. See, also, *Champion* v. *Brown*, 6 Johns. Ch. 398; *Neale*

v. *Hagthrop*, 3 Bland, 572; *Booth* v. *Booth*, 3 Litt. 58; *Mosely* v. *Garrett*, 1 J. J. Marsh. 212; *Phillips* v. *Green*, 3 A. K. Marsh. 9.

If the assignment to the bank of the $3,000 policy was not good, I have no doubt of the validity of the policy as the property of Mrs. Curtis. It was obtained by her, and contains a clause reading as follows: "And said company do hereby promise and agree to and with the said assured, well and truly to pay, or cause to be paid, the sum insured, to the said Alice H. Curtis or assigns, within ninety days after due notice and proof of death of said George E. Curtis. And, in case the said assured should die before the decease of said George E. Curtis, then the amount of this insurance shall be payable to their children, or to their guardian if under age." Our statute expressly authorizes the policy to be taken in this manner. How. St. §§ 4238, 6300, 6301. The obligation to pay Mrs. Curtis, under the circumstances, is absolute on the part of the company, if the assignment to the bank is not good; and whether such assignment is good or not is to be determined by the laws of this state, where it was made, and is attempted to be enforced. Upon this subject it is unnecessary to discuss the character of Mrs. Curtis' interest under these policies, or either of them, as, in the view I take, she was the lawful owner of the same, both at the time the assignment was made to the bank, and at the time her husband died. Under the testimony in the case, I think it clearly appears she never knew that she had put her name to the assignments of these policies to the bank, and never assented to the same or intended so to do; that she never received any consideration therefor; and that the obtaining of her signatures to the assignments in the manner in which it was done was a fraud upon Mrs. Curtis' equitable rights in the premises. The assignments as to her were void; and the bank, as against her, obtained no rights therein. What might have been the effect of the transfer under other circumstances it is not for us now to consider. *Reed* v. *Buys*, 44 Mich. 80, 6 N. W. Rep. 111; *Tabor* v. *Insurance Co.*, 44 Mich. 324, 6 N. W. Rep. 830; *Schlatterer* v. *Nickodemus*, 51 Mich. 626, 17 N. W. Rep. 210; *Bank* v. *Deal*, 55 Mich. 592, 22 N. W. Rep. 53; *Gibbs* v. *Linabury*, 22 Mich. 479; *Anderson* v. *Walter*, 34 Mich. 113; *Insurance Co.* v. *McClellan*, 43 Mich. 565, 6 N. W. Rep. 88; *Benson* v. *Morgan*, 50 Mich. 77, 14 N. W. Rep. 705; *Tompkins* v. *Hollister*, 27 N. W. Rep. 651; *Foster* v. *McKinnan*, 4 Reporter, 704; *Putnam* v. *Sullivan*, 4 Mass. 45; *Nance* v. *Lary*, 5 Ala. 370; *Fay* v. *Smith*, 1 Allen, 477; *Wade* v. *Withington*, Id. 561; *Bank* v. *Bank*, 10 Cush. 488; *Gould* v. *Segee*, 5 Duer, 260; *Hall* v. *Wilson*, 16 Barb. 548; *Barry* v. *Insurance Co.*, 49 How. Pr. 504; *Barry* v. *Insurance Co.*, 14 Abb. Pr. (N. S.) 385; *Eadie* v. *Slimmon*, 26 N. Y. 9.

I think the decree should be reversed, and a decree entered in this court in favor of Mrs. Curtis for the amount of the policies, against the complainant, with interest to the date of the commencement of this suit, less the amount paid by the bank to redeem the policies of insurance; also the amount of any premiums paid upon said policies, or either of them, with interest from the time of payment to the time of the commencement of this suit, which should be paid to the bank, and that Mrs. Curtis should recover her costs in both courts against the bank, to be taxed by the clerk of this court; and that the register of the court below be directed to make payment accordingly, in accordance with the terms of the decree to be entered here.

CAMPBELL, C. J., and MORSE, J., concurred. CHAMPLIN, J., did not sit.

DANA *et al.* v. TURLAY.

(*Supreme Court of Minnesota.* January 2, 1888.)

PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S CONTRACT.

An agent was authorized by his principal to sell certain lands upon the terms that equal payments should be made in one, two, and three years. The written

contract of sale actually made by him varied from these terms in certain particulars. He thereafter notified his principal, who was a non-resident, of the sale, and pending correspondence in respect to correcting certain alleged defects, sent to the latter a deed for execution, and also a purchase-money mortgage, with notes, drawn up ready for execution by the purchaser, showing on their face the terms of the purchase as actually agreed on for his inspection. These were all received and acknowledged by the principal, who made no objection to the modification in the terms of payment, and promised to return them after they had been submitted to his counsel. While he still held the papers, the purchaser notified the agent that he would accept the title as it was, and that he was ready and willing to complete the purchase. The vendor subsequently refused to make the sale, or proceed further under the contract. *Held*, that the contract as made was ratified by him, and that the purchaser was entitled to a specific performance thereof.

(*Syllabus by the Court.*)

Appeal from district court, Ramsey county; BRILL, Judge.

Williams & Goodenow, for Dana *et al.*, respondents. *W. K. Gaston*, for Turlay, appellant.

VANDERBURGH, J. Action for specific performance of an agreement for the sale of land, made with defendant through one Lynch, his agent.

1. It was proper to prove the nature and extent of Lynch's authority in the premises. The agency is denied in the answer, and it was necessary for plaintiff to show the relations of the parties, and produce evidence of his authority; and it would be for the court to determine its sufficiency. The defendant claims that the contract, as made, departed in certain essential particulars from the terms of sale as authorized by him. On the other hand, the plaintiffs contend that the contract was fully ratified by defendant subsequent to its execution.

2. The contract, as authorized, fixed the price at $10,000, payable in one, two, and three years, while in the contract, as made, the deferred installments of the purchase money were severally made payable "on or before" those dates. It was by its terms to be completed in 20 days after the abstract was delivered, and was dated October 30, 1886. The agent, Lynch, who lived in St. Paul, where the property is situated, immediately notified the defendant, who resided in Kansas, by mail, of the sale, and that the purchasers were to have 20 days after delivery of the abstract to complete the purchase. The defendant replied, declining to be at the expense of furnishing abstract, but making no other objections. The agent thereupon procured the abstract, and, November 3d, notified him of the fact, and that if the title was perfect, a deed would be forwarded to him for execution. And on the seventeenth of November he sent the deed, with the notes and mortgage, to the defendant prepared for execution in pursuance. The defendant acknowledged the receipt of these papers, and promised to return them as soon as his attorney had examined them, but made no objection to the form or terms thereof. He, however, notified his agent that he would pay no special assessments. The evidence is sufficient to show that the contract was ratified by the defendant, and thereupon became binding on him. There was subsequent correspondence between Lynch and the defendant in respect to certain apparent defects in the title, which were found to be insubstantial or easily supplied; and, upon defendant's neglect to take any steps to perfect the title, it was satisfactorily arranged by the agent, with the plaintiffs, who were anxious to complete the purchase, and consented to pay all special assessments on the land. These arrangements were completed before December 4th, and the plaintiffs, who had made all the concessions previously required by the defendant, were ready and willing to fulfill the contract on their part, and so notified the agent. Thereupon, on that day, the latter wrote to defendant that the purchasers were satisfied with the title, and requested the return of the papers. On the sixth of December the defendant notified the agent of his refusal to complete the sale. Upon this evidence, the court was clearly right in finding that the

defendant was bound by the contract, and was justified in ordering judgment for specific performance. The plaintiffs were not in default. The contract was kept on foot pending the correspondence in respect to the title, which was rendered necessary in consequence of defendant's absence, and his own objections and delay. As to the form of the judgment, it will undoubtedly be settled by the court upon notice to the defendant, in conformity with the agreement of the parties. The question need not be considered on this appeal.

Order denying new trial affirmed.

WITT v. ST. PAUL & N. P. RY. CO.

(*Supreme Court of Minnesota.* January 10, 1888.)

1. RAILROAD COMPANIES—APPROPRIATION OF LOT TO CENTER OF STREET.
Where, in condemnation proceedings by a railway company, a village lot is appropriated under the description thereof as designated by a survey and plat of the same, the company takes presumptively to the center of the street. And, subject to the public easement and the control of the proper public authorities, the company acquires the same interest in that portion of the lot so taken lying in the street as to the remainder thereof, and may apply it to the same uses.

2. TRESPASS—TITLE—ACTUAL POSSESSION.
Actual possession is sufficient evidence of title to enable the party in possession of land to maintain trespass against a stranger.

3. DEED—CONSTRUCTION—GENERAL RULES.
It is a cardinal rule of construction, to ascertain and give effect, if practicable, to the intention of the parties as gathered from the language of a deed, the situation of the parties, and the subject-matter. All parts of the instrument are to be considered together, and the construction is to be upon the whole, if the different parts can stand together. The words of a deed are to be taken as the grantor's, and any ambiguity or uncertainty is to be resolved in favor of the grantee; but technical rules of construction are not to be so applied as to defeat the manifest intention of the parties.

4. SAME—DESCRIPTION—EXCEPTIONS.
Where the grant is in general terms, a particular exception is good; and so also a general description of land conveyed by deed may be limited and restrained by a particular description.

5. SAME.
Where a grantor and his wife, who had been in possession without color of title of certain village lots, (in connection with others in the same block held under a tax title which appeared of record,) under circumstances tending to show adverse possession thereof, the lots being situated in, and a part of, block 10, (according to the plat of a certain addition,) executed a deed to a purchaser containing the following description, viz.: "All of blocks 10 and 11," (in the same addition,) "intending to convey *only* those lots in said blocks 10 and 11 which have been quitclaimed to the parties of the first part, or either of them, by conveyance of tax titles," *held*, that there passed by the deed only such lots as were acquired under the conveyance of tax titles.

6. ADVERSE POSSESSION—HOSTILE ENTRY—CONTINUOUS HOLDING—SUCCESSIVE OCCUPANTS.
To make a case of adverse possession which will be recognized as equivalent to title, it must have been continued for the statutory time under the original hostile entry; and each succeeding occupant must show title under his predecessor, and his possession be referable to such entry.[1]

(*Syllabus by the Court.*)

Appeal from district court, Hennepin county; REA, Judge.

D. A. Secombe, for St. Paul & N. P. Ry. Co., appellant. *A. B. Jackson*, for Charles Witt, respondent.

VANDERBURGH, J. The plaintiff seeks to recover damages against the defendant, for certain acts of trespass to several village lots alleged to belong to

[1] Respecting the character of occupancy that will constitute adverse possession, see Merrill v. Tobin, 30 Fed. Rep. 738; Roots v. Beck, (Ind.) 9 N. E. Rep. 698, and note; Murray v. Hudson, (Mich.) 32 N. W. Rep. 889, and note; Murphy v. Doyle, (Minn.) 33 N. W. Rep. 220; Richards v. Smith, (Tex.) 4 S. W. Rep. 571; Baum v. Shooting Club, (N. C.) 2 S. E. Rep. 673.

him, and specifically described as lots 8, 9, 10, 11, 12, 13, and 14, in block 10, in Demmon's addition to North Minneapolis, according to the recorded plat of the same. The pleadings, however, admit that the defendant has duly taken and appropriated for its railroad, by virtue of condemnation proceedings, under Gen. St. 1878, tit. 1, c. 34, lot 13, the front 55 feet of lots 8 and 9, and also that part of the street lying in front of and adjoining lot 14, above described, and that it has built its railroad upon the front 55 feet of lots 8 and 9 over and upon the front portions of lots 10 and 11, and in the street in front of lots 12 and 13, and in the street over the strip condemned in front of lot 14.

1. As respects lots 8, 9, and 13, the trespasses complained of consisted in excavations or embankments caused to be made by the company in that half of the street in front of and next adjoining the lots. By the descriptions under which the lots were condemned and appropriated, the company took presumptively to the center of the street; and, subject to the rights of the public, the defendant may enter upon and may use that portion of the street so acquired for its improvements, just as it may use and occupy any other portions of the lots in question. Under a description of village lots *eo nomine*, as platted, the land in the street passes as parcel of the lots, and not as appurtenant. *In re Robbins*, 34 Minn. 99, 24 N. W. Rep. 356. And under that description, the title, right, or interest acquired, whatever it be, in the street is presumed to be included in the estimation of the value or damages in the condemnation proceedings, and such estimation is usually deemed to be the value of the lot as described, whether in such proceedings under railway charters, the company requires the fee or the land for its corporate purposes only. *Robbins* v. *Railroad*, 22 Minn. 287. No damages were recoverable by plaintiff for the alleged trespasses to these lots.

2. The defendant has acquired no part of lot 14, save that portion which lies in the street, and plaintiff alleges ownership and possession of the balance of the lot. The evidence tends to show that he was, at the time of the alleged trespass, in the possession thereof, and justifies an allowance of damages in his favor. It is not material to inquire whether he produced any other evidence of title in himself, since possession was *prima facie* sufficient against a mere trespasser. *Sherin* v. *Brackett*, 30 N. W. Rep. 551, 552.

3. As to the lots 10, 11, and 12, the defendant established on the trial, by indisputable evidence, its ownership of the paper title regularly derived from the patentee of the United States, and is the actual owner thereof in fee, and entitled to the possession of the same, unless its grantors were disseized and barred by an actual adverse possession, which has inured to the benefit of plaintiff, and ripened into a right of possession equivalent to title.

The plaintiff, to support his title, offered evidence tending to show that one Peter Poncin, who had no color of title to these lots on or before the year 1864, entered and occupied block 10, in which they are included in connection with the adjoining blocks 9 and 11, which were all inclosed together, including the streets. The evidence also tended to prove that Poncin had and claimed title to block 9, except one lot, and upon this block he resided and erected substantial improvements; and blocks 10 and 11, which were inclosed in part by line fences of the neighbors, connected by a fence built and maintained by him, together with the intervening streets, were used by him, in connection with block 9, chiefly for pasturage and tillage. His occupancy continued down to the year 1871, when he made a sale and conveyance to one Fluhrer, who immediately entered into possession, lived upon block 9, and used and occupied the other blocks as Poncin had done. After several years, Fluhrer died; but his widow continued in possession until she sold to the grantor of plaintiff in the year 1879, who immediately succeeded to her possession, and has since retained the same. No deeds or record evidence of these sales and transfers were introduced by plaintiff, though admitted to be in writing; but the plaintiff claims that it sufficiently appears from the evi-

dence in his behalf that the entry of Poncin was hostile, and the possession adverse, to the present time, and that the possession of the several successive occupants was connected and continuous.

Whether, upon a careful examination and analysis the plaintiff's evidence would be found to sustain this contention, we deem it unnecessary to decide, for the reason that we are of the opinion that the record evidence of the transfers referred to introduced by the defendant, make it manifest that, as respects the three lots in question, there was no privity between the several successive occupants, and that the plaintiff has not yet acquired title thereto by adverse possession.

It appears that in 1863 a tax deed of the seven lots described in the complaint, and certain lots in block 11, was issued by the auditor of the county to a tax purchaser. In 1874 the owner of the title to lots 10, 11, and 12 in controversy bought in and acquired the interest of such tax purchaser, and in 1867 the owner of the tax title conveyed his interest in block 10, except the three lots last above mentioned, to Catherine Poncin, wife of Peter Poncin, and thereafter, in October of the same year, a lease was executed and placed on record by Catherine Poncin and husband to one Keegalsperger, of all the lots in block 9, except lot 7, and in addition 15 lots in blocks 10 and 11, but excepted therefrom lots 10, 11, and 12 aforesaid, and such lease expressly recited that the title to the 15 lots referred to was a tax title. The conveyance of the Poncins to Fluhrer was a quitclaim deed, dated May 15, 1871, and recorded May 18, 1871. The description therein was as follows: "All of block 9, and also all of blocks 10 and 11, Denman's addition to North Minneapolis, intending to convey *only* those lots in said blocks 10 and 11 which have been quitclaimed to said parties of the first part, or either of them, by conveyance of tax titles. In the said block 9, there is *excepted* lot 7, as not belonging to the said parties of the first part." On the first day of May, 1879, the deed under which plaintiff claims was executed, and afterwards duly recorded, and contained a description of the same 15 lots in blocks 10 and 11 above mentioned as being acquired under the tax sale, but did not include lots 10, 11, and 12, block 10, in question here.

We are now to consider the exception of the defendant to the refusal of the court to instruct the jury that, upon the evidence in the case, they could not find a verdict for any damages in relation to these particular lots. Admitting that the evidence of plaintiff tended to prove adverse possession by the Poncins of the three blocks while they were in the occupation thereof, the defendant claims that Fluhrer's possession under them must be deemed to be limited to the land described in the deed of Poncin to him, which, as it contends, does not include these lots. The plaintiff, however, insists that the granting clause in that deed covers the whole of the three blocks 9, 10, and 11, and is not affected by the limitations or exceptions therein following the designation of the blocks. But this construction of the description in that deed is, we think, too narrow. Technical rules of interpretation are not favored, and are not to be so applied as to defeat the intention of the parties. The books say, in general terms, "the first deed and the last will shall prevail." "If two clauses or parts of a deed are repugnant one to the other, the first shall be received, and the last rejected." These are general rules, the principles of which are applicable in proper cases, but are not to be invoked unless, upon a fair construction of their meaning, such clauses are found irreconcilable; and, of course, have no application where the language and interpretation are not doubtful. But the words of the deed are to be taken as the grantor's, and any ambiguity or uncertainty is to be resolved in favor of the grantee. *Pike* v. *Monroe*, 36 Me. 315; *Cutler* v. *Tufts*, 3 Pick. 276; *Waterman* v. *Andrews*, 14 R. I. 595.

The cardinal rule of construction is to ascertain and give effect to the intention of the parties to the deed; and to this end the court must consider all parts of the instrument, and the construction must be upon the entire deed,

and not upon disjointed parts of it. And if the language is ambiguous and it is necessary in order to ascertain the intent of the parties, evidence of the circumstances, including the situation of the parties and of the property, and the state of the title, may be received. *French* v. *Carhart*, 1 N. Y. 102; *Norris* v. *Beyea*, 13 N. Y. 283; *Jackson* v. *Myers*, 3 Johns. 395; *Coleman* v. *Beach*, 97 N. Y. 553; *Austrian* v. *Davidson*, 21 Minn. 119, 120. It is competent for the grantor to convey such interest in or portion of his lands as he chooses, and to adopt any suitable language to evidence such intention, and too much stress is not to be laid on the grammatical construction or forms of expression used, if his intention is evident from the instrument; and there is no principle which prevents giving effect to the intention thereby clearly indicated. *Bates* v. *Foster*, 59 Me. 160. An exception is good where the granting part of the deed is in general terms. 4 Kent, Comm. *468. "It is void when the exception is as large as the grant, or the excepted part be specifically granted." Id. Thus a block is a general description as respects the lots therein, and an exception of lots in a grant thereof is good. But the exception of one of several lots specifically granted would be void for repugnancy. So, also, the rule is well settled that a general description of land conveyed by deed may be limited and restrained by a particular description. *Woodman* v. *Lane*, 7 N. H. 241; *Sprague* v. *Snow*, 4 Pick. 54, 56; *Austrian* v. *Davidson*, 21 Minn. 119.

In *Bates* v. *Foster*, *supra*, the description of certain lands granted was followed by these words: "Meaning hereby to convey to the said Bates the same premises and title conveyed to me by David Withan, and no more." The case closely resembles this. It was held that the interest acquired by the grantor from Withan alone passed. Says the court: "The defendant in his deed says he intended to convey the same he received from Withan; and no more; but it is said these words are repugnant to what goes before, and are therefore void. Such a construction is not admissible, unless they are necessarily so inconsistent that both cannot stand together. Whatever may have formerly been the rules of construction in this respect, in modern times they have given away to the more sensible rule which is, in all cases, to give effect to the intention of the parties, if practicable, when no principle of law is thereby violated." Metc. Cont. 290; *Miller* v. *Railroad Co.*, 90 N. Y. 430. Substantially similar clauses received a similar interpretation in *Flagg* v. *Bean*, 25 N. H. 49; *Ousby* v. *Jones*, 73 N. Y. 621; and *Bent* v. *Rogers*, 137 Mass. 194.

In the deed before us the exception of lot 7, in block 9, is clearly good; and as to blocks 10 and 11, the intention to include only the lots which the grantor had acquired from the tax purchaser, and to except the others, is equally clear. No person of ordinary understanding could, upon inspection of the deed, fail to discover such intention. And the deeds, which were all recorded, showed just what lots he had acquired title to, and the nature of his title.

Fluhrer went into possession under this deed, which is the evidence of what he purchased, and Poncin abandoned the possession. The transaction indicates that the latter did not claim these lots as owner, and that he considered his occupancy thereof, sandwiched as they were between the lots which he held under the tax deed, and included in one general inclosure, as merely precarious. The possession of Fluhrer must be referred to the deed, and, as to these lots, there was no privity between him and Poncin. He merely succeeded to the possession of the latter, but there was no unity of possession under an original hostile entry by Poncin. As held in *Sherin* v. *Brackett*, 30 N. W. Rep. 552, to establish adverse possession it need not be continued in the same person; but, when held by different persons, it must be shown that privity existed between them. Each succeeding occupant must show title under his predecessor in order to link his possession with that of the latter under the original entry. Ang. Lim. § 413; *Christy* v. *Alford*, 17 How. 604; *San Francisco*

v. *Fulde*, 37 Cal. 353. Thus, as between testator and devisee or ancestor and heir, the disseizin commenced by the former is continued in the latter in accordance with his title, and is referred to the original entry. It is plainly distinguishable from a case of successive entries and new disseizins. *Haynes* v. *Boardman*, 119 Mass. 415.

The possession of the heir or purchaser is regarded a continuance of that of the ancestor or grantor on account of his privity of title to the land. *Leonard* v. *Leonard*, 7 Allen, 282. If there is no privity, a new and distinct disseizin is made by each disseizor. *Sawyer* v. *Kendall*, 10 Cush. 245. And in *Ward* v. *Bartholomew*, 6 Pick. 409, it was distinctly held that, where a disseizor conveys part of the land, and the grantee under color of the deed enters upon the whole, the possession of the first disseizor will not avail the grantee in regard to the part not embraced in the deed. No connected or continuous adverse possession is shown in this case between Poncin and Fluhrer, or between Fluhrer and the plaintiff, and Poncin's deed expressly excludes these lots from the sale and conveyance made by him; and upon the record as presented the plaintiff has not acquired title thereto, and the instruction should have been given as requested.

Judgment reversed and cause remanded.

OLSON *v.* ST. PAUL, M. & M. RY. CO.

(*Supreme Court of Minnesota.* January 10, 1888.)

1. MASTER AND SERVANT—FELLOW-SERVANTS—FOREMAN AND SECTION OR TRACK MEN.
The foreman of a gang of section or track men engaged in the discharge of his ordinary duties in the course of his employment is a fellow-servant with them.[1]

2. SAME—RISKS OF EMPLOYMENT—RUNNING SPECIAL TRAINS WITHOUT NOTICE.
Where it is the established practice and one of the rules of a railway company to run special or irregular trains at any time, without notice in advance to station agents or section men, who are required to govern themselves accordingly, and it appears from the evidence that an engine with snow-plow is a train of that class, *held*, that sending out such a train over the road, in a storm, without such notice, was not negligence, but that the risks to track-men attending its use are among those assumed by such employes, if they are informed of the rule, or if, from their observation and knowledge of the practice of the company in respect to running such trains, they knew, or ought to have known, in the exercise of ordinary intelligence and reasonable prudence, that such a train might be expected.[2]

3. SAME—KNOWLEDGE OF DANGER.
Upon the evidence in this case, *held* error for the court to refuse to charge the jury that if the injured employe knew of such usage and practice of the company, he could not recover.

(*Syllabus by the Court.*)

Appeal from district court, Grant county; BAXTER, Judge.

J. W. Reynolds, for Olson, respondent. *W. E. Smith* and *R. B. Galusha*, for St. Paul, M. & M. Ry. Co., appellant.

[1] Upon the point as to who are fellow-servants within the meaning of the rule exempting the master from liability for injuries received by an employe through the negligence of a co-servant, see Reddon v. Railroad Co., (Utah,) 15 Pac. Rep. 262, and note; Van Wickle v. Railway Co., 32 Fed. Rep. 278; Thelman v. Moeller, (Iowa,) 34 N. W. Rep. 765; Railroad Co. v. De Armond, (Tenn.) 5 S. W. Rep. 600; Railroad Co. v. Norment, (Va.) 4 S. E. Rep. 211.

[2] A servant, knowing the hazards of his employment as the business is conducted, cannot recover for injuries received while engaged therein, on the ground that there was a safer way for conducting the business, the adoption of which would have prevented the injury. Naylor v. Railway Co., (Wis.) 11 N. W. Rep. 24. In general, as to the risks of employment assumed by a servant on entering the service of his master, see Railway Co. v. Frawley, (Ind.) 9 N. E. Rep. 594, and note; Schultz v. Railway Co., (Wis.) 31 N. W. Rep. 321, and note; Railway v. Bradford, (Tex.) 2 S. W. Rep. 595, and note; Hewitt v. Railroad Co., (Mich.) 34 N. W. Rep. 659, and note; Scott v. Railway Co., (Or.) 13 Pac. Rep. 98.

VANDERBURGH, J. The plaintiff's intestate was one of a gang of section-men employed by defendant on the line of its road, under the direction of a foreman who had charge of the men on the particular section where he was killed by a snow-plow while engaged with others with a hand car on the track. They appear to have been engaged in their ordinary work under the direction of the foreman, who was present with them, and who was also killed by the same accident. They had been shoveling snow, and were at the time returning to the section-house with the car, in the midst of a severe storm of snow and wind, in consequence of which they did not hear or see the approach of the engine and snow-plow in time to make their escape.

1. The foreman was a fellow-servant with the deceased, and in the discharge of his duties did not represent the master as such, and for his acts or omissions in the discharge of such duties in the course of his employment, the defendant was not liable. *Cook* v. *Railway*, 34 Minn. 47, 24 N. W. Rep. 311; *Brown* v. *Railway*, 31 Minn. 553, 18 N. W. Rep. 834; *Brown* v. *Railroad*, 27 Minn. 162, 6 N. W. Rep. 484; *Fraker* v. *Railway*, 32 Minn. 57, 19 N. W. Rep. 349; *Capper* v. *Railway*, 103 Ind. 308, 2 N. E. Rep. 749, and cases cited. We are not now speaking of the duty of the master to make known in some suitable way to the servant the existence of risks not known to him, and which he has not impliedly assumed in his contract of employment. *Engine Works* v. *Randall*, 50 Amer. Rep. 801, 100 Ind. 293.

2. The admissions in the reply eliminate from the case all questions of negligence on the part of the company in respect to the running and operation of the engine and snow-plow, and affirm that the usual and proper signals were given on approaching the station, and that "the said engine and snow-plow were run and operated in a careful and prudent manner, and at a proper rate of speed, by defendant's servants then in charge thereof, and that they were personally guilty of no negligence in the premises," so that the only remaining questions are whether the defendant owed the duty to the section-men to give them special warning of the fact that the snow-plow was sent out over that division of the road, or had failed in its duty to inform the men of its rules permitting wild or extra trains to be run without special notice or warning to the men of their approach and requiring them to govern themselves accordingly.

3. The rules of the company referred to, and which were put in evidence, are as follows: "Rule 66. No notice will be given to station agents of the passage of irregular trains, and they will govern themselves accordingly." "Rule 70. Track and bridgemen must use the utmost caution at all times, as under the telegraphic system of running trains a train may be expected at any moment. No notice whatever will in any case be given of the passage of extra trains. Foremen will govern themselves accordingly."

The evidence in the case shows that regular trains run according to schedule time, and that wild, special, or extra trains run at any time, and that an engine and snow-plow is a train of this class, of whose approach no notice is given under the rules and practice of the company. Now, if the deceased and his fellow section-men knew, or from their observation and information about the running of the trains ought, in the exercise of ordinary intelligence and prudence, to have known, that an extra or wild train might come over the road at any moment, without notice, they must be deemed to have assumed this as one of the hazards incident to the employment, (*Railway Co.* v. *Leech*, 41 Ohio St. 391; *McGrath* v. *Railroad Co.*, 18 Amer. & Eng. R. Cas. 6; *Railroad Co.* v. *Wachter*, 60 Md. 395;) and we are unable to see why there should be any exception in the case of a snow-plow, or that the act of sending out the snow-plow over the line, in this particular instance, was in itself negligent or wrongful under the rules referred to. There does not seem to be any reason why at that season, and in such a storm, a snow-plow might not with as much reason be expected as any other extra train. The employes

of the company are presumed to understand the nature, use, and operation of snow-plows, and that they are liable to be run frequently over the road in the proper season, as well during storms as at other times, and if any extra risk attends their use it must be met by corresponding care and caution on the part of the men. *Railroad Co.* v. *Hester*, 21 Amer. & Eng. R. Cas. 537; *Hughes* v. *Railroad Co.*, 27 Minn. 140, 6 N. W. Rep. 553.

4. This brings us to the consideration of the evidence on the question of the notice or knowledge which the deceased had in respect to the established rules and usage of the company in running extra trains without notice. The complaint alleges generally that the "defendant negligently, wrongfully, and suddenly, without previous warning, notice, or announcement, ran its snow-plow over its line from an easterly direction" upon and over the deceased. This the answer denies, and sets up and relies upon the existence of the rules above quoted. It is undoubtedly the rule that the burden rests on the plaintiff asserting a breach of duty by the defendant to prove it. *Fraker* v. *Railway Co.*, 32 Minn. 59, 19 N. W. Rep. 349. But where, as in this case, the defendant admits that the train was run without any precaution or notice in advance that a wild train was to be expected, and, to rebut any presumption of negligence in the premises, relies upon its rule dispensing with such notice, it is incumbent on the defendant, in order to give effect to it, to show that its employes were duly informed of the rule, or have such knowledge of the usage and practice of the company in the premises as would be equivalent thereto, and fully acquaint them with the dangers arising from this particular cause. There may, perhaps, be some question whether this issue was fairly tendered by the complaint; but the defendant appears to have so treated it, and the case seems to have been tried on that theory. As the foreman was also killed in the collision, evidence had to be obtained from other sources. How long the deceased had been engaged in this service does not appear, but the evidence shows that he must have been engaged so for a week at least before the accident, but it fails to show that the rules were ever shown or furnished to him, and there is some evidence tending to show they were not. By the terms of rule 70 (and the same fact appeared by other evidence) it was undoubtedly the duty of the foreman to inform the men under him that trains might be expected without notice, and to warn them of the danger; and as this was the duty of the master, he must *pro hac vice* be held to represent the master, and his neglect or omission of this duty would be that of the master. *Slater* v. *Jewett*, 85 N. Y. 71. But if the section-men acquired knowledge of the facts and risks from other sources, and had learned that the rule and practice of the company were to send out extra trains, without notice, and that section-men were obliged to be always on the lookout therefor, then, by continuing in the service, they would be considered as voluntarily assuming the risks from this cause as well as others connected with the employment. *Haskin* v. *Railroad Co.*, 65 Barb. 134. The evidence tended to show that a quarter or more of the trains sent out are specials or extra,—despatched without notice,—and that such is the uniform practice of the defendant, and that during the month of February, 1884, to the date of the accident, such trains over that section of the road averaged one or more each day; and also that the exigencies of the business and the impracticability of notifying section-men in advance, owing to the nature of their work, extending over miles of track, and often remote from telegraph stations, obviously rendered it necessary to dispense with notice, and to adopt the present uniform practice in conformity with rule 70. And this fact itself, and the nature of the employment, would naturally suggest the importance of extra caution on the part of the men, and a reason for the rule. We think, therefore, there was evidence for the consideration of the jury tending to prove that the deceased had notice of the usage of the company, and that it was error for the court to refuse the defendant's first request to charge the jury to the effect that if they should

find that the deceased knew of such usage and practice of the company, he could not recover. There must therefore be a new trial.

Order reversed, and new trial granted.

HOAGLAND v. VAN ETTEN *et al.*

(*Supreme Court of Nebraska.* January 5, 1888.)

1. ACTION—REAL PARTY IN INTEREST.
   The real party in interest under section 29, Code, is the person entitled to the avails of the suit.
2. SAME—ASSIGNEE WITHOUT INTEREST CANNOT SUE.
   A mere assignee having no interest in the result of the suit, but who obtains an assignment upon a promise to pay the assignor the amount he may derive from the action, is not the real party in interest, under section 29, and cannot maintain the action.
3. MECHANICS' LIENS—LABOR AND MATERIALS FURNISHED FOR CONTRACTOR.
   While the owner of a building is liable to material-men and laborers, under our mechanic's lien law, for material furnished or labor performed for a contractor on such building, yet, as a different rule prevails for asserting such lien, the owner may plead as a defense the fact that the labor or material was furnished to a contractor, and that no lien has been obtained.

(*Syllabus by the Court.*)

Appeal from district court, Douglas county; WAKELEY, Judge.

This is an action for the foreclosure of a mechanic's lien, brought by George A. Hoagland against Emma L. Van Etten, Andrew Mayer, and Abner French. Judgment was rendered for plaintiff, and defendant Emma L. Van Etten appealed.

David Van Etten, for appellant. *Warren Switzler*, *Savage & Morris*, and *Otis H. Ballou*, for appellees.

MAXWELL, C. J. This is an action to foreclose a mechanic's lien upon certain real estate described in the petition, owned by Mrs. Van Etten. Mayer claims for material furnished to one Hayden, a contractor, in the erection of the defendant Van Etten's dwelling, and French is a senior mortgagee. The amount claimed to be due the plaintiff for material furnished by him is the sum of $803.76, with interest. He also claims there is due him the sum of $17.07 upon the account of one Andrew L. Wiggins, and the sum of $18.87 on the account of Harvey S. Nutting. He further claims to be due him the sum of $86 on the account of Anton Gsanter & Co.; and on the account of Nich. Spellman the sum of $72; and $24 on the account of one William Klatt; $13.87 on the account of Hans Tams; $28.82 on the account of Jacob New; $30.05 on the account of Sullivan Bros.; $163.12 on the account of Sidney D. Crawford; $40.87 on the account of John Leibbe; $48 on the account of Abner C. Smilley; $21.41 on the account of N. J. Sander; $58.83 on the account of James Marton & Son; $213 on the account of Henry A. Kosters. The plaintiff also alleges "that he owns the above claims against said last-named defendant, and they are all past due and demand has been made on the said defendant for payment, and payment thereof was refused, and no part of any of said claims has been paid." The defendant, in her answer, denies that the plaintiff owns the claims above set forth, and alleges that the plaintiff is not the real party in interest. On the trial, the court instructed the jury: "It will not be necessary for you to determine whether the assignment was valid or not; but you will allow the amount due, if anything, on each particular claim, the same as if sued on by the original party, and subject to the same defenses, if any, regardless of the alleged assignment."

It is conceded that the assignments were merely formal, to enable the plaintiff to bring the action for all, and that he is not the real party in interest. In justification of this course, the plaintiff's attorney cites Pomeroy on Remedial Rights & Remedies, § 132. In all the cases cited by Mr. Pomeroy in sup-

port of his proposition, except two, the plaintiff had an interest in the proceeds resulting from the suit. It was not a case of an entire want of interest, but merely a defect of parties plaintiff. In such case it is well known that if one of the proper parties brings an action, and no objection is made for defect of parties, he may maintain the action although others should be brought in; as, in case a debt is assigned as collateral security for a less sum than the value of the debt, the assignee may maintain an action on the security, although the assignor, having an interest in the surplus, would be a proper party. Section 29, Code, provides that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section thirty-two." In *Mills* v. *Murry*, 1 Neb. 327, it was held that the assignee or actual owner of a chose in action is the proper and only party who can maintain a suit thereon. This doctrine was affirmed in *Seymour* v. *Street*, 5 Neb. 93; *Hicklin* v. *Bank*, 8 Neb. 463, 1 N. W. Rep. 135. The language of the statute is plain and unambiguous: "Every action *must* be prosecuted in the name of the real party in interest, except," etc. This case is not within any of the exceptions named, and therefore must be considered with reference solely to section 29. If a party having no interest in the subject-matter of the suit, who holds simply as assignee, and is to deliver to his assignor the proceeds of the action, may maintain an action on such an assignment, then section 29 has no meaning whatever. We do not care to enter into a discussion of the propriety or impropriety of requiring actions to be brought in the name of the real party in interest. The statute contains a plain provision, which this court has no authority to disregard. We hold, therefore, that an assignee having no interest in the result of the suit, and not entitled to any portion of the proceeds thereof, is not entitled, under section 29, to maintain an action as the real party in interest. Where a number of persons hold mechanics' liens against certain real estate, such persons may and should be brought before the court, as among such lienholders there is no priority, but each lien should stand upon its own separate facts, in order that issue may be taken thereon.

The first answer filed by the defendant was to a great extent stricken out, on motion. An amended answer was thereupon filed, the sixth and seventh counts of which were stricken out, and the sustaining of such motion is now assigned for error. Said counts are as follows: "Said defendant, for a further defense in said action, alleges the facts to be that on or about the tenth day of September, 1883, she contracted with one David I. Hayden, a contractor and carpenter and joiner in said city of Omaha, by a duly written, signed, executed, and delivered contract, (a copy of which is hereto attached, marked 'Exhibit A,' and hereby made a part of this answer,) and that by virtue of said contract, of which each and every one of said parties had knowledge, said Hayden agreed to and with said defendant, for certain and specified sums of money,—to be paid as in said contract specified, amounting in all to the sum of $975.00, of which no payment was required until forty-five days after the completion and acceptance of said work specified, and then not to exceed twenty dollars per month without interest until due, with forbearance of ninety days after any payment became due before action or foreclosure of lien could be instituted, and of nine months after decree and termination of action before said property could be advertised for sale thereunder, and other conditions of payment, as in said contract specified,—to construct and erect for said defendant, as in said contract specified, two certain and specified additions to her house on said lot, and to furnish all the labor, skill, mechanism, and materials for said work and building, and to do and perform other work on said lot, and furnish the materials for the same, as in said contract specified; and that whatever materials, services, and labor said plaintiff, and either, any, or all of said named parties, furnished and supplied for said work and building and appurtenances, if any, were furnished and supplied to the said

Hayden under and by virtue of the said contract, of which they each and all had knowledge before furnishing or doing anything whatsoever upon the same, and they each and all so intended and furnished nothing whatsoever to said defendant, and did nothing whatsoever for her, or at her instance and request, as they each and all well knew and so intended. That, in pursuance of said contract by and between said Hayden and said defendant, said Hayden commenced said work, and employed one Nich. Spellman to do and perform the brick-work specified in said contract, and he (Spellman) to furnish all the labor and materials for the same, as said Hayden's contractor, being the subcontractor of said work. That said Spellman, as said subcontractor, agreed to and with said Hayden to do and construct said brick-work, furnishing all the materials and labor for the same, as in said original contract specified, for the sum of $11.00 per thousand, laid in the wall, finished and completed, to apply on an indebtedness of the said Spellman to the said Hayden, and commenced to do the same, but failed entirely to complete said work, doing but a very small part of the same; and what he did do he did in violation of said contract, and in such a shabby, worthless manner, and used such poor and worthless material, that portions of his said work fell down, and said defendant was obliged to rebuild the same, after failure and notice to said Spellman and the said Hayden; and that said Spellman's work, as aforesaid, was of no value whatever, but, on the contrary, was a damage to said building, and cannot be repaired without removing the same, and rebuilding, damaging said defendant more than $500.00; and said Hayden and said Spellman have neither of them repaired said damage, or any part of it, notwithstanding they each had full knowledge and information, and were notified by defendant of the same, and that said work and materials furnished were in violation of said contract."

There are, doubtless, allegations in these counts which are immaterial, and probably, had a proper motion been filed, could have been stricken out; but a party is entitled to set up all the defenses he may have to an action. Where a defense is set up that material was furnished to a contractor for the erection of a building for the defendant, while the contract between the contractor and the person erecting the building will not prevent a recovery, in a proper case, for material furnished, or labor performed upon the structure, yet the time in which the lien is to be filed is limited to sixty days, while, if the contract is made with the owner, the person claiming the lien has four months in which to file the same. The allegation in the petition as to the date of filing the several liens assigned to the plaintiff is in blank. A party is entitled to have a case submitted to a jury upon his theory, provided that the answer, if taken as true, would constitute a defense to the action, and there is testimony tending to support the answer.

As there must be a new trial in this case, and many of the facts are practically conceded,—as that the defendant, Mrs. Van Etten, is the owner of the lot in controversy,—it would seem to be unnecessary to introduce a number of the voluminous records used on the hearing of the case; but this is a matter within the control of the trial court. The judgment of the district court is reversed, and the cause remanded for further proceedings.

(The other judges concur.)

CAMPBELL *et al.* v. HOLLAND.

(*Supreme Court of Nebraska.* January 5, 1888.)

1. VENDOR AND VENDEE—BONA FIDE PURCHASER—DECLARATIONS OF VENDOR.
The evidence tended to prove that the plaintiff purchased a one-half interest in the property in litigation at a certain date, he then being in possession as agent, and continued in possession until a subsequent date, when he purchased the remaining one-half interest, the question being the *bona fides* of both of said purchases and sales. *Held*, that the declarations of the vendor as to his interest in and ownership

of said property, made after said purchase and sale, but before the last one, were admissible in evidence for the purpose of impeaching plaintiff's title, but that such declarations, made after the last purchase and sale, were inadmissible.

2. FRAUDULENT CONVEYANCES—INTENT OF GRANTOR—EVIDENCE.
On an issue of fact as to whether an assignment, or transfer, of property was made to hinder, delay, or defraud creditors, it is competent, where the assignor, or vendor, is a witness to inquire of him whether, in making the assignment, or transfer, he intended to delay or defraud his creditors. See *Seymour* v. *Wilson*, 14 N. Y. 567.

3. SAME.
The same rule applies to cases where the assignee or purchaser is called as a witness.

4. SAME—EVIDENCE—REBUTTAL.
The plaintiff, being a witness on his own behalf, was cross-examined as to the source from which he derived the money used in the purchase of the property in litigation, and, having answered that a certain portion of it had been received by him in payment of a loan previously made to his father, an attempt having been made, as well in his further cross-examination as otherwise, to discredit his statement in this behalf, he was permitted to testify, in rebuttal, as to where he obtained the funds out of which said loan was made. *Held* no error.

5. EVIDENCE—BOOKS OF ACCOUNT—ERASURES.
On the trial, defendants cross-examined the plaintiff as to certain erasures in his account-books, and a leaf of one of them which appeared to have been torn out; he answered that the erasures had been made by himself, to correct errors, and the leaf torn out, also by himself, because it had been accidentally soiled and rendered unfit for use; defendants afterwards offered said books in evidence, which offer was re fused. *Held* no error.

6. TRIAL—CROSS-EXAMINATION—DISCRETION OF TRIAL COURT.
When, upon the examination or cross-examination of a witness, a certain conversation is drawn from him in evidence, the opposite party will always be permitted to cross-examine or re-examine him, for the purpose of eliciting the whole of such conversation. The scope of such examination is a question peculiarly for the trial court.

7. SAME—INSTRUCTIONS.
The instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient. *Bartling* v. *Behrends*, 20 Neb. 211, 29 N. W. Rep. 472.

8. SAME.
When the law applicable to the pleadings and evidence in a case has already been fully given by instructions to a jury, by the court, on its own motion, it is not error to refuse further instructions.

9. NEW TRIAL—AFFIDAVITS—COUNTER-AFFIDAVITS.
Where, upon a motion for a new trial, founded on affidavits, all of the material facts contained in such affidavits are contradicted by affidavits in resistance, the judgment of the trial court denying such motion will ordinarily be upheld.

10. SAME—NEWLY-DISCOVERED EVIDENCE—CUMULATIVE.
A new trial will not be granted on account of newly-discovered evidence merely cumulative in its character.

(*Syllabus by the Court.*)

Error to district court, Sarpy county; WAKELEY, Judge.

H. D. Travis and *E. H. Wooley*, for plaintiffs in error. *J. H. Haldeman* and *Chas. O. Whedon*, for defendant in error.

COBB, J. This was an action in the district court of Sarpy county, by Martin B. Holland against Artemas W. Campbell, sheriff of Sarpy county, and the sureties on his official bond, for levying on, seizing, taking, and carrying away, by the said sheriff, under an order of attachment, issued to him out of the district court of Cass county, in an action therein pending, wherein the Commercial Bank of Weeping Water was plaintiff, and Lawrence Holland and others were defendants, of a certain stock of lumber and building material, alleged to be the property of said Martin Holland, and in his possession. Campbell, the principal defendant, answered, setting up the said order of attachment, alleging that the property set out and described in the plaintiff's petition was then and there the property, goods, and chattels of Lawrence Holland, defendant in said order of attachment, and justifying the taking of said property under and by virtue of said order; also, alleging that, at the

time of said levy, the said Martin B. Holland was present, and made no objection to said levy being made, and made no claim whatever, as owner or otherwise, to said property, or any part thereof, so as aforesaid levied upon. Also, that said property, levied on as aforesaid, was, at the time of said levy, the property of said Lawrence Holland, and was not the property of the said Martin Holland at that time, nor ever was the property of said Martin Holland. Also, that whatever pretended claim, title, or ownership that the said plaintiff now asserts, or claims to have, in said property, was derived from the said Lawrence Holland; and that said pretended title was conveyed by said Lawrence Holland to said Martin Holland without consideration, and for the purpose of defrauding the creditors of the said Lawrence Holland, and especially the Commercial Bank of Weeping Water, in whose favor the said order of attachment was issued; that said Lawrence Holland and said Martin B. Holland are brothers, and that said pretended transfer of said property was made from Lawrence Holland to Martin B. Holland by collusion between said brothers, for the purpose of defrauding the creditors of said Lawrence Holland; and that the said Martin B. Holland has, in truth and in fact, no title, ownership, or interest in said property, but that the same was, at the time of said levy, and for a long time prior thereto had been, the property of said Lawrence Holland, etc.

There was a trial to a jury, with a verdict and judgment for the plaintiff. The cause is brought to this court on error by the defendants, who assign the following errors: "*First.* The court erred in excluding from the jury the testimony of J. S. Tewksbury and J. M. Roberts, in regard to conversations had by them with Lawrence Holland, about the lumber-yard in controversy, subsequent to the nineteenth day of April, 1886. *Second.* The court erred in admitting in evidence the testimony of Lawrence Holland 'that the sale from himself to his brother was an actual, *bona fide* sale.' *Third.* The court erred in admitting in evidence the testimony of Martin B. Holland, 'that the sale from Lawrence Holland, to himself was made in good faith.' *Fourth.* The court erred in excluding from the jury the portions of the day-book and ledger offered by plaintiff in error. *Fifth.* The court erred in admitting the testimony of Lawrence Holland to the effect that he claimed a defense against the $3,000 note held by the Commercial Bank of St. Louis. *Sixth.* The court erred in admitting the testimony of J. M. Roberts, J. S. Tewksbury, and Ed. Cooper, on cross-examination, to the effect that Lawrence Holland claimed to have a defense against the $3,000 note held by the Commercial Bank of St. Louis. *Seventh.* The court erred in admitting the testimony of Martin B. Holland, on rebuttal, as to where he got the money which he claims to have loaned his father in 1885. *Eighth.* The court erred in giving instructions numbered 3, 5, 6, and 12, asked by defendant in error, and in giving instructions numbered 5, 6, 7, 8, 11, and 12 given by the court on its own motion. *Ninth.* The court erred in refusing to give instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, asked by plaintiff in error. *Tenth.* The court erred in permitting C. O. Whedon, one of the attorneys for defendant in error, to exhibit portions of the day-book and ledger which has been excluded, to the jury while making his argument. *Eleventh.* There was misconduct on the part of C. O. Whedon, one of the attorneys for defendant in error, in exhibiting to the jury portions of the day-book and ledger which had been excluded from the evidence. *Twelfth.* There was misconduct on the part of the jury while deliberating upon their verdict in this cause. *Thirteenth.* There was misconduct on the part of the bailiff who had the jury in charge while they were deliberating upon their verdict in this cause. *Fourteenth.* The verdict returned by the jury is contrary to instructions numbered 1, 2, 3, 4, 9, and 10, given by the court on its own motion. *Fifteenth.* The judgment is contrary to the evidence and the law. *Sixteenth.* The court erred in overruling the motion for a new trial on the ground of

newly-discovered evidence. *Seventeenth.* The court erred in overruling the motion for a new trial."

Upon the trial, the defendants called J. S. Tewksbury, a witness on their behalf, and put to him the following questions: "*Question.* Did you hear the testimony of Lawrence Holland, last night, as to his having any conversation with you, as to placing his property out of his name, and placing the Springfield yard in the name of Martin Holland? *Answer.* I did not. *Q.* State whether or not it is a fact that you had a conversation with him upon the train in relation to this matter? .(Objected to, because no foundation was laid for this question on the examination of Mr. Holland, and also as immaterial, irrelevant, and incompetent. Sustained.) *Q.* I will ask you if in the month of March, or thereabouts, you had a conversation with Mr. Lawrence Holland, upon the train on the Missouri Pacific Railroad, about the matter of his placing this lumber-yard out of his hands? *A.* I don't think that I had, in March. *Q.* I will ask you if at any time, upon the train, you had a conversation with him upon that matter? *A.* There was a conversation in regard to the lumber-yard; it was some time in April. *Q. by the Court.* Where? *A.* On the train, on the Missouri Pacific Railroad, between Springfield and Omaha. *Q. by Mr. Wooley.* State what the conversation was? (Objected to as above.) *Q. by the court.* What time in April? *A.* I couldn't state the exact date; I think it was the latter part. *Q. by Mr. Wooley.* I will ask you if, upon the Missouri Pacific train, along in the month of April, Mr. Holland stated to you that his brother, Martin Holland, was running the Springfield yard in Martins's name, in order that, if the Commercial Bank of St. Louis got a judgment against him, upon that note of $3,000, he could beat them on the execution? (Objected to as leading, and as above, sustained.)

The defendant also called J. M. Roberts, a witness on their behalf, and put to him the following questions, among others: *Question.* State whether or not, soon after this yard at Springfield began to be run in the name of Martin Holland, if you had any conversation with Lawrence Holland about it before the nineteenth day of April? *Answer.* Yes, sir. *Q.* State, as near as you can, what that conversation was, so far as it appertained to the Springfield yard being run in Martin's name? *A.* I can't tell you the exact date, somewhere in March, I think; I asked him if this yard—he spoke about the yard being run in Martin's name—if Martin had bought the yard? He said not; Martin was running it for half the profits, he to furnish the capital; he had agreed to furnish about $5,000, and he said to me, 'Do you think I have sold it?' I told him I did not know whether he had; he said, 'I have not, it is mine.' *Q.* State what, if anything, he said in the conversation about why it was run in Martin's name? (Objected to as immaterial and leading, and assuming a fact not proved. Sustained.) *Q.* State whether or not he said anything about why it was run in Martin's name? *A.* Yes, he did. *Q.* Now, state what he said? *A.* He said he wanted to fix his property so that if they got judgment against him on that note, they could not find any property to levy an execution on; he wanted to put it in that shape to avoid the payment of that note. * * * *Q.* State if, between the first day of March and the nineteenth day of April, Mr. Lawrence Holland came to Springfield and, at the time, told you he came here to sell this yard? (Objected to as leading, incompetent, and immaterial. Sustained.) *Q.* State what, if anything, Mr. Lawrence Holland, between the first day of March and the nineteenth day of April, said to you about selling this yard at Springfield? *A.* He told me he was coming up here to see about selling it, to raise some money. *Q.* I will ask you what, if anything, Mr. Holland said to you about the ownership of that yard, between the first day of March and the nineteenth day of April? *A.* He said it was his yard. *Q.* I will ask you to state what, if anything, he said to you about selling this yard the first day of June, 1886? (Objected to as irrelevant, immaterial, and incompetent. Sustained.)"

According to the testimony of Martin B. Holland, he purchased a one-half interest in the lumber-yard in the latter part of February, and the other half on the nineteenth day of April, 1886. It was evidently the intention of the trial court to admit any declaration of Lawrence Holland, made in reference to the ownership or transfer of said yard, or any interest therein, prior to said last-mentioned date, and to exclude all such declarations made by him subsequent thereto. Under the authority of the first case cited by counsel for plaintiffs in error, this was right. In that case, (*Carney* v. *Carney*, 7 Baxt. 284,) Carney, Sr., while insolvent, had conveyed, without consideration, to Carney, Jr., his son, certain lands of which the vendor remained in the actual possession. The case turned on the *bona fides* of the sale. On the trial, the declarations of Carney, Sr., made after the conveyance, but while he remained in the actual possession of the land, were admitted in favor of the party attacking the sale. The court in the syllabus say: "As a general rule, the declarations of a party, made after he has parted with his interest in the subject-matter of litigation, cannot be received to disparage the title or right of a party, acquired in good faith, previous to the time of making such declarations. But this very just and reasonable principle must be taken as inapplicable to cases of fraudulent sales of property. If, for example, a conveyance is made absolute on its face, and the vendor continues to retain possession of the property, as before, this being *prima facie* evidence of fraud, a creditor, impeaching such conveyance on the ground of fraud, may be admitted to prove the declarations of the vendor thus retaining the possession, in relation to the ownership, or the character of his possession of the property."

Counsel for plaintiff in error seem to claim that the declarations of Lawrence Holland, in regard to the ownership of the lumber-yard, without regard to the time when such declarations were made, are admissible in evidence on the part of the party attacking the sale, on the ground that they are the declarations of a co-conspirator of the party sustaining the sale. I doubt the application of the peculiar law of conspiracy to a case like the one at bar. And, were it conceded to be applicable to such cases in general, it could only be applied after proof of a conspiracy including the party to be affected by the declarations, as well the one making them.

The second and third assignments will be considered together. At the trial, the plaintiff was recalled, as a witness in his own behalf, and asked the following questions: "*Question.* I will ask you to state what knowledge you had, if any, of the indebtedness of your brother at the time of this sale to you of this property; state all of the facts in regard to this matter. *Answer.* I had no knowledge whatever of his indebtedness; any indedtedness. *Q.* What was your purpose in buying this property? *A.* More than anything else, to do business for myself. *Q.* Was this done for the purpose of assisting your brother to cover up his property in any way? (Objected to as calling for a conclusion of the witness. Overruled.) *A.* No, it wasn't."

Lawrence Holland, upon his examination in rebuttal, as a witness for the plaintiff, had the following questions propounded to him: "*Question.* I will ask you to state whether or not the sale and transfer of this property, in controversy in this action, to the plaintiff, was made for the purpose of defeating or hindering any of your creditors in the collection of their debts. (Objected to as incompetent, and not proper rebuttal. Overruled.) *Answer.* It was not, as I didn't count at the time I had any creditors only what were amply secured. And again: *Question.* State whether or not this sale to your brother of the property in question, was an actual *bona fide* sale of the property by you to him. (Objected to as not proper rebuttal, calling for a conclusion of the witness, and incompetent. Overruled.) *Answer.* Yes, sir; it was."

The admission of this testimony constitutes the ground of the first and second assignments. The only authority cited, in support of this point, is the case of *Monteith* v. *Bax*, 4 Neb. 166. That case is only authority to the ef-

fect that "the question of intent in case of an alleged fraudulent conveyance of property * * * is one of fact for submission to a jury." In the courts of the state of New York, it seems to have been settled, by the case of *Seymour* v. *Wilson*, 14 N. Y. 567, that "on an issue of fact as to whether an assignment or transfer of property was made to hinder, delay, or defraud creditors, it is competent, where the assignor is a witness, to inquire of him, whether in making the assignment, or transfer, he intended to delay or defraud his creditors." See, also, *Cunningham* v. *Freeborn*, 11 Wend. 240. Also, *Paper Works* v. *Willett*, 19 Abb. Pr. 416.

Upon the cross-examination of the plaintiff, his attention was called to certain erasures made in his books of account, and the fact of two or more leaves having been torn out of his ledger; page 121 was corrected by an erasure, and pages 119 and 120 torn out. His attention was also called to his day-book, and he stated, in answer to questions by counsel for defendants, that certain items were posted to page 119 and 120 of the ledger, which had been torn out. He also stated that these erasures had been made and leaves torn out by himself, to correct errors and mistakes, which he had made of entries therein. After plaintiff had closed his case in chief, and defendant had entered upon the examination of witnesses on their behalf, they offered the several pages of the plaintiff's day-book and ledger, showing the said erasures, alterations, etc., in evidence, which was refused by the court; which refusal forms the basis of defendant's fifth assignment of error. I am somewhat at loss as to the purpose for which defendant sought to introduce the books in evidence. Surely not as books of account, to prove charges made by one party against the other, which, as I think, and as this court has often held, is the only purpose for which books of account, simply as such, are admissible in evidence. If the purpose was to weaken the force of plaintiff's testimony as to the fact of his purchase of the lumber-yard, and collateral facts, then that purpose would be accomplished as well by the cross-examination of plaintiff in respect to these erasures, alterations, and missing pages; as well without the admission of the books themselves, technically, in evidence, as with.

It appears, from the tenth assignment of error, that, upon the argument of the case to the jury, the court permitted counsel for the plaintiff to exhibit these books to the jury, and comment upon these faulty and missing pages in his argument. The court would, doubtless, have recognized this right in the counsel for defendant, also, had they chosen to avail themselves of it; and, by that means, all the advantage which could possibly have been gained by the admission of the books in evidence, would have been attained without. But, as a question of law, I know of neither principle nor authority that was violated by the exclusion of the books when offered in evidence.

The fifth and sixth assignments may be considered together. After the examination in chief of the witness Lawrence Holland, by counsel for plaintiff, he was cross-examined by the other side; first, about a certain trip which they claimed witness had made to Springfield, shortly after April 19, 1886, for the purpose of selling the lumber-yard in question; and, among others, they asked him the following questions: "*Question.* Isn't it a fact that you came to Springfield very close to the first day of June, after certain notes of yours, one for $4,000, and one for $3,000, had become due at the Commercial Bank, and that you then told Mr. Roberts that you were coming here to try and sell those yards to pay that note? *Answer.* No, sir. *Q.* When did those notes become due? *A.* The nineteenth day of May. * * * *Q.* I will ask you if it is not a fact that about this time, March 1, 1886, the Commercial Bank of St. Louis held a note against you of $3,000, and that Tewksbury and Cooper were indorsers upon that note? *A.* I don't know who held the note on the first day of March. *Q.* Is it not a fact that there was in existence a note of $3,000, which you had given Tewksbury & Cooper, which had been indorsed by them, to some one, and if the Commercial Bank of St. Louis did

not claim to hold that note? *A.* I don't know, really, that the Commercial Bank claimed any ownership; there was such a note out, but I don't know; the Commercial Bank didn't claim to own it at that time. * * * *Q.* Is it not a fact that yourself and Mr. Tewksbury had several conversations in regard to that note, and how you could avoid the payment of it? *A.* In regard to how we could fix it to not pay it? There was no conversation in regard to not paying the note, except how we could bring a claim against Redman, Clary & Co. *Q.* This note was first transferred by Tewksbury & Cooper to Redman, Clary & Co.? *A.* Yes, sir."

On re-direct examination counsel for the plaintiff put the following questions to the witness: "*Question.* You may state the facts in regard to this transaction with Redman, Clary & Co.; what the real facts were; whether you were in debt to them or not. (Objected to as immaterial, and irrelevant, and incompetent, and not re-direct. Overruled.) *Answer.* My claim against Redman, Clary & Co. amounts to something like $7,000; the note was for $3,000. * * * *Q.* Did you, in fact, owe them anything? *A.* No, sir, I didn't; they owe me over $7,000."

J. M. Roberts, cashier of the Commercial Bank of Weeping Water, was sworn, and examined as a witness for the defendant. He was cross-examined by counsel for the plaintiff; re-examined, and re-cross-examined; but I find nothing in his testimony to which the assignments under consideration will apply.

J. S. Tewksbury was sworn, and examined as a witness on the part of the defendants. In the course of his examination the following questions were put to him, which he answered as follows: "*Question.* State if you were an indorser upon the $3,000 note that was in the hands of the Commercial Bank of St. Louis? *Answer.* I was. *Q.* I will ask you if you were made a party upon that suit, on the note, in the United States court. *A.* I believe I was. *Q.* When did that note mature? *A.* Came due the first of March, I think. *Q.* State if you and Mr. Holland had a conversation in regard to that note about the time it became due? *A.* Shortly afterwards. *Q.* I will ask you if, within a few days, four or five, after this note became due, you had a conversation with Lawrence Holland about it? *A.* I did. *Q.* State fully what he said, if anything, about putting his property out of his name so as to defeat the collection of that note. *A.* He said he had his property in such a shape that he could, and he would, do it before he would pay it," etc. (On cross-examination by counsel for plaintiff.) *Q.* At the time you say you had this conversation with Lawrence Holland in regard to Redman, Clary & Co. business at St. Louis, that note, you say that Holland said he would not pay the note? *A.* He said he did not intend to. *Q.* Did he say at that time that Redman, Clary & Co. owed him? (Objected to as immaterial, and not proper cross-examination. Overruled. Not answered.) *Q.* Did he say, in that conversation, that Redman Clary & Co. owed him? *A.* He had a claim against them; he said he had."

The object of this cross-examination of Lawrence Holland, and examination in chief of J. S. Tewksbury, by counsel for defendants, was to show the motive on the part of Holland for selling, or putting the lumber-yard out of his hands to avoid paying the note spoken of. For that purpose, they drew out a statement of certain facts from Holland. The additional facts, drawn out on re-examination by counsel for plaintiff, were, as I think, proper for the purpose of exhibiting the entire transaction to the jury, and the evidence was admissible. The examination of the witness Tewksbury was addressed to a certain conversation between him and Lawrence Holland; and his cross-examination by counsel for plaintiff was proper and admissible, for the purpose of presenting the entire conversation, and of presenting that part of it which might be deemed favorable, as well as that which was unfavorable, to the plaintiff. I know of no principle of the law of evidence more firmly settled

than that, when a part of a conversation is drawn out by one party, the other party has the privilege to draw out, from the same witness, the entire conversation.

As to the seventh assignment. Counsel for the defendant had rigidly cross-examined the plaintiff as to the source from which he had derived the money which he had loaned to Lawrence Holland, and which, he claimed, constituted a part of the consideration for the purchase of the property in litigation. Some of this money he claimed to have received from his father, in payment of a loan made to him a year or more before. The object and tendency of much of this cross-examination was to cast a doubt and discredit upon this claim of the plaintiff, and I think it was altogether proper to allow the plaintiff to testify, in rebuttal, as to where he obtained the funds out of which said loan was made; and I know of no principle of law which was violated thereby.

The eighth assignment is based upon certain instructions given by the court to the jury. In this assignment there is some confusion. The record shows that all of the instructions asked for by either party were refused; the court having already, as shown by the sequence of the record, given sixteen instructions of its own motion, as follows: "*First.* This action is brought against the defendant Campbell, who is the sheriff of this county, and the other defendants, who are sureties upon his bond, given as such sheriff before entering upon the duties of his office. *Second.* The alleged ground of action is, that the conditions of the bond were violated, by reason of the sheriff, through his deputy, wrongfully seizing and taking possession of the stock of lumber, and other property, in question, as to which evidence has been given. *Third.* It is conceded in the case, and that you should assume this to be true, at the time of the levy in question the sheriff, Campbell, had in his hands an order of attachment issued in an action commenced in Cass county, Nebraska, in which the Commercial Bank of Weeping Water was plaintiff, and one Lawrence Holland was defendant; and that the property in controversy was levied upon and seized under such order of attachment as being the property of Lawrence Holland. *Fourth.* If this property so levied upon and seized, or an undivided interest therein, was the property of Lawrence Holland, as between him and his creditors, then such levy and seizure were lawful, and the plaintiff cannot recover. *Fifth.* If, on the contrary, the property was wholly the property of the plaintiff, as between him and the creditors of Lawrence Holland, the order of attachment gave the sheriff no authority to levy on the property, and the plaintiff is entitled to recover. It appears in evidence that prior to any transfer of the property to plaintiff, Lawrence Holland had an interest therein, as a member of a firm to which it belonged; that such firm made a transfer of the property to the plaintiff; and that, subsequently, Lawrence Holland transferred to the plaintiff whatever interest he had therein. By these transfers, the title to the property vested in the plaintiff, as between the parties to the transfers, but whether or not such transfers were valid as to the creditors of Lawrence Holland, is a different question, involving other considerations, and is one of the principal questions for you to determine. *Sixth.* If the sale or transfer of the property, or an interest therein, was made with the intent to hinder, delay, or defraud the creditors of Lawrence Holland, and if the plaintiff knew of such intent when he purchased the same, then such sale or transfer was void as to such creditors, and the sheriff had a right to make the levy and seizure in question, and this action cannot be maintained. And, in such case, the payment of a valuable or full consideration for the property or interest purchased, would not protect plaintiff, but such sale or transfer would still be void as to Lawrence Holland's creditors. *Seventh.* If, however, the plaintiff paid a valuable consideration for the property, and bought the same in good faith, without any knowledge of an intent on the part of Lawrence Holland to hinder, delay, or defraud his creditors, then the plaintiff acquired a valid title thereto, notwith-

standing any fraud, if such there was, on the part of Lawrence Holland; and notwithstanding the consideration paid was not the full value of the property, should you find that such was the fact. *Eighth.* In determining whether or not Lawrence Holland intended to hinder, delay, or defraud his creditors, you may inquire into the extent of his indebtedness, and of his property, and means of meeting it; and as to how far the same was secured, whether in whole or in part; and as to whether he claimed in good faith to have a defense to any apparent indebtedness against him; and, generally, as to whether he had or had not a motive or inducement to place his property beyond the reach of creditors. But the mere fact that he claimed to have, and believed he had, a good defense against notes which he had given, would not justify him in transferring property for the purpose of protecting it against proceedings for enforcing a claim on such note. *Ninth.* As to plaintiff's knowledge of a fraudulent intent on the part of Lawrence Holland, it is not necessary that plaintiff should have had actual and positive knowledge of such intent, if it existed; but if he had knowledge of facts and circumstances tending to show the existence of such an intent, and sufficient to lead a man of ordinary perception, care, and prudence to suppose that there was such an intent, this would be equivalent in law to a knowledge thereof, if in fact there was such fraudulent intent on the part of Lawrence Holland. *Tenth.* Evidence was received during the trial as to acts and declarations of Lawrence Holland prior to the transfer in question. These were received only as against him, and as tending to show a fraudulent intent on his part; but they are not evidence against the plaintiff to show fraud, or knowledge of fraud, on his part, and it is necessary to show his participation in the fraud by other evidence. *Eleventh.* In determining whether the transfers in question were fraudulent as to creditors, you are at liberty to consider the relation of the parties thereto to each other, the time and circumstances thereof; whether or not Lawrence Holland was indebted beyond his means of payment, or had a motive to place his property beyond the reach of his creditors; whether or not the plaintiff knew, or had the means of knowing, his brother Lawrence's financial condition, or with what motive or purpose he was making the transfer; what the plaintiff's means of payment were, and his object in making the purchase; the value of the property, and the amount paid therefor; and all the facts and circumstances of the transactions appearing in evidence, in concluding the agreement as to the terms on which Lawrence Holland was to hold the note taken in part payment. *Twelfth.* Fraud is not to be presumed; and, in this case, the burden of proof is upon the defendant to satisfy you, by a preponderance of evidence, of a fraudulent intent on the part of Lawrence Holland, and knowledge thereof on the part of the plaintiff. *Thirteenth.* Where, in the trial of a suit, a party places a witness upon the stand, he thereby indorses his reputation for truth and veracity, and he will not be permitted to say that such witness is unworthy of belief. *Fourteenth.* The court instructs the jury that, under the pleadings and proofs in this case, the plaintiff is not estopped from asserting his right to the property in controversy. *Fifteenth.* If the jury believe, from the evidence, that the plaintiff actually, and in good faith, purchased the property in question, from Lawrence Holland, without any fraudulent intent on his part, and with no knowledge of a fraudulent intent on the part of his grantor, then it is wholly immaterial whether or not the consideration paid, either in money or notes, was equal to the value of the property so purchased by plaintiff. *Sixteenth.* It is admitted by the said defendant, and Artemas W. Campbell, that the property in question was, on the twenty-fourth day of June, 1886, by his deputy, taken from the possession of the plaintiff; and it is also admitted that said defendant has ever since deprived the plaintiff of the possession of the same; and if the jury believe from the evidence that the property in question did, at the time this action was commenced, belong to the plaintiff, then the measure of damages for

plaintiff to recover will be the value of the property at the time of the taking, as shown by the evidence, with interest thereon at the rate of seven per cent. per annum from the twenty-fourth day of June, 1886, up to the first day of this term of court, to-wit, November 8, 1886."

Counsel in their brief urge objection to the sixth instruction on two grounds:

First. As to the knowledge on the part of Martin Holland of the fraudulent intent of Lawrence. It is assumed that this instruction was wrong, and hence that a subsequent one, stating the law correctly, would not remedy the wrong. To this point they cite the case of *Wasson* v. *Palmer*, 13 Neb. 376, 14 N. W. Rep. 171. The point in that case, to which reference is doubtless made, is thus stated in the syllabus: "If one of the paragraphs in the charge of the court to the jury misstate the law upon a material point, such error will not be cured by another paragraph which states the law correctly; because the jury will be left in doubt as to which paragraph was correct." The sixth paragraph of the charge which we are now considering, does not mistate the law. While it does not fully state the law applicable to the point being considered, so far as it goes, it states it correctly. And in so far as it falls short in stating the law fully, that deficiency is supplied by the ninth paragraph of the same instructions. In the case of *Bartling* v. *Behrends*, 20 Neb. 211, 29 N. W. Rep. 472, the court, in the syllabus, say: "The instructions given to the jury must be construed together; and if, when considered as a whole, they properly state the law, it is sufficient."

Second. Under this subdivision, counsel, in the brief say: "The jury are told that under the circumstances it would be wholly immaterial whether or not the consideration paid, either in money or notes, was equal to the value of the property so purchased by plaintiff." Of this objection it is deemed sufficient to say that I place no such construction upon the language of the instruction. It would be easier to place that construction upon the language of the seventh instruction, but, even if so applied, it would be strained and unnatural. Counsel misprint in the brief, and evidently have misread, the fifth instruction. A careful reading of it cannot fail to show that the court did not tell the jury that "Martin acquired some title by the transaction," but that by virtue of the transfer of the property by Beardsley, Clark & Co., and the subsequent transfer by Lawrence Holland of all interest he had in the property to Martin Holland, he acquired title to the property as against Beardsley, Clark & Co., as a firm, and Lawrence Holland; but leaves the question of title as between Martin Holland and Lawrence Holland's creditors to other considerations, which the court declared to be one of the principal questions involved in the case.

As to the eighth instruction, I think the law is well and carefully expressed. Its meaning I understand to be, that, while the belief on the part of Lawrence Holland that he had a valid defense to the $3,000 note would not justify him in putting his property out of his hands, for the purpose of avoiding his possible liability to pay it, yet such belief on his part might be considered, among other facts, in arriving at a conclusion as to whether or not he had a motive or inducement to place his property beyond the reach of his creditors.

The eleventh instruction is objected to as leaving it to the option or whim of the jury, whether they should consider the several matters therein mentioned or not. It will not be contended that it would have been proper for the court to have told the jury what degree of weight they should give to any, or all, of the several matters referred to in the said instructions. It was addressed to a jury supposed to be impartial, as between the parties, and open to instruction as to what portions of the great mass of testimony in the case it was proper for them to consider in arriving at their verdict. Had the instruction told them that, in considering of their verdict, it would be proper for them to take into consideration the several matters therein specified, no-

one could doubt its correctness, and that is the sense in which the language actually used was, and should have been, understood by the jury. The objection of counsel to the twelfth instruction involves the same considerations as those already passed upon, while discussing the sixth paragraph, and it is deemed unnecessary to repeat them. The third instruction, stated by counsel in the brief to have been given at the request of the plaintiff, appears in the above list of instructions as given by the court on its own motion, as paragraph 13. It states the law correctly: *non constat*, that a party may not at a trial, call the opposite party, or a witness who proves upon his examination to be unfriendly to the party calling him, and then call other witnesses to contradict his evidence.

The following instructions were asked by the defendants and refused by the court, and to which refusal the defendants excepted: "*Second*. In determining the question of whether or not the sale, if you find there was one, from Lawrence to Martin Holland, was fraudulent, and made with the intent to defraud the creditors of Lawrence Holland, you should take into consideration all the surrounding circumstances, as shown by the evidence. Fraud can seldom be proven by direct testimony, because fraudulent purposes are generally kept secret by those interested, and hence the law permits fraud to be shown by proving the surrounding circumstances having a tendency to show fraud. *Third*. A sale to a near relative does not of itself, show fraud, but when the seller is heavily in debt or insolvent, and sells property to a near relative, it is proper for you to take into consideration the fact that the purchaser is a near relative of the seller; and if there are any circumstances brought out by the evidence, such as a knowledge by the purchaser of the seller's financial embarrassment, or any secrecy in the sale, or any exercise of authority over the property by the seller after the sale, or inadequacy of consideration paid,—then the fact of relationship becomes an important one, and you should give it proper weight in determining whether the sale from Lawrence Holland to Martin Holland was made to defraud the creditors of Lawrence Holland or not, to hinder or delay his creditors in the collection of the debts, and if Martin Holland bought said property in order to assist his brother in said purpose, or had such notice of the fraudulent intent of his brother as to put an ordinarily prudent man upon inquiry, then such sale would be fraudulent and void in law, and stand as no sale at all, and the property would, in law, remain the property of Lawrence Holland, and be subject to attachment for the payment of his debts, and your verdict should be for the defendants." "*Fifth*. The jury are further instructed that the change of possession from the vendor to the vendee, in contemplation of law, is an actual change of possession, and not a merely constructive change, and is an open, visible, and public change, showing that the property was actually transferred from Lawrence Holland to Martin B. Holland, and that the possession of an agent is constructively the possession of his principal; and, if the jury find that Martin B. Holland was a servant or agent of Beardsley, Clark & Co., of which firm Lawrence was a silent member, and that Beardsley, Clark & Co., as a matter of fact, transferred said lumber-yard to Lawrence Holland in place of to Martin B. Holland, and that Martin B. Holland pretended and held out to the public that he was the vendee of Beardsley, Clark & Co., then there was no actual change of possession such as is contemplated by the law, and if you find the facts to be as stated above, then said Martin B. Holland was possessed of knowledge of facts sufficient to put him on inquiry, and was in a position to know why Lawrence Holland did not make the sale openly to Martin B. Holland, in place of having his vendor convey over him, to said Martin, and you must find for the defendant. *Sixth*. If you find that the said Martin B. Holland, plaintiff, did not make any claim of ownership of the yard in controversy, when the levy was made upon it by the sheriff, and did not bring such claim to the notice of said defendant, then it is a strong circumstance, going to show that said Martin

B. Holland was not the real owner of said yard." "*Eleventh.* A conveyance of personal property by one largely in debt, especially where the creditors are insisting on settlement, and where the grantor and grantee sustain the relation of brothers, creates presumption of fraud, and requires clear proof on the part of the grantor and grantee to remove, and the fact that a full price was paid for the property will not rebut the presumption of fraud. *Twelfth.* The jury are instructed that every man intends the necessary consequences of his own acts, and, if the conduct of a debtor results in defrauding his creditors, he is presumed to have foreseen the result and intended it, and a transfer made out of the usual course of business is evidence of fraud. *Thirteenth.* If you find that Martin B. Holland was a creditor of Lawrence Holland, and accepted a conveyance of the said lumber-yard, under circumstances that would put an ordinarily prudent man on inquiry, he is not a purchaser in good faith, and is a participant in the fraud of this grantor. *Fourteenth.* If the jury find that Martin B. Holland, at any time after March 1, 1886, conducted said lumber-yard in the name of Martin B. Holland, and was really not the owner of said yard, but was receiving a share of the profits as compensation, and that Lawrence Holland was the real owner, and had creditors who were pushing him for settlement, or threatening suit, then the presumption of the law is, that the pretended ownership of said Martin B. Holland was fraudulent as to creditors, and that a state of relations once proved to exist between parties continues to exist until the contrary is proved." "*Eighteenth.* You are further instructed that any collusion between Lawrence Holland and Martin Holland, for the benefit of Lawrence Holland, would render the transfer void. If you find from the evidence that a note was given for the yard, either as a fictitious consideration, or secretly, as a part of the consideration, so that Lawrence Holland could control the note for his own use, this would be a fraud upon the creditors of Lawrence Holland, and make the transfer void, and your verdict should be for the defendants." "*Twentieth.* You are further instructed that when the fraudulent intent of the grantor is shown, the grantee must show the payment of an adequate consideration by competent evidence. The facility with which a fictitious consideration may be fabricated renders it necessary for him to produce all the proofs which may reasonably be supposed to be in his power, of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud; such proof is vital to uphold a transfer in other respects surrounded with suspicion; and this requirement is not met by the mere proof of payment, without showing where the money came from and how it was obtained; and, if the grantee claims to have had money loaned out with which he made payment, then his failure to produce the testimony of any of the persons to whom it was loaned, or the written evidences of the debt, or the mortgages by which it was secured, if any of these things may reasonably be supposed to be in his favor, are circumstances to be taken against him."

It would be impossible, without extending this opinion to an inadmissible length, to discuss these instructions. I will, therefore, content myself with saying that, in so far as they state the law applicable to the pleadings and evidence in the case correctly, the same was given in equally correct language in the instructions by the court on its own motion, and that when such is the case, such additional instructions may properly be refused.

Counsel in the brief complain that the court failed to instruct the jury as to the issues in the case. While this complaint may have some foundation, as matter of form, it has none in reality. The first five instructions sufficiently present the issues in the case, and, it may be added, that none of the instructions presented by defendants and refused, purport to contain a statement of the issues.

Defendants claim that there was misconduct on the part of the jury for which they were entitled to a new trial, in that one of the jurors separated himself from his fellows after they had retired, and before they had agreed

upon their verdict. Also, that there was misconduct on the part of the bailiff having said jury in charge. I have carefully examined and considered the voluminous supplemental bill of exceptions, containing the affidavits both in support of, and in resistance to, the motion for a new trial. The evidence contained in these affidavits is altogether conflicting. Not a material fact is alleged in the affidavits in support of the motion, which is not denied, or explained away, by those in resistance.

The above does not fully apply to the allegation of newly-discovered evidence. This consists in the fact that J. F. Perkins will testify that in February, 1886, he told the plaintiff that Lawrence Holland had told him that he expected to have trouble with Redman, Clary & Co., in regard to losses which they claimed he had sustained in *option deals;* that plaintiff said, in reply, that he had told Lawrence that he, Lawrence, had too much confidence in Redman, Clary & Co., and that they would *beat* him some day. This testimony, if admissible, in chief, would be valuable only as cumulative evidence. As an independent fact, such conversation between the plaintiff and Perkins would fall far short of proving or establishing facts within the knowledge of the plaintiff sufficient to amount to constructive notice of his brother's insolvency or fraudulent purpose in disposing of the lumber-yard. A new trial will never be granted on account of newly-discovered evidence merely cumulative in its character.

Finally, the testimony is too conflicting upon every material point, even where there may seem to be a preponderance in favor of the defendants, to admit of a reversal of the judgment, on the ground that the verdict is not sustained by the evidence.

The judgment of the district court is affirmed.

REESE, C. J., concurs. MAXWELL, J., dissents from the judgment.

MCKESSON v. HAWLEY.

(*Supreme Court of Nebraska.* January 5, 1888.)

LIMITATION OF ACTIONS—ADVERSE POSSESSION—SALE BY TRUSTEE—REDEMPTION.

On the twelfth of February, 1872, A. executed to B. a trust deed to secure the payment of a sum of money due April 12, 1872. The trust deed provided, among other things, that, if the notes were not paid at maturity, the trustee should advertise and sell the real estate, and convey a fee-simple title to the purchaser. The notes were not paid at maturity. On the seventh day of June, 1872, the trustee advertised and sold the real estate to the highest bidder, according to the terms of the trust deed. On the twelfth day of September, 1873, the purchaser at the trustee's sale conveyed the property to another by warranty deed. On the fifth day of October, 1874, the property was again sold, and conveyed by warranty deed; and on the twenty-eighth day of April, 1876, plaintiff purchased the same, and received a similar conveyance. Defendant and her grantors were in open, notorious, and adverse possession of the property for more than 10 years prior to the commencement of this action, which was to redeem the property from the trust deed. It was held that the statute of limitation had run, and that plaintiff's cause of action was barred.

(*Syllabus by the Court.*)

Appeal from district court, Lancaster county; HAYWARD, Judge.

This action was to redeem real estate from a sale under trust deed, and was brought by Nancy A. McKesson against Ellen Hawley. Decree for defendant. Plaintiff appealed.

N. C. Abbott, for appellant. *Lamb, Ricketts & Wilson,* for appellee.

REESE, C. J. This action was commenced in the district court of Lancaster county, the summons being issued on the eleventh day of April, 1885. The suit was ejectment, seeking the possession of the real estate described in the petition. On the eighteenth of October, 1886, an amended petition was filed, changing the nature of the action to one to redeem the same land—to-wit, the

W. ½ of lot 2, block 55, in the city of Lincoln—from a lien created by a trust deed given to secure the payment of the sum of $318. It is alleged that the plaintiff's equity of redemption has never been foreclosed, or any proceedings had or instituted for the purpose of foreclosing the said mortgage; that, under the stipulations contained in said trust deed, the trustee pretended to advertise and sell the property for the satisfaction of said debt, and pretended to sell the same on or about the seventh day of June, 1872, and delivered a deed to the purchaser, Hartley, for the consideration of the sum of $190, that being the amount for which the land was sold; and that, through mesne conveyances from the purchaser to the defendant, the title of the said Hartley had been conveyed to her. It is alleged that the proceedings to foreclose the mortgage or trust deed by the alleged advertisement and sale were void, and that the plaintiff was entitled to redeem the real estate. An accounting is prayed for of the amount due the defendant on the mortgage, and also taxes paid by her, and of the rents and profits for the use and occupation of the premises during the time the same was in the possession of the defendant and her grantors, and that, after deducting therefrom the amount found due on the mortgage, the plaintiff have judgment for the remainder, and that she be immediately permitted to redeem the property. By the answer, the title of plaintiff is denied, as well as her right to the possession of the property. It is alleged that on the twelfth day of September, 1873, one J. W. Hartley and his wife, claiming to own said property in fee-simple, conveyed the same by warranty deed to one J. D. Smith, and that Smith thereupon entered into actual and undisputed possession of the property, claiming title under his deed from Hartley; that he remained in possession until the fifth day of October, 1874, when, by warranty deed, he and his wife conveyed the property to one Wealthy Craig, and that she immediately took actual possession of the property under her title thus acquired, and retained the same until the twenty-ninth day of April, 1876, when she, by warranty deed, conveyed to defendant, and delivered to her the possession thereof; that thereupon defendant entered into the actual possession of the same, and has ever since held open, notorious, and adverse possession thereof, claiming title thereto under and by virtue of the deeds described; that all of the deeds referred to were filed for record, and duly recorded, immediately after they were executed; that defendant and her grantors have held open, exclusive, continuous, and adverse possession of said property for more than 10 years prior to the commencement of plaintiff's suit, claiming title under their deeds,—thus presenting, as a defense, the statute of limitations. The trial was had in the district court, which resulted in a decree in favor of defendant, from which plaintiff appeals.

As is shown by the record, the trust deed referred to was dated February 12, 1872, to secure the sum of $318, due April 12th of the same year. The deed is in the usual long form, and authorizes the trustee, in case of failure to pay the moneys secured by it, to advertise the property, and sell it at public sale, at a place therein directed, and, upon such sales being made, the trustee to execute and deliver to the purchaser a deed in fee-simple of said property. The money secured by this trust deed or mortgage was not paid when it became due, whereupon the trustee proceeded to advertise and sell the property. The sale was made on the seventh day of June, 1872; J. W. Hartley being the purchaser. On the twelfth day of September, 1873, Hartley sold and conveyed the property to J. D. Smith. On the fifth day of October, 1874, J. D. Smith sold and conveyed it to Wealthy Craig; and she, by a like sale and conveyance, transferred it to defendant, on the twenty-ninth day of April, 1876. The evidence shows that immediately after the purchase from Smith, and the transfer to Craig by him, on the twelfth day of October, 1874, Mrs. Craig entered into actual possession of the property under her deed, and retained such possession as owner unmolested until the time of her conveyance

to defendant; and that defendant, upon her purchase, immediately took possession, and has remained in possession ever since. There is some testimony that Smith was in possession of the property prior to his transfer to Craig, but this is not very clear. From this it appears, beyond controversy, that defendant and her grantor, Craig, were in open and adverse possession of the property from the fifth day of October, 1874, until the eleventh day of April, 1885, the time of the commencement of this action; covering about 10 years and a half.

There is some question presented as to what the statute of limitations would be in a case of this kind; defendant, claiming that plaintiff should be limited to four years, under the provisions of section 16, Civil Code. But we are inclined to think that the provisions of section 6 should be applied, which would fix the limitation at 10 years. This section is as follows: "An action for the recovery of the title or possession to lands, tenements, or hereditaments can only be brought within ten years after the cause of said action shall have accrued. This section shall be construed to apply also to mortgages." In *Crawford* v. *Taylor*, 42 Iowa, 260, it is said that an action to redeem from a mortgage is barred in the same time an action to foreclose would be, and cannot be maintained after 10 years from the date when the right of action accrued; 10 years being the statutory limitation of that state. Applying this rule to the trust deed in question, it is apparent that plaintiff's right to redeem accrued on the twelfth day of April, 1872,—13 years before the commencement of her action. But, assuming the statute of limitation would not begin to run against her at that time, it seems clear that it would begin to run in favor of defendant, under the title of herself and grantors, as soon as adverse possession was taken under the alleged purchase from the trustee. This possession dated back prior to the fifth day of October, 1874, and, as we have seen, more than 10 years prior to the commencement of the action. Plaintiff's right of action is therefore barred by the statute of limitations. See *Clark* v. *Potter*, 32 Ohio St. 49; *Knowlton* v. *Walker*, 13 Wis. 264; *Waldo* v. *Pice*, 14 Wis. 286; *Stevens* v. *Savings Inst.*, 129 Mass. 547.

But it is contended by plaintiff that the possession of defendant and her grantors was not adverse. It is insisted that the title of the trustee was a recognition of the plaintiff's title; and that, as the foreclosure proceedings were void, defendant could hold only as assignee of the rights of the trustee, and, therefore, not adversely. Such, to our mind, cannot be the law. Notwithstanding the fact that foreclosure proceedings might have been void, it is clear that the purpose of such proceedings was to cut off and destroy the title of plaintiff; and therefore the conveyance by the trustee to Hartley, had it been legal, would have terminated plaintiff's title. The grantees of Hartley, taking and holding the property, or asserting their right to hold it, under warranty deeds from him, were clearly adverse to plaintiff. They held as owners, and the statute would run in their favor.

The decree is right, and is therefore affirmed.

(The other judges concur.)

ANSLEY v. PASAHRO *et al.*

(*Supreme Court of Nebraska.* January 5, 1888.)

1. VENDOR AND VENDEE—VENDOR'S LIEN.
   A vendor of real estate, upon the absolute conveyance thereof by deed, has no lien on the land so conveyed for such portion of the purchase money as remains unpaid. *Edminster* v. *Higgins*, 6 Neb. 265.

2. SAME.
   The policy of our law is to discourage secret liens, and to require all instruments affecting title to real estate to be entered upon record.

3. SAME.
The doctrine that the vendor has a lien on the land conveyed for purchase money remaining unpaid is repugnant to our statutes in relation to real estate, and is no part of the law of this state.

4. SAME—MECHANIC'S LIEN—PRIORITY.
Rule applied. A. sold and deeded certain real estate to P. on the twenty-ninth day of June, 1885. On the same day T., by virtue of a contract with P. therefor, sold and delivered to him material for the erection of a building on said property. On the twenty-third day of July, 1885, P. and wife executed a mortgage to A. to secure the unpaid portion of the purchase price. *Held*, that the mechanic's lien in favor of T. was superior to the lien of A created by the mortgage.

(*Syllabus by the Court.*)

Appeal from district court, Nuckolls county; MORRIS, Judge.

Action by Elmer Ansley to foreclose a mortgage against C. F. Pasahro, Mary Pasahro, Templeton Bros., and W. C. Van Gundy. Decree for plaintiff. Templeton Bros., claiming a mechanic's lien on the mortgaged premises, appeal.

Case & McNeny, for appellants, Templeton Bros. *W. A. Bergstresser*, for appellee.

REESE, C. J. This action was instituted in the district court of Nuckolls county for the purpose of foreclosing a mortgage executed by defendant Pasahro to plaintiff, Ansley, upon certain real estate described in the petition. Defendants Templeton Bros. and Van Gundy were made parties to the action, for the reason that they had filed in the proper office statements for mechanics' liens which they claimed against the premises for material furnished Pasahro in the construction of a barn. There is no question presented as to the foreclosure proceedings so far as the mortgage is concerned. Pasahro and wife making default in the court below, Templeton Bros. appeared and answered, setting up their mechanic's lien, and alleged that it was superior to the lien of plaintiff's mortgage. It appears from the record that Ansley sold and deeded the property in question to Pasahro on the twenty-ninth day of June, 1885. On the same day Pasahro entered into a contract with Templeton Bros. for lumber with which to make the improvement on the premises. On the twenty-third day of July of the same year Pasahro and wife executed the mortgage to Ansley, which is now sought to be foreclosed, the consideration of the mortgage being the unpaid part of the purchase price of the property. On the trial the court found that the lien of the mortgage was superior to the lien created by the mechanic's lien, and rendered a decree accordingly. From this decree Templeton Bros. appeal.

I think the only question which can be considered is whether or not the furnishing of material for the construction of the barn after the execution of the deed from Ansley to Pasahro, and before the execution of the mortgage from Pasahro to Ansley, would constitute Templeton Bros. to be the holders of the prior lien, or whether the fact that the mortgage was given for the purchase price would entitle the mortgagee to priority. On the trial of the case, the following proceedings were had, as shown by the bill of exceptions: "The plaintiff introduced Deed Record Book K, page 522, thereby showing a deed from Elmer Ansley and wife to C. F. Pasahro, a copy of which is hereto attached, marked 'Exhibit A;' also page 495 of Mortgage Record Book 8, showing mortgage from C. F. Pasahro and wife to Elmer Ansley, a copy of which said mortgage is hereto attached, marked 'Exhibit B.' It is agreed in open court that the mortgage above referred to is for the purchase money of said premises. Plaintiff rests. Defendants Templeton Brothers then introduced page 44, vol. 1, of Mechanic's Lien Record of said county, showing mechanic's lien filed, *Templeton Brothers* v. *C. F. Pasahro*. Copy thereof is hereto attached, marked 'Exhibit C.' It is admitted that the lumber described in said mechanic's lien was used for the erection of a barn on said premises." This is the whole of the bill of exceptions, with the exception of the exhibits re-

ferred to, which are in the usual form, and need not be here copied. By the journal entry of the decree it is shown that Pasahro and wife made default, and the case was tried upon the petition of plaintiff and the answer of Templeton Bros. The finding of the court, as contained in the record, is as follows: "The court finds that C. F. Pasahro, and wife, Mary Pasahro, executed and delivered to plaintiff the mortgage deed set forth in said petition, upon the following-described real estate, to-wit: Lots one, two, and three, in block forty-six, in the village of Superior, Nuckolls county, Nebraska, according to the original plat and survey thereof, as the same appears of record in Nuckolls county, Nebraska, and that said mortgage was duly recorded on the thirtieth day of July, A. D. 1885, in Book 8 of Records of Mortgages, page 495, in said Nuckolls county, Nebraska; and the court further finds that said mortgage was given to secure the payment of six several promissory notes, five each for the sum of $300, and one for the sum of $200. The court further finds that the said notes and mortgage were given by the said C. F. Pasahro and Mary Pasahro to secure the unpaid part of the purchase money for said premises in said petition and mortgage described. The court further finds that there is due to plaintiff, Elmer Ansley, from defendant C. F. Pasahro the sum of $970 on three of the promissory notes described in said mortgage and petition, drawing ten per cent. interest. The court further finds that secured in this same mortgage are three several promissory notes, being three of the six heretofore described of date of July 23, 1885, and one becoming due June 29, 1886, for the sum of $300, drawing interest at ten per cent. from date; and one to become due September 29, 1886, for $300, drawing ten per cent. interest from date; and one becoming due December 29, 1886, for the sum of $200, drawing ten per cent. interest from date; and that these several sums due and to become due are part of the purchase money of the land described in the said petition and mortgage; and that the same is the first and best lien on said premises. And the court further finds due to Templeton Brothers, from defendant Pasahro, for materials furnished and for which mechanic's lien is filed, the sum of $301.73; and the court finds due defendant Van Gundy, from Pasahro, the sum of $15 for material furnished, and for which a mechanic's lien has been duly filed,—and these materials were used in the construction of a barn on said mortgaged premises; and that the mechanics' liens are second and inferior to the mortgage."

We are thus specific in the presentation of the evidence and the findings of the court, for the reason that it is said in the brief of appellee that "it also affirmatively appears that the deed was delivered on the twenty-third day of July, 1885, and the mortgage set out in the petition was executed and delivered on the same day." We have examined the record carefully, and cannot find that this statement is borne out by the evidence. The contract for the purchase of the material of Templeton Bros., made by Pasahro, was on the twenty-ninth day of June, the date of the execution of the deed, and more than half the lumber was furnished on that day. The presumption would be quite natural that Pasahro was in possession of the property at that time, and that his possession was under and by virtue of his purchase from Ansley, the deed bearing date of that day. If this is true, the only question presented is whether or not Ansley would have a vendor's lien as against third parties, without notice, for the remainder of the purchase price. If not, Templeton's mechanic's lien is the superior equity. This question, we think, has been finally put at rest in this state by the decisions of this court in *Edminster* v. *Higgins*, 6 Neb. 265, and *Rhea* v. *Reynolds*, 12 Neb. 128, 10 N. W. Rep. 549. The opinion in both cases was written by the present Chief Justice MAXWELL, and in the former case it is said: "This provision of the common law [referring to vendor's liens] doubtless had great influence in leading the court of chancery of England to adopt the doctrines of vendor's lien from the civil law, to prevent a failure of justice. But this doctrine can have no ap-

plication in this state, where debts are a charge upon the lands of decedents, and where the estate descends or is devised subject to such debts. We are clearly of the opinion that the doctrine of a vendor's lien in a case like the one at bar is repugnant to our statutes in relation to real estate, and is therefore no part of our law." That was a case in which the alleged lien of the vendor was sought to be enforced against the heirs of the vendee, and not where the interests of a third party, without notice, were involved. The latter case was one in which an action was commenced by the vendor of real estate upon a promissory note for the purchase price of the real estate, and for the purpose of enforcing a vendor's lien. The district court found that no lien existed, and dismissed the action. It was held that Rhea, the plaintiff, was entitled, upon the pleadings, to judgment against Reynolds for the amount of the note, and the case was reversed for that reason, in which opinion it is said: "We adhere to our decision in *Edminster* v. *Higgins*, 6 Neb. 265, in that a vendor of real estate upon an actual conveyance thereof, by deed, has no lien upon the land so conveyed for such portion of the purchase money as remained unpaid. The reason is, the grantor has parted absolutely with all claims and demands upon the land, and cannot be allowed to enforce special demands against it not arising by contract or operation of law."

As the bill of exceptions does not contain the evidence introduced by Van Gundy upon the trial, we cannot say as to what his rights are, or when his lien attached. The decree of the district court, so far as his interests are concerned, will not be molested. The decree of the district court will therefore be modified in this court, and the decree will be that the lien in favor of Templeton Bros. is superior to that created by the mortgage of plaintiff, and that the same be foreclosed; the proceeds arising from the sale of the real estate upon the foreclosure of the mortgage be applied—*First*, to the payment of the lien of Templeton Bros.; *second*, to the amount found due upon the mortgage; and, *third*, to the amount due Van Gundy on his lien. Judgment accordingly.

(The other judges concur.)

POWERS *v.* CRAIG.

(*Supreme Court of Nebraska.* January 5, 1888.)

1. NEGLIGENCE—SETTING PRAIRIE FIRE—PROVINCE OF JURY.
   In an action for damages resulting from the destruction of property by fire negligently set upon the prairies of this state, the question of negligence is alone for the jury to determine.[1]
2. SAME—EVIDENCE—CUSTOM—FIRE-GUARDS—CONTRIBUTORY NEGLIGENCE.
   In such case, where it was shown that the fire originated at the camp-fire built upon the prairie, in the vicinity of a large quantity of dry grass, at 1 o'clock in the day, when the wind was high, and blowing in the direction of the plaintiff's property, the question of the custom of the country in plowing fire-guards around such property is not a material inquiry; and especially so when a stream 30 feet in width was between the property destroyed by the fire and the place where the fire was kindled. In such case, the failure to plow or burn fire-guards would not be contributory negligence.

Error to district court, Cherry county; TIFFANY, Judge.

Action by Chauncey E. Craig against R. W. Powers to recover for damages caused by a prairie fire. There was a verdict and judgment for plaintiff, and defendant brings error.

D. A. Holmes, for plaintiff in error. *J. H. Gurney* and *H. R. Bisbee*, for defendant in error.

REESE, C. J. This action was originally commenced in the county court of Cherry county, by defendant in error against plaintiff in error, to recover

[1] As to the province of the court and jury in considering questions of negligence, see Walton v. Ackerman, (N. J.) 10 Atl. Rep. 709, and note.

the sum of $800 damages sustained by the plaintiff in the action by reason of the destruction of hay by fire which, it was alleged, originated from a camp-fire started by plaintiff in error while traveling through the country in the vicinity of the premises of the defendant in error. The case was taken to the district court by appeal, and tried to a jury. Defendant in error recovered a verdict and judgment. Plaintiff in error prosecutes error to this court.

It appears from the testimony that, at or about the time alleged in the petition, plaintiff in error was passing through the country near the premises of defendant in error, with a number of cattle, and the men necessary to take charge of his herd and outfit, and about the noon hour camped near the premises of defendant in error, and, for the purpose of preparing dinner, kindled a fire. The date was the thirteenth of October, 1884. It was a very windy day, and the surrounding grass was rank and dry. After eating dinner, the men remained near the fire for perhaps half an hour, without rebuilding it, and, when they left, some water was thrown upon the remaining coals, but no special effort seems to have been made to see that the fire was all extinguished. The fire had been built in a small pit, which was found, and is described as being about one foot and a half in length, and about one foot in width, and perhaps six inches deep. The grass had been previously burned around the pit a distance of about one foot, although some of the witnesses for the plaintiff in error testified that the width of the burnt space was probably six to eight inches. Very soon after the departure of the plaintiff in error and his men from the fire, they discovered the prairie grass burning not far from the place where they had eaten dinner, and under the force of the wind it was being driven towards the hay of defendant in error. A creek or stream of considerable size was between where the plaintiff in error had camped and the hay of defendant in error; the bed of the stream being estimated by the witnesses at from 20 to 30 feet in width. The fire was blown across this stream to defendant's premises, and the destruction of his hay followed.

A number of questions are presented by the record, which will be noticed in the order of their assignment here.

The first assignment is that the court erred in overruling the objection to the testimony offered by the plaintiff below. This assignment has reference, we presume, to conversations testified to between witnesses of defendant in error and plaintiff in error. Defendant in error was called as a witness, and testified, in substance, that at the time of the fire he was at work on a railroad grade about a mile and a half distant from it; that when he saw the smoke he started in that direction on horseback, and on arriving there he discovered the pit in which the camp-fire had been built, and that the fire had not been extinguished; that he noticed a few "brands" with fire on them; that the fire had at that time burned a little to the south, but was running under the force of the wind to the north, in the direction of his hay; and that the plaintiff in error was there about the time of his arrival. He was then asked if he had any conversation with plaintiff in error. His answer being in the affirmative, he was directed to state what plaintiff in error said in reference to the camp-fire. Over the objection of the plaintiff in error, his answer was: "I asked him how they thought the fire got away from there. They said they supposed they had the fire put out; or possibly it might have been, that is what they said. I do not remember the words exactly; that is the substance of it." We can see no objection to the admission of this testimony. It seems to have been conceded, and we think the facts fully sustain the claim, that the fire originated from the camp-fire of plaintiff in error. No other cause is shown. It was discovered within a very few minutes after the departure of the men from the place where they built their camp-fire. The fire was not extinguished. The grass was very dry, and the wind was blowing a gale. It is true that another person, referred to in the testimony, was seen to pass by the camp during the time that plaintiff's men were preparing to depart; but

there is nothing in the testimony anywhere that he either meddled with that fire, or started another. He was near the wagon, talking with plaintiff's hands, and left before they did; having gone a considerable distance before they drove away. The proof of the remark by the plaintiff in error, that they thought they had extinguished the fire, even it be construed into an admission, could work no possible prejudice to him, as the proof was ample as to the origin of the fire.

The next assignment of error is that "the court erred in rejecting testimony offered by plaintiff in error." This objection refers to the offer of plaintiff in error upon the trial to prove "that the country in the vicinity of Mr. Craig's place, west of Valentine, in that locality, was unsettled prairie, and but very little under cultivation, but that, periodically, prairie fires swept over the country, devastating the country; and that it was customary among the settlers who were there to protect themselves against damage by fire by either plowing or burning suitable fire-guards, and that the plaintiff had failed to provide such fire-guards." This testimony was, upon objection by defendant in error, excluded. In this we see no error. It was alleged in the petition that the fire had been negligently kindled at a distance of about 250 yards from the stacks of hay of defendant in error, and that plaintiff in error did, carelessly and negligently, leave the fire burning, and from such carelessness and negligence the prairie grass became ignited, and the fire spread to defendant's land. The proof showed the existence of the stream to which we have referred, and which, under ordinary circumstances, would doubtless have served as a fire-guard, and would have protected defendant's property from fire running in the direction or course taken by the fire in question. The theory upon which this testimony was sought to be introduced was the contributory negligence of defendant in error. This question was submitted to the jury by proper instructions from the court. The question of contributory negligence, if it arose in this case at all, was whether the negligence of defendant in error contributed to this particular injury. The fact that the country was "unsettled prairie, and very little under cultivation," was fully shown by the testimony in the case, and, if material to the defendant, was sufficiently proven. The simple question presented by this offer, we think, was as to the custom of settlers in the matter of plowing or burning fire-guards. Even if the circumstances under which the fire in question was kindled would permit an inquiry as to the negligence of defendant, we can see no error in the exclusion of the inquiry, for the reason that it was shown by the testimony that no fire-guard had been made; the reliance of defendant in error being upon the stream to which we have referred, as sufficient protection from fire in that direction. The question, then, as to the negligence of defendant in error, was fully submitted. Upon the question as to what was the custom of the settlers, there was no necessity for inquiry.

The third assignment of error: "The court erred in refusing to give instructions asked by defendant." The instruction asked by plaintiff in error which the court refused to give was as follows: "You are instructed that if the plaintiff in this case failed to exercise the diligence that an ordinarily prudent man would, under such circumstances, have exercised, in protecting the hay burned from being destroyed by fire which might be raging in the vicinity, by plowing, burning, or otherwise providing suitable fire-guards, then he is not entitled to recover in this case, unless the negligence of the defendant was grossly in excess of that of the plaintiff." As we have already seen, the question as to whether or not defendant in error had plowed or burned fire-guards around his stacks was not a material one to be considered by the jury, and that question need not be further considered. The question of negligence of defendant in error was a proper one for the jury to consider, under all the evidence in the case; and it would have been improper for the court to have instructed them as to what would or would not constitute contributory negli-

gence. Considering the location of the hay, and all its surroundings, the proximity of the stream to which we have referred, the question of contributory negligence was alone for the jury, and there was no error in refusing to give the instructions prayed.

The fourth assignment of error is that "the court erred in giving the instruction on request of plaintiff." Although it is not shown by the record, yet we presume that instruction No. 2, given upon the court's own motion, is here referred to. This instruction is as follows: "You are instructed that the law of Nebraska makes it a misdemeanor for persons to negligently or carelessly set on fire any prairie in any part of this state. You are further instructed that every one has a right to presume that no one will be guilty of a misdemeanor, and is therefore under no obligation to anticipate such negligence or to guard against it. Therefore, if you find that the defendant or his agent did negligently or carelessly set fire to the prairie, and that such fire burned the plaintiff's hay, the defendant would be liable for the damage, notwithstanding you might find from the evidence the further fact that the plaintiff had not sufficient fire-guard around the stacks, unless the plaintiff neglected, after he discovered the fire, to use all reasonable means within his power to prevent the injury therefrom." The objection to this instruction is that there was nothing in the record of the trial which would justify the court in instructing the jury concerning the criminal liability of plaintiff in error. As we have before seen, the action was based upon the negligence of plaintiff in error in permitting the fire to escape. The whole instruction, taken together, is simply a statement of the law that the careless use of fire, by which the prairies of the state might be ignited, is prohibited by statute, and that the defendant in error would be under no obligations to anticipate such negligence on the part of plaintiff in error; and the further consideration that the absence of fire-guards would constitute no defense to the action. Upon this latter part of the instruction, this court has sufficiently spoken in *Railroad Co.* v. *Westover*, 4 Neb. 268. As is indicated in that case, it may be said that it was clearly the duty of plaintiff in error to take the necessary precautions to prevent the escape of the fire kindled by him. Failing to do so, the question of his negligence, under the circumstances, would be determined by the jury.

The fifth assignment of error, "that the court erred in overruling the motion for a new trial," is substantially disposed of already. There was sufficient testimony to warrant the finding of the jury that plaintiff in error was the cause of the destruction of defendant's property. The question as to whether he, or those under him, acted negligently in permitting the fire to escape, was one of fact for the jury. They found against him upon this question. The testimony was ample to sustain the finding.

We have carefully examined the record, and can find no prejudicial error. The judgment of the district court is therefore affirmed.

(The other judges concur.)

STATE v. KELLNER.

(*Supreme Court of Nebraska.* January 5, 1888.)

1. CRIMINAL LAW—APPEAL FROM JUSTICE—DISMISSAL.
   Defendant was arrested upon a complaint, tried before a justice of the peace for a misdemeanor, convicted, and appealed to the district court. Upon trial in the district court, testimony was introduced tending to establish all the material allegations of the complaint. Upon the close of the state's testimony, defendant moved the court that the cause be dismissed and the defendant discharged, which motion was sustained. *Held* error.

2. WEIGHTS AND MEASURES—FALSE WEIGHTS—CRIMINAL LIABILITY—EVIDENCE.
   Where a defendant was charged with keeping and having charge of scales for the purpose of weighing live-stock, grain, coal, and other articles, and knowingly and willfully reporting false or untrue weights, whereby another was defrauded, it was held competent, for the purpose of showing guilty knowledge, to prove that, at or

about the time alleged in the complaint, the defendant used, and caused to be used, in the weighing of stock and grain, a loaded weight, heavier than other and correct weights kept by him, thereby causing the apparent weight of the stock, hay, etc., to be diminished.

(*Syllabus by the Court.*)

Exceptions by prosecuting attorney from district court, Madison county; CRAWFORD, Judge.

This is a proceeding in error, instituted by the county attorney of Madison county, Nebraska, under sections 515–517, Crim. Code, providing that the county attorney may present to the supreme court a bill of exceptions for the purpose of obtaining the decision of such court upon the points presented therein, which decision shall determine the law to govern in any similar case, but which shall not reverse or in any manner affect the judgment of the lower court. The defendant, Morris Kellner, was prosecuted under section 136, Crim. Code, which provides a penalty for use of false weights whereby any one is defrauded or injured. Under the instructions of the court, the defendant was discharged.

John S. Robinson, Co. Atty., and *W. V. Allen*, for the State. No appearance for the defendant.

REESE, C. J. This is a proceeding in error, instituted by the county attorney of Madison county, under sections 514, 515, and 517, Crim. Code. The prosecution was instituted against defendant in error before a justice of the peace of Madison county for a violation of section 136, Crim. Code. A trial was had before the justice of the peace, which resulted in a conviction of plaintiff in error. From the judgment of conviction he appealed to the district court. In that court a jury was impaneled, and the trial proceeded with until the testimony of the state had all been introduced, when the defendant moved the court for an instruction to the jury "to find for the defendant." "The motion sustained by the court. State duly excepted; whereupon the jury was duly discharged by the court, and the prisoner discharged from custody. State duly excepted." It is insisted here that the court erred in discharging the jury and discharging the defendant. There is no question made which requires notice as to the sufficiency of the complaint. Our attention must be alone directed to the evidence adduced upon the trial.

Without extending this opinion to the length which would be required to copy the testimony of the various witnesses, and for the purposes of this decision alone, we think it may be said that the following facts were sufficiently established to require their submission to the jury. These are that defendant was engaged in the business of purchasing stock and grain in the village of Madison, Madison county, using, as his own, platform scales, upon which to weigh the stock and grain purchased by him. That upon the occasion referred to in the testimony the witness Trine sold defendant five loads of hogs, and delivered the same, they being weighed on the scales in question. That at the time that the last load of hogs was weighed he went to defendant, who was standing at the scales, picked up one of the weights, suggested that his load weighed lighter than he had expected, and asked that the 2,000 pound weight which had been used should be removed, and another one placed upon the beam of the scales, which was done, and a different weight produced, but it seems not to have been definitely settled as to just what the difference was. Defendant remarked that it made about five pounds difference, which he allowed to the witness. The weight referred to by the witness was similar to the other weights, with the exception that what appeared to be a "round drilled hole" was in the weight, which had been filled up with some white metal resembling lead. It was shown that this weight was used by defendant in weighing stock and grain. On two other occasions the three 2,000 pound weights were obtained from his scales without his knowledge, and carefully weighed. Two

of the weights weighed exactly four pounds each; the other, being the one containing the metal referred to, which is described as having the appearance of lead, weighed four pounds one ounce and a half. Some testimony was introduced tending to prove the difference which would be produced in weighing by the use of the heavy weight; the other weights being shown to be correct. I quote from the testimony of one of the witnesses: "*Question.* Will you state what the difference in pounds would be of a weight that was used upon the end of a beam that so used would weigh 2,000 pounds upon the platform, and a four pound weight when there is an ounce and a half added to it,—what would be the difference in pounds? *Answer.* As near as I can judge, it is between forty-seven and fifty pounds. There is a difference; some scales break on two pounds, and on a large platform scale like this two pounds is as close as you can ordinarily figure. I think it will make from forty-seven to fifty pounds, ordinary quick weighing, as we ordinarily do business, and as Mr. Kellner does, and as a man ordinarily weighs."

The section of the statute above referred to makes it criminal for any person knowingly to keep or to have in charge any scales or steelyards for the purpose of weighing live-stock, hay, grain, coal, or other articles, who shall knowingly and willfully report any false or untrue weights, whereby another person or persons may be defrauded or injured. While there is no direct or positive proof that witness Trine was defrauded or injured in the sale of the hogs referred to, to defendant, yet we think there was clearly sufficient testimony upon all the essential parts of the case to require its submission to a jury. If the two weights which were alleged to have been the correct ones were not used at all times, and the inaccurate weight was used, that weight being the heavier, it would not follow that the seller of stock to defendant would be a loser—defrauded—if the loss was occasioned with the knowledge of the defendant. These facts were alone for the jury to determine, upon evidence.

Probably for the purpose of proving guilty knowledge on the part of defendant, the witness Wilburger was called, sworn, and, after testifying that he had worked for defendant, said: "I unloaded grain and hogs, and weighed and helped weigh part of the time. *Question.* It was part of your business, then, to use the scales you have mentioned, that were owned by Mr. Kellner? *Answer.* Yes, sir. *Q.* Do you remember how many two thousand pound weights there were on these scales? *A.* I seen three on the scales. *Q.* You may describe those three weights. *A.* They all looked alike to me. One of them had some lead in it, or was filled with something that looked like lead. *Q.* You may state to the jury where these weights were kept while you worked for Mr. Kellner. *A.* Well, a part of the time they were on the scales; sometimes two, and sometimes three. I found one of them up on a cross-beam in the elevator one day. *Q.* Which one did you find on the cross-beam of the elevator? *A.* One of the two thousand pound weights. *Q.* Can you describe that one that you found there? *A.* That was the one that had the lead in it; that is the only way I can describe it. *Q.* You say that you weighed hogs and grain for Mr. Kellner? *A.* Yes, sir. *Q.* You may go on and state to the jury if he ever interfered with you while you were weighing hogs and grain. (Defendant objects, as being incompetent, irrelevant, and immaterial. Objection sustained by the court. State then and there duly excepted.) *Q.* Do you know whether Mr. Kellner ever used this weight that had the lead in it? (Defendant objects, as being incompetent, immaterial, and irrelevant. Objection sustained by the court. State duly excepts.) *Q.* Now, Mr. Wilburger, do you know whether all three of these 2,000 pound weights were used by Mr. Kellner in weighing upon these scales while you worked for him? (Defendant objects, as being incompetent, irrelevant, and immaterial. Objection sustained by the court. State duly excepts.) *By Mr. Robinson.* The prosecution now offers to show by the witness upon the stand—(Defendant objects

that no offer can be made in criminal cases to prove certain facts. Objection sustained by the court. State then and there duly excepted.) *Q.* I want you to tell the jury, Mr. Wilburger, if you can, whether it is true or not, while you were weighing a load of Kellner's hogs,—a load of hogs on Mr. Kellner's scales,—on one occasion, Mr. Kellner interfered, or changed the weights. (Defendant objects, as being incompetent, irrelevant, and leading. Objection sustained by the court. The state duly excepted.)" As to the weight of the testimony actually given tending to prove the allegations of the complaint the jury were the sole judges. If no testimony were introduced to prove such facts, it would have been the duty of the court, upon request, to instruct the jury to find the defendant not guilty; but, as we have heretofore said, there was evidence tending to prove each material allegation of the complaint, and this should have been submitted to the jury. While it is probably true that, in the examination of the witness Wilburger, the time fixed was not identical with that charged in the indictment, yet it would have been competent for the purpose of proving guilty knowledge on his part, and should have been admitted.

The court therefore erred in rejecting the offered testimony, and in discharging the defendant.

(The other judges concur.)

HAYS *v.* MERCIER *et al.*

(*Supreme Court of Nebraska.* January 5, 1888.)

1. APPEAL—FROM ORDER SUSTAINING DEMURRER—MOTION FOR NEW TRIAL NOT NECESSARY.
   Where plaintiff filed his petition in equity in the district court, and to which defendant presented a demurrer, the ground for demurrer being that the petition did not state facts sufficient to constitute a cause of action, and such demurrer being sustained, it was held that neither a motion for a new trial, nor bill of exceptions, was necessary in order to obtain a review in the supreme court by appeal.
2. MECHANICS' LIENS—PROCEEDINGS TO ENFORCE—AFFIDAVIT.
   An affidavit for a mechanic's lien in the following form: "*State of Nebraska, Chase County—ss.:* J. P. Hays, being first duly sworn, on his oath says that the foregoing account of work, labor, and skill is a true and correct account of the work, labor, and skill done and performed and furnished by this affiant for the said Thomas Mercier, under a verbal contract for the erection of a store-house building for the said Thomas Mercier upon the following described lot, piece, or parcel of land, viz.: Lot number one, in block number four, in the town of Imperial, Chase county, Nebraska, according to the recorded plat and survey of said town, now of record in the office of the county clerk of said county. And this affiant further says that he has, and does hereby claim, a lien on the said premises, as above described, for the full amount of his said account for labor, work, and skill, to-wit, the sum of $161.50, together with interest thereon at the rate of 7 per cent. per annum from this date; and further affiant says not:" *held* sufficient, when assailed by demurrer.

(*Syllabus by the Court.*)

Appeal from district court, Chase county; COCHRANE, Judge.

Action by Joseph P. Hays to foreclose a mechanic's lien. A demurrer to the petition was sustained, and plaintiff appeals.

C. W. Meeker and *E. W. Metcalfe*, for appellant. *H. F. Wilson* and *J. Byron Jennings*, for appellees.

REESE, C. J. This action was commenced in the district court of Chase county, and was for the foreclosure of a mechanic's lien. The action is against Thomas Mercier, as owner of the property, and Mary J. Mercier, John M. H. Hooker, and Hannibal H. Whitman are made defendants, as owners of some interest in the property. Hooker filed his separate answer, setting up a mechanic's lien as subcontractor. Thomas Mercier and Mary J. Mercier filed a general demurrer to the petition. The demurrer was sustained, and plaintiff's cause dismissed, from which he appeals to this court.

Since the filing of the case in the supreme court, Thomas and Mary Mercier

appeared especially, and filed their objections to the jurisdiction of the court. These objections are based upon four alleged causes: "*First*, no exception was taken to the decision of the court in which the cause was tried at the time the judgment was rendered, nor at any time; *second*, no bill of exceptions is on file in this cause; *third*, no relief was asked by appellant in the district court; *fourth*, no motion for a new trial was filed in the district court." As to the first objection, that no exception was taken to the decision of the court, we find it is not sustained by the record, from which we quote the following: "This cause having been submitted to the court on the demurrer to the petition, on consideration thereof the court does sustain the same, so far as it relates to the mechanic's lien; and the plaintiff not desiring to prove his claim as to the account set up in the said petition, and not desiring to amend his petition, it is ordered by the court that said action be dismissed, and that defendant recover from the plaintiff his costs herein expended, and taxed at $7.33,—to all of which ruling of the court in sustaining said demurrer plaintiff then and thereupon duly excepted." This was sufficient. As to the second ground of objection, that there is no bill of exceptions filed in this case, it must be sufficient to say that none is required. The third ground of objection is not sustained by the record. It can serve no important purpose to quote the petition at length, but we find in it the allegation of the essential facts; the usual prayer for an accounting; and that "the amount found due be declared a lien upon the property described; in case the amount found due is not paid within a time to be fixed by the court, that the premises be sold, and the proceeds be applied to its payment; and such other and further relief as equity and justice may require." As to the fourth ground, no motion for a new trial was necessary. The objection to the jurisdiction of the court is therefore overruled.

The allegations of the petition filed in the district court were to the effect that plaintiff had performed certain work for defendant in the construction of a building upon lot 1, in block 4, in the original town of Imperial; that the total value of the services rendered was $411.18; that there had been paid thereon the sum of $249.61; that a balance of $161.57 remained unpaid. It was alleged that this work was performed under and by virtue of a verbal contract with the defendant, the owner of the building, for the same, and that the necessary affidavit had been filed in the office of the county clerk by which to perpetuate the lien. The petition seems to contain all the averments which could be required in a case of this kind. But it is claimed that the affidavit for the mechanic's lien, filed in the office of the county clerk, was insufficient. This affidavit is as follows: "*State of Nebraska, Chase County—ss.:* J. P. Hays, being first duly sworn, on his oath says that the foregoing account of work, labor, and skill is a true and correct account of the work, labor, and skill done and performed and furnished by affiant for the said Thomas Mercier, under a verbal contract for the erection of a store-house building for said Thomas Mercier upon the following described lot, piece, or parcel of land, viz.: Lot number one, in block number four, in the town of Imperial, Chase county, Nebraska, according to the recorded plat and survey of said town now of record in the office of the county clerk of said county; and that this affiant further says that he has and does hereby claim a lien on the said premises, as above described, for the full amount of his said account for labor, work, and skill, to-wit, the sum of $161.57, together with interest at the rate of 7 per cent. per annum to this date; and further affiant says not." This affidavit is subscribed and sworn to in the usual form. The account is attached to the affidavit, showing the debits and credits thereon.

As we understand the case presented, defendant offers but one objection to the affidavit, and that is that it is not alleged therein that Thomas Mercier was the owner of the property upon which the labor was bestowed. The recitals of the affidavit are that the labor was furnished to said Thomas Mercier

under a verbal contract for the erection of the store-house building for said Thomas Mercier, upon the lot therein described. As has been frequently said by this court, the mechanic's lien law of this state is a remedial statute, and must be liberally construed in furtherance of justice. The demurrer admitted all the material allegations of the petition,—the ownership of Mercier, being therein alleged, is admitted of record; and the only question to be here considered is whether or not, as between the parties to the contract, it is necessary that the affidavit by which a lien is sought to be perpetuated should contain the averment that the person with whom the contract was made, and for whom the labor was performed, was the owner of the property against which the lien is sought to be established. Section 3, c. 54, Comp. St. 1885, entitled "Mechanics' and Laborers' Liens," is in part as follows: "Any person entitled to a lien under this chapter shall make an account in writing of the items of labor, skill, machinery, or material furnished, or either of them, as the case may be, and, after making oath thereto, shall, within four months of the time of performing such labor and skill, or furnishing such machinery or material, file the same in the county clerk's office of the county in which such labor, skill, and materials shall have been furnished,—which account so made and filed shall be recorded in a separate book to be provided by the clerk for that purpose; and shall from the commencement of such labor, or the furnishing of such materials, for two years after the filing of such lien, operate as a lien on the several descriptions of such structures and buildings, and the lots on which they stand, as in the first section in this chapter named."

While it would, no doubt, be good practice, in an affidavit for a mechanic's lien, to make the direct averment that the person with whom the contract was made was the owner of the property, yet we find nothing in the statute which would require a technical averment as to such ownership. The language of the law is "that the person entitled to a lien shall make an account in writing of the items of his labor, skill, machinery, or materials, and, after making oath thereto," (that is, to the account,) shall file the affidavit, or, rather, the account so verified, in the office of the county clerk. It is true that the allegation of ownership is an essential averment to the maintenance of the action; but this averment, in our opinion, is required only in the petition for the foreclosure of the lien. The petition in this case contains all necessary averments upon this subject. To the petition alone, then, when assailed by demurrer, must we look. While it is not our purpose to dispose of this case on that ground, yet we feel inclined to remark that the question here presented cannot properly arise upon demurrer, but must be a question of the admissibility of the evidence upon which the lien is sought to be foreclosed. Waiving this consideration, however, we hold that the affidavit was sufficient, and the demurrer should have been overruled.

The judgment of the district court is reversed, and the cause is remanded for further proceedings according to law.

(The other judges concur.)

FREEMAN v. FREEMAN.

(*Supreme Court of Michigan.* January 5, 1888.)

ACCORD AND SATISFACTION—PAROL EVIDENCE—MATTERS NOT INCLUDED IN.

Where a contract importing to settle all differences, "of whatever name or nature," is complete in itself, and was afterwards fully performed, and a suit in chancery at that time pending between the parties was discontinued, evidence cannot be introduced to show that it was only a partial settlement, and that the matters in controversy in the chancery suit were not included.[1]

Error to circuit court, Clinton county.

William H. Freeman sued Richard Freeman on a judgment obtained against him in New York. Judgment for defendant, and plaintiff brings error.

O. L. Spaulding and *H. & H. E. Walbridge*, for appellant. *Daboll & Brunson*, for appellee.

MORSE, J. The parties to this controversy are brothers residing in the county of Clinton. The plaintiff sued defendant in the circuit court for that county upon a judgment obtained in the state of New York against the defendant, in favor of Guy H. McMaster and J. Foster Parkhurst. The judgment was rendered September 12, 1876, and assigned to plaintiff May 1, 1886. Suit was commenced before the outlawry of the judgment. The defense to this judgment was that, at the time the plaintiff acquired it, he was acting as the agent of defendant to sell certain real and personal property, pay the defendant's debts, and account to him for the balance, if any. The evidence introduced by the defendant to substantiate this defense tended to show that when the defendant, in the year 1876, left the state of New York and came to Michigan, he left in the care of the defendant a large amount of real and personal property. There were various mortgages upon the parcels of land owned by defendant, and, in order to cut off a dower-right in dispute, it was agreed that the plaintiff should procure the title of these lands in himself by having the mortgages foreclosed, and bidding in the title. That, in pursuance of such agreement, the plaintiff did thus obtain title in himself to 318 acres of land. That he sold all of it except 97½ acres, which he retains; and out of the proceeds of such sales, after paying the debts of defendant, has a large amount of money in his hands, belonging to defendant, over and above the amount of this judgment. To rebut this testimony, the plaintiff showed that, November 7, 1885, the defendant in this suit filed a bill in the circuit court for the county of Clinton in chancery for an accounting and settlement of all differences between himself and the plaintiff, including the transactions in the state of New York, as well as matters of difficulty between them in Clinton county. It is claimed, also, that the differences in Michigan grew out of the New York affair. November 16, 1885, there was a settlement between the parties, which was evidenced by the following writing:

"Memorandum of agreement made and entered into this sixteenth day of November, A. D. 1885, by and between William H. Freeman, party of the first part, and Richard Freeman, party of the second part, witnesseth, that the parties hereto, being desirous of settling all matters of difference between them, of whatever name or nature, have agreed as follows: Party of the first part hereby agrees to give party of second part a good and sufficient quitclaim deed of the following described premises: The south fifty-eight acres of the north-west quarter of section four, and the east half of the south-east quarter of the north-west quarter of section five, all in the township of Olive, Clinton county, Mich. The party of the second part hereby agrees to give party of first part a mortgage for two thousand dollars on the above-described premises, pay-

[1] Under an agreement that plainly purports to set forth the full consideration which prompted its execution, parol evidence is inadmissible to show a consideration not mentioned or referred to in it. Parker v. Morrill, (N. C.) 3 S. E. Rep. 511.

able as follows: Five hundred dollars on or before two years from date, five hundred on or before four years from date, five hundred on or before six years from date, five hundred on or before eight years from date, with interest at eight per cent., payable annually on all sums unpaid. If party of second part should wish to make any one of the payments before due, he should give sixty days' notice to party of first part. Party of second part also agrees to deed, or cause to be deeded, to party of first part, by good and sufficient deed, the following described premises: The west half of the south-east quarter of section twenty-six in Bingham, Clinton county, Mich. Party of second part to pay the taxable costs in the case of *Alice L. Freeman* vs. *Wm. H. Freeman and Wm. A. Freeman;* also the case of *Wm. A. Freeman* vs. *Richard Freeman*, before Wm. H. Castel, circuit court commissioner. It is further mutually agreed that the parties hereto shall meet at the office of H. & H. E. Walbridge, St. Johns, on Thursday, to execute the necessary papers to carry out and fulfill the terms of this agreement. W. H. FREEMAN.

"R. FREEMAN.

"In presence of PORTER K. PERRIN,
"HENRY M. PERRIN."

On the seventeenth day of December, 1885, the solicitor of Richard, complainant in that suit and defendant in this, entered an order discontinuing the chancery suit, which order recited the fact that the parties to said suit, having settled all matters of difference between them, and adjusted the matters involved in the said bill of complaint, ordered that said cause be discontinued. This order was signed by C. M. Merrill, solicitor for complainant. It was admitted on the trial of the present case that the bill of complaint in this chancery case covered all the New York matters, and all unsettled differences between the parties, and embraced the whole matter and transactions gone into by the defendant in the trial of this cause. After the defendant had rested, the plaintiff, in rebuttal, introduced this contract of November 16, 1885, in evidence, and also the records and files in the chancery suit, including the order discontinuing the same. Thereupon, under objection, the defendant put in the testimony of one George Waldron, who was present at the settlement between the parties, who testified to the effect that in the talk leading to the settlement, and in the settlement, they confined themselves to the Michigan matters, and did not include the New York transactions. The plaintiff's counsel moved to strike out this testimony, for the reason that it tended to vary and contradict by parol the written contract of the parties. The court refused the motion. The defendant testified that he did not authorize his solicitor, Charles M. Merrill, to discontinue the chancery suit, but admitted that it was to be discontinued and dropped on account of the entering into of the contract of November 16, 1885, and it was so understood by both the parties. The court submitted the case to the jury upon the theory that if the New York matters were not settled by the contract of November 16, 1885, the plaintiff could not recover. It appears from the record that the agreement of November 16th was carried out by the execution of the necessary papers. The jury found in favor of the defendant.

It is claimed by the plaintiff's counsel that the contract of settlement is clear and unambiguous, and should have been construed by the court, and not the jury; that the court erred in receiving and submitting to the jury testimony tending to explain, vary, and contradict this written agreement; that no fraud or mistake was claimed to invalidate it, and that by its terms, and the subsequent discontinuance of the chancery suit, all matters of difference between the parties were conclusively settled. We think the counsel are right in their claim. The contract of settlement clearly imports that they intended by this agreement to settle all their differences "of whatever name or nature." It also appears, without dispute, from the testimony of all the parties, that the chancery suit was to be dropped or discontinued by reason of such settle-

ment, and the order shows the understanding under which it was discontinued. The contract of settlement is complete in itself. It needs no explanation to be understood; there is no ambiguity about it. It clearly appears therein that the parties met, and agreed to settle all their differences, and solemnly put in writing the terms and details of such settlement, and appointed a time to execute the necessary legal documents to carry out and fulfill the same. It was afterwards executed and fully performed. We do not think the defendant can now be heard to establish that it was only a partial settlement of their differences, and that the New York matters then in suit between them were not included. The jury should have been directed to find a verdict for the plaintiff in the amount of the judgment and interest.

The judgment of the circuit court for the county of Clinton is reversed, with costs, and a new trial granted.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

MILLER v. BECK *et al.*

(Supreme Court of Michigan. January 5, 1888.)

1. EJECTMENT—ADVERSE POSSESSION—INSTRUCTIONS.
Where, in an action of ejectment, the question of adverse title by possession was raised, the circuit judge instructed the jury as to the length of time during which the property must have been openly and notoriously occupied, but did not tell them it must be distinct and hostile, nor define more clearly the meaning of the term "adverse." *Held* not error.

2. SAME—PLEADING—GENERAL ISSUE—EVIDENCE OF ADVERSE POSSESSION.
In an action of ejectment, where defendant pleads the general issue, it is sufficient to admit the defense of title by adverse possession; and the question when the adverse possession began is for the jury to determine.

Error to circuit court, Ingham county; G. T. GRIDLEY, Judge.

The plaintiff, John P. Miller, brought this action against Rebecca Beck and others, in ejectment, to recover possession of a strip of land in the city of Lansing. The cause was tried to a jury, and verdict and judgment for defendants. Plaintiff brings error.

H. B. Carpenter, for appellant. *Frank L. Dodge*, for appellees.

MORSE, J. This is an action of ejectment to recover possession of a strip of land in the city of Lansing, a few inches wide, upon which rests the outer and rear wall of a brick store owned by the defendant Rebecca Beck. Samuel Beck purchased in 1869 a parcel of land off the north end of lot 6, block 100, in the city of Lansing, 20 feet north and south by 66 feet east and west. This is now the property of Rebecca, his widow. When Samuel bought the land there was a wooden building upon it, which was burned in August, 1870 or 1871. The year it was burned, Samuel Beck erected a three-story brick building, 20 feet wide by 60 feet long. The six feet remaining at the rear was excavated, and used as an area to give light to the cellar. A wall was built around this area. The brick building so erected by Samuel Beck was burned in 1885, and in the spring of that year a two-story brick building was erected on the site of the former store, but it was built six feet longer, thus occupying the space before used for an area. Plaintiff owns a parcel of land next south and adjoining the Beck lot, and also owns 22 feet further east, and also a lot 20x22 feet east of the Beck store. He claims that the rear or east wall of the defendant's store was placed in part, by mistake, upon his land to the extent of from three and one-half to five inches. On the ninth day of September, 1886, he brought this suit.

The defendants claim that the rear or east wall of the brick store does not encroach upon the land of plaintiff, but that, if it does, the few inches of land in dispute have been occupied adversely by Samuel Beck and his grantee, the

defendant Rebecca Beck, for a sufficient length of time to bar the plaintiff's rights therein. The testimony shows that this rear wall was built exactly in the same place occupied by the old wall of the area. Louis Beck, son of Samuel and Rebecca, testified that he thought the first brick store and the area wall was built in the fall of 1870, but was not sure but it might have been in 1871. No other testimony appears as to the time it was built. It seems to be undisputed that from the time the area wall was built the land occupied by it was held and claimed by the Becks, and occupied by them without interruption, until the commencement of this suit.

The jury found a verdict for the defendants. The only errors assigned are directed against the charge of the court. It is submitted that the court erred in permitting the jury to find title in the defendants by adverse user and possession—*First*, because the statute of limitations relied upon was not pleaded; and, *second*, because it was not certain from the testimony of Louis Beck when the occupation began. If it was in 1871, the 15 years of the statute had not expired when this suit was brought. Neither of these objections are tenable. A plea of the general issue is sufficient, in an action of ejectment, to admit, without notice, the defense of title by adverse possession. Tyler, Ej. 463, 464; How. St. §§ 7808, 7809; *Hughes* v. *Graves*, 39 Vt. 359; 3 Washb. Real Prop. 163, 164; *Nelson* v. *Brodhack*, 44 Mo. 596; *Dalby* v. *Snuffer*, 57 Mo. 294; *Wood* v. *Jackson*, 8 Wend. 9; *Howard* v. *Mitchell*, 14 Mass. 243. It was for the jury to determine from Louis Beck's testimony when the adverse possession began.

It is also argued by the plaintiff's counsel that the circuit judge should have defined more clearly to the jury the meaning of the term "adverse," as applied to defendants' possession. He insists that the average juryman is entirely unacquainted with the legal meaning and import of the word. It does not appear from the record that the counsel requested the court to define or declare the meaning of adverse possession any more fully or specifically than he did. Nor does it seem to us that the jury could have been misled by the instructions of the court. It was very apparent and clear from the testimony that the possession of the Becks included all the legal elements of an adverse holding, and the only question to be decided by the jury was the length of time such holding had existed before suit. The circuit judge instructed the jury more than once that the premises must have been occupied by the Becks for the space of 15 years by an open and notorious possession,—one that was adverse to the plaintiff,—in order to bar the recovery of the plaintiff. There was no dispute about the continuity of the possession of the Becks, and the only fault the plaintiff's counsel can find with this charge of the court is that he did not tell them that this possession, in order to be adverse, must have been distinct and hostile to the rights of the plaintiff in the land. The circuit judge had a right to presume, we think, that an ordinary jury has ordinary intelligence, and that the word "adverse," in itself, means "hostile and distinct," when applied to qualify or define a possession of lands. At any rate, the evidence is undisputed that this possession was held under a claim of right, and that it was open, notorious, continued, distinct, and hostile, and the verdict of the jury was right as to the character of the possession. If the attention of the court had been called to this matter, he would, without doubt, have clearly specified and set forth all the distinctive elements needed to establish an adverse possession; but, under the proofs, his failure to do so could have resulted in no possible harm to plaintiff.

The judgment is therefore affirmed, with costs. The record will be remanded for further proceedings under the statute if desired.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

McCABE v. CANER.

(*Supreme Court of Michigan.* January 12, 1888.)

1. NEGOTIABLE INSTRUMENTS—CONSIDERATION—SURRENDER OF HOMESTEAD ENTRY.
Defendant executed to plaintiff certain promissory notes, in consideration of plaintiff's agreement to relinquish and surrender to the government his certificate of homestead entry, to enable defendant to locate the land. The surrender was made as agreed. *Held* a valid consideration for the notes.

2. ASSUMPSIT—PLEADING—EVIDENCE.
In an action of *assumpsit* upon promissory notes, the declaration was upon the common counts, and the answer was the general issue with notice that no consideration was given for the notes, and that they were made under a contract against public policy. *Held*, that evidence of fraud and misrepresentation in procuring the contract was inadmissible under the pleadings.

Error to circuit court, Clare county; HENRY HART, Judge.

Action of *assumpsit* on four promissory notes, brought by States McCabe against Maron F. Caner. Verdict and judgment for plaintiff, and defendant brings error.

J. L. Potts and *C. W. Perry*, for appellant. *S. K. Gates* and *C. F. Gates*, for appellee.

SHERWOOD, J. The suit in this case is an action of *assumpsit* to recover the amount due on four promissory notes, each dated the thirteenth day of October, 1879, and given for $100 and interest, and made payable at the Portland Bank. The last note fell due on the thirteenth day of October, 1883. The declaration is upon the common counts. Plea, general issue, with notice that no consideration was given for the notes, and that the notes were made upon a contract against public policy. The cause was tried in the Clare circuit, where the plaintiff had a verdict and judgment in his favor. Defendant brings error.

The record discloses the fact that the plaintiff had entered, under the homestead law of the United States, a parcel of land in Clare county, subject to such entry, and received a certificate of entry from the land-office; that the notes in question were given by the defendant to the plaintiff upon the agreement of the plaintiff that he would surrender his certificate of entry to the government, and would relinquish all of his interest thereunder to the government, at the request of the defendant, to enable the defendant to locate said land, and acquire the interest of the plaintiff therein; that such was the sole consideration given for said notes. And it further appears from the testimony of the defendant, which was objected to by plaintiff, that he did surrender his homestead entry certificate back to the government; that it was more than six months after the entry before plaintiff made any settlement, or established his residence upon said land; and he further gave testimony tending to show that plaintiff did not locate said land in good faith as a homestead; that he made no improvements upon the land or cultivated the same, or made the same his home; that at the time the plaintiff took the notes, and "relinquished his claim, and surrendered his said homestead entry certificate back to the United States, he was not residing upon said land." That at the time the notes were given, the plaintiff represented, and the defendant believed, that the surrender of the certificate would "insure the defendant being able to locate said land as a homestead;" that said defendant took said relinquishment to the United States land-office at Reed City, where he delivered the same to the register in charge, and duly located said land in his own name, residing thereon the required time, made final proof and took out the patent therefor to himself, and the title still remains in the defendant; that just prior to the making and delivering of said notes in question, steps had been taken by one David, under the United States statute, to have the plaintiff's entry canceled by the government, on the same grounds heretofore set forth

in this bill of exceptions, and after hearing thereon the government sustained the entry of the plaintiff herein. The defendant herein was present during said hearing, and waited till the same was decided by the government, when he procured the relinquishment, as aforesaid. No evidence appears to have been offered on the part of the plaintiff in rebuttal. When defendant closed his testimony, and after hearing counsel, Judge HART directed the verdict of the jury.

We have no doubt about the correctness of this decision upon the defendant's own showing. The testimony of the misrepresentation and fraud was not admissible under the pleadings, and has no rightful place in the case, and should have been excluded when objected to. The plaintiff performed his agreement, as the testimony shows, and it was a legal one. The government had not found fault with the plaintiff's conduct in the premises, at the time the notes were given; and the testimony tends to show that it stood ready to recognize the homestead rights he surrendered for the notes, and they were a legal consideration therefor. Really, the government's right to forfeit the plaintiff's entry, if such were the case, had nothing to do with the case. If such right existed as claimed, the government could enforce it or not, as it chose. The plaintiff's relinquishment of his rights in the premises was a good consideration for the notes. *Olson* v. *Orton*, 8 N. W. Rep. 878; *Thompson* v. *Hanson*, 11 N. W. Rep. 86; *Lamb* v. *Davenport*, 18 Wall. 307; *Myers* v. *Croft*, 13 Wall. 291; *Kennedy* v. *Shaw*, 43 Mich. 359, 2 N. W. Rep. 396; *Sanford* v. *Huxford*, 32 Mich. 318; *Rood* v. *Jones*, 1 Doug. (Mich.) 188. The judgment must be affirmed.

MORSE and CHAMPLIN, JJ., concurred. CAMPBELL, C. J., did not sit.

TYLER *v.* FLEMING.

(*Supreme Court of Michigan.* January 12, 1888.)

1. INFANCY—CONTRACT BY INFANT—RATIFICATION—SILENCE—PROVINCE OF JURY.
   G. executed a note during minority, and the evidence tended to show that up to the time of his death, two years after reaching majority, he had not ratified the note further than to maintain silence concerning it. In an action on the note against his representative the court instructed the jury, in effect, that G.'s failure to give notice of disaffirmance after reaching majority amounted to a ratification, and directed a verdict for plaintiff. *Held*, that the question of ratification was for the jury, and that the action of the court was error.[1]
2. SAME—EMANCIPATION CANNOT AFFECT CONTRACT OF INFANT.
   Held, *also*, that the question as to whether or not G. was emancipated by his father at the time he executed the note could not affect his liability, and was irrelevant.
3. EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS—APPEAL—ENTRY OF JUDGMENT.
   On appeal to the circuit court from a disallowance of a claim against an estate, it is improper to enter a judgment against the administrator. The entry should be an allowance or disallowance of the claim, to be certified to the probate court.

Error to circuit court, Clare county; HENRY HART, Judge.

Action by R. Smith Tyler against John Fleming, administrator of the estate of Franklin Gallop, upon a note executed by the deceased during his lifetime. There was a verdict and judgment for plaintiff, and defendant brings error.

C. W. Perry, for appellant. *Browne & Cummins*, for appellee.

MORSE, J. The plaintiff presented a claim against the estate of Franklin Gallop, deceased, based upon a promissory note for $110, dated August 22, 1882, payable in one year from date, with interest at 10 per cent. The note

[1] Respecting the contract of an infant, its disaffirmance and ratification, see Ihley v. Padgett, (S. C.) 3 S. E. Rep. 468; Clark v. Tate, (Mont.) 14 Pac. Rep. 761.

was signed by William Gallop and Frank Gallop, (the deceased,) as makers. The claim was disallowed by the commissioners. Plaintiff appealed to the circuit court for the county of Clare. Upon the trial in that court, testimony was given on behalf of the defendant tending to show that the note in question was given in place of another note made by Daniel Gallop, and also signed by William Gallop, to plaintiff; and that said Daniel Gallop had offered to pay the first or original note given by him to plaintiff, and had always been ready and willing to pay the same at any time, but said plaintiff had never offered to deliver said original note up to Daniel; and that said note was past due when the note in suit was executed. And further evidence was given on the part of defendant tending to show that, at the time this note was made, Franklin Gallop was a minor, and had never been emancipated by his father, the said Daniel Gallop, and that the contract contained in said note had never been ratified by Frank after attaining his majority; that Daniel had no knowledge of the note in suit being given to take up the original note. In rebuttal, the plaintiff introduced testimony tending to show that, when the note made by Frank and William was received by him, the original note was delivered over to them, and that it was not in his possession at the time of the trial, and never had been since the note in suit was executed and delivered to him. Also evidence tending to prove that, at the time the note in question here was given, the deceased, Franklin Gallop, had been emancipated, and was doing business in his own name for his own benefit, with the consent and approval of his father, and that Daniel authorized Frank to take up the original note, and, at the time, Frank and William were in partnership, and the said note was given in the course of their partnership transaction. The circuit judge instructed the jury, in substance and effect, that the deceased failing to give notice to the plaintiff during his life-time, after he became of age, (he having lived some two years after he became twenty-one years of age,) that he could not and would not be bound by his signature to said note, his legal representatives after his death could not take advantage of his silence without offering some proof, at least, that the deceased did not intend to be bound by his contract; and directed a verdict for the plaintiff for the face of the note and interest.

The judgment entry in the circuit court is not correct, or applicable to proceedings of this kind. No error is assigned upon it, but a common-law judgment cannot run against the administrator, or against the property in his hands as such, as it does in this case. The entry should be an allowance or disallowance of the claim, which allowance or disallowance is to be certified to the probate court. See *La Roe* v. *Freeland*, 8 Mich. 531–534.

The only errors assigned in the record are to the charge of the court. We think the case should have been submitted to the jury. If the deceased was a minor at the time of the execution of this note, the burden of proof was upon the plaintiff to show that he had ratified it after he attained his majority. It seems from the record that there was evidence tending to prove that deceased had not ratified the contract. The circuit judge was not authorized in law to presume a ratification because of the mere silence of the deceased for two years. There must have been an express promise after he became of age, or such acts as would have been equivalent to a new contract. *Goodsell* v. *Myers*, 3 Wend. 479; *Wilcox* v. *Roath*, 12 Conn. 550; *Tucker* v. *Moreland*, 10 Pet. 58; *Ford* v. *Phillips*, 1 Pick. 202; *Fetrow* v. *Wiseman*, 40 Ind. 148; Tyler, Inf. (2d Ed.) 84–92; *Minock* v. *Shortridge*, 21 Mich. 304; *Prout* v. *Wiley*, 28 Mich. 164.

The record in this case is blind and uncertain. It appears that there was evidence tending to show that the original note was delivered over to William Gallop and the deceased, but which one of them took and kept possession of it we are not informed; nor does it appear whether the relation of the deceased to the note sued upon was that of maker or surety for William.

We do not propose, therefore, to discuss what might be the law applicable to facts which may not be facts in the case.

The question whether or not the deceased was emancipated by his father at the time he signed this note had no relevancy to the issue. It could not affect his liability upon this note.

The judgment of the court below is reversed, and a new trial granted, with costs of this court to defendant.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

BALDWIN *v.* CLOCK.

(*Supreme Court of Michigan.* January 19, 1888.)

PAYMENT—EVIDENCE OF—RECEIPT—ADMISSIONS.

Plaintiff, in an action as surviving partner to recover for legal services rendered by his firm in relation to defendant's land in Toledo, testified that the services were rendered as alleged. Defendant produced a receipt signed by the deceased partner, as follows: "Received of [defendant] six dollars, payment in full for trip to Toledo;" dated more than a year before the services testified to by plaintiff were performed. Defendant also produced a witness who, without giving dates, testified that the deceased partner told him that the account mentioned in the receipt was paid in full. Plaintiff testified that the receipt was merely for the expenses of a certain visit to Toledo. The court charged that plaintiff must not only prove his claim, but that it was unpaid; also that the receipt "goes as far as it reads, except as explained or modified by the acts or remarks of the parties," and referred to the receipt, in connection with the alleged admission, as sufficient, if believed, to show a payment in full. *Held* error.

Error to circuit court, Monroe county; GOUVERNEUR MORRIS, Judge.

Action by Ephraim Baldwin, as surviving partner of the law firm of Baldwin & Wing, against Daniel Clock, to recover for legal services rendered. There was a verdict and judgment for defendant, and plaintiff brings error.

Willis Baldwin, for appellant. *Elam Willard*, for appellee.

CAMPBELL, C. J. Plaintiff, as survivor of the law firm of himself and Anderson Wing, practicing in Monroe, sued defendant for legal services rendered in connection with defendant's claim against a railway company for damaging his land in Toledo, Ohio. Plaintiff recovered $40, the amount of his claim for firm services, but did not recover the sum of $25 claimed for the value of retaining Warner Wing as counsel. Defendant appealed, and in the circuit the plaintiff recovered nothing, and assigns errors for misdirection of the circuit judge.

Plaintiff made out by his own testimony a full case showing his own services and Judge Wing's, with the assent and concurrence of the defendant to all the employment. One purpose of the employment was to procure an injunction against the alleged wrongful encroachments of the railroad. Plaintiff showed that he was employed four days, and Judge Wing two days, in looking up and consulting in the matter, and had prepared the material and authorities for procuring the injunction.

Defendant produced a receipt signed in the firm name by Anderson Wing, plaintiff's deceased partner, in these words: "Received of Daniel Clock six dollars, payment in full for trip to Toledo." This was dated June 18, 1872. This was a year before the services referred to by plaintiff in his testimony. Defendant also produced a letter written in 1874 by Baldwin and Wing inclosing an account charging the services in 1873 at a larger sum than that recovered before the justice, but within the amount testified to by plaintiff. Defendant also introduced testimony tending to show that plaintiff wished to look at the premises, and offered to go down to Toledo for five dollars, which was paid him. He also said that he did not wish Judge Warner Wing employed as counsel, and when he learned of such employment he dismissed plaintiff, and

employed Mr. Kent, of Toledo. He also produced a witness who, without giving time or identity of claim, swore that Anderson Wing said to him in a saloon that the account mentioned in the receipt was paid in full. Plaintiff testified that the receipt was merely for the expenses of a visit to Toledo.

Errors are assigned upon some disparaging remarks of the judge, and the admission of a piece of testimony, which is itself omitted from the record. But as there was a more vital mistake made on the merits, these need not be considered, although, if the judge referred to plaintiff and the value of his services, he went beyond his province. The court charged that the plaintiff must not only prove his claim, but that it was not paid. And it was further charged that the receipt goes for what it reads, except as explained or modified by the acts or remarks of the parties, and referred to the receipt in connection with what was said by Anderson Wing as what might, if believed, show a settlement in full. Nothing is plainer than that payment is a matter of defense to be shown by defendant in some way, when plaintiff has made out his own case. And so far as the receipt goes, it does not purport to cover anything but a trip to Toledo; and the very loose talk of the witness about Anderson Wing's admissions goes no further. There was nothing to authorize the jury to consider this receipt or Wing's statement to cover the principal part of the account, and the only matters which plaintiff claimed in his testimony.

The judgment must be reversed, with costs, and a new trial granted.

(The other justices concurred.)

PINGREE *et al.* v. STEERE.

(*Supreme Court of Michigan.* January 19, 1888.)

REPLEVIN—DESCRIPTION OF PROPERTY.

A writ of replevin described the property to be taken as "sufficient of the boots and shoes now in the store or building situate on lot 182 of Moore's plat of the village of Edmore," etc., "and now occupied by defendant herein, to satisfy the claim of the plaintiffs herein, as mortgagees of said goods, amounting to eight hundred and five dollars." It appeared that plaintiff's mortgage in fact covered the entire stock. *Held*, that the description was sufficient. SHERWOOD, J., dissenting.

Error to circuit court, Montcalm county; VERNON H. SMITH, Judge.

Replevin by Hazen S. Pingree, Frank C. Pingree, Charles G. M. Bond, and John R. Howarth against William Steere. On motion, the writ was quashed, and plaintiffs bring error.

Isaac Marston, for appellants.

The only question in this case relates to the description of the property, and would seem to be fully settled by the case of *Farwell* v. *Fox*, 18 Mich. 169; and, as bearing thereon, *Willey* v. *Snyder*, 34 Mich. 61, 62. The affidavit in this case and the writ describe the goods to be taken with very great clearness. It describes them as boots and shoes in a particular building, sufficient to satisfy the claims of the plaintiffs, as mortgagees of said goods, amounting to $805. This gave the quantity or limit. It is also stated that plaintiffs are mortgagees of said goods and chattels. This implies that they are mortgagees of the whole. If so, they could have replevied the whole stock. No one would doubt but that a direction to replevin all the boots and shoes in the store would have been good. But this was only for a part. Fifty bushels of wheat, out of a larger quantity in a granary, would be good. One million feet of saw-logs, out of a larger quantity, would be good. One ox, out of a dozen, would be good; such was the case in 18 Mich. In the cases referred to, the correct rule is pointed out. The officer with the writ makes the necessary inquiries, and by the aid thereof executes it. In this case he could easily ascertain the goods mortgaged, so as not to take goods not mortgaged. He could

ascertain the value, and stop when he had enough, just as he could ascertain the number of bushels of grain by measuring, or the number of feet, board measure, in a quantity of logs to make up a million feet. In the case of a mortgagee bringing replevin, this is the proper way of describing the property, and the usual way. To take all the mortgaged property, as he would have a right to do, would often be a great hardship on the mortgagor or his assigns; and surely, if he takes a part where he is entitled to the whole, the mortgagor, or those claiming under him, should not be heard to complain.

Geo. S. Steere, for appellee.

The description was insufficient to support the writ. How. St. § 8320; Wells, Rep. c. 7; *Paterson* v. *Parsell*, 38 Mich. 607; *Ames* v. *Boom Co.*, 8 Minn. 467, (Gil. 417;) *Ellingbor* v. *Brakken*, (Minn.) 30 N. W. Rep. 659, 660; *Low* v. *Martin*, 18 Ill. 286; *Stanley* v. *Robinson*, 14 Bradw. 480; *Guille* v. *Wong Fook*, (Or.) 11 Pac. Rep. 277-280; *Foredice* v. *Rinehart*, (Or.) 8 Pac. Rep. 285; *MaGee* v. *Sniggerson*, 4 Blackf. 70; *Snedeker* v. *Quick*, 11 N. J. Law, 179; *Scutter* v. *Worster*, 11 Cush. 573.

CHAMPLIN, J. A writ of replevin described the property to be replevied as follows: "Sufficient of the boots and shoes now in the store or building situate on lot 182 of Moore's plat of the village of Edmore, Montcalm county, and now occupied by defendant herein, to satisfy the claim of the plaintiff herein, as mortgagees of said goods, amounting to eight hundred and five dollars." The sheriff replevied a quantity of boots and shoes, caused an inventory and appraisal thereof to be made, and summoned the defendant, who entered a general appearance, by his attorney. The plaintiffs' attorney filed his declaration, and defendant's attorney then moved to quash the writ, for the reason that the writ did not sufficiently describe the property to be replevied; and the court, upon this ground, quashed the writ.

In *Farwell* v. *Fox*, 18 Mich. 166, the writ described the property as "six oxen," and it was held to be sufficient. In *Kelso* v. *Saxton*, 40 Mich. 666, it was held that property described in the writ as "one cow, seven years old, color red and white," and "two yearlings, red and white in color," was good. In *Sexton* v. *McDowd*, 38 Mich. 148, it was held that the description need not be so explicit and exclusive as to supersede recourse to extrinsic help. If, with such aid as the plaintiff usually affords, the officer can identify the property, it is sufficient; citing *Farwell* v. *Fox*, *supra*. "Indeed," said the court, "it may be laid down that, in the great majority of cases, the designation in the writ must be supplemented by other means of identification, and the officer must use his intelligence in ascertaining assisting facts, and in applying the description to the property intended." And in *Wattles* v. *Dubois*, 34 N. W. Rep. 672, (decided at the present term,) the writ described the property as "two hundred and fifty bushels of wheat of the Foultz variety, raised and grown upon the farm of plaintiff, on section 7, in township of Portage, Kalamazoo county, Michigan." We held the description sufficient.

It appears that the plaintiffs were entitled to the possession of the whole stock, under their mortgage, and it is not perceived how the defendant is harmed by replevying from him less than the plaintiffs were entitled to. And, if the plaintiffs were entitled to replevin the entire stock, there could be no difficulty in executing the writ by taking sufficient to satisfy the plaintiffs' claim from the stock mortgaged. The judgment must be reversed, and the order setting aside and quashing the writ vacated, and the defendant will have leave to plead to the declaration.

MORSE, J., concurred.

SHERWOOD, J. I think the decision of the circuit court upon the motion to dismiss the writ was right. The statute requires that the writ shall describe

the property to be replevied. The description is of first importance, and, if not given in the writ, the court has no jurisdiction. How. St. § 8320; *Denison* v. *Smith*, 33 Mich. 155; *Wilson* v. *Arnold*, 5 Mich. 98; *Stevens* v. *Osman*, 1 Mich. 92; *Farwell* v. *Fox*, 18 Mich. 166; *Paterson* v. *Parsell*, 38 Mich. 607; *Snedeker* v. *Quick*, 11 N. J. Law, 179; *Davis* v. *Easley*, 13 Ill. 192; *Root* v. *Woodruff*, 6 Hill, 418; *Stanchfield* v. *Palmer*, 4 Greene, 25. The kind of property to which that sought to be taken under this writ belongs is mentioned, and the amount desired to be recovered in value is stated; and this is all there is of the description of the property contained in the writ. The particular description of the goods which the officer should take is not mentioned in process. It is boots and shoes the plaintiffs desire the possession of; but the number or kind of both, or of either, is not stated. This, however, is what the statute requires. It is true, this court has held in one case that "six oxen" was a sufficient description, and, in another, that "one cow, red and white," was sufficient; but this court, nor any other that I have been able to ascertain, has ever held that a thousand dollars' worth of cows, or sheep, or oxen would be a sufficient description of the property, under a statute like ours, and which would be a case really like the present. The officer has nothing to do with the value of the property mentioned in the writ. The legislature have not invested him with the judicial power of determining the value, for any purpose, of the property mentioned in the writ of replevin; and yet, in deciding the amount of property he is required to take under this writ, the only limitation placed upon his action as to the amount he should take is to be determined by the value he shall place upon the same. This simply converts the writ of replevin, in force and effect, into an execution against the property of the defendant, and allows the property of the debtor to be seized and turned over to the creditor before any trial has been had, or the indebtedness or liability of the defendant has been legally ascertained. His property has been seized and taken from and given over to another irrevocably, upon the mere claim of the plaintiff, without trial or condemnation. This is against the spirit of the statute, and should not be allowed. It is thought by my brethren that the reference in the writ to a mortgage to the plaintiff has something to do in aiding the otherwise defective writ. It is difficult to see how this could aid the defective description, so long as the description contained in the mortgage is not given, nor the fact stated that the mortgage contains a description of the property, or that the mortgage was in existence at the time the writ issued. It is the exercise of extraordinary power when the legislature allows the property of one person to be taken, and its possession transferred to another, before any liability of the one to the other has been established by due process of law; and, when it is thus allowed, all the safeguards which the law and the courts have secured to the debtor should not only be regarded, but rigidly observed, both in the letter and spirit of the statute. I think Judge SMITH's decision in this matter did no more than this, and should be affirmed.

CAMPBELL, C. J., did not sit.

WINCHELL v. CLARK.

(*Supreme Court of Michigan.* January 5, 1888.)

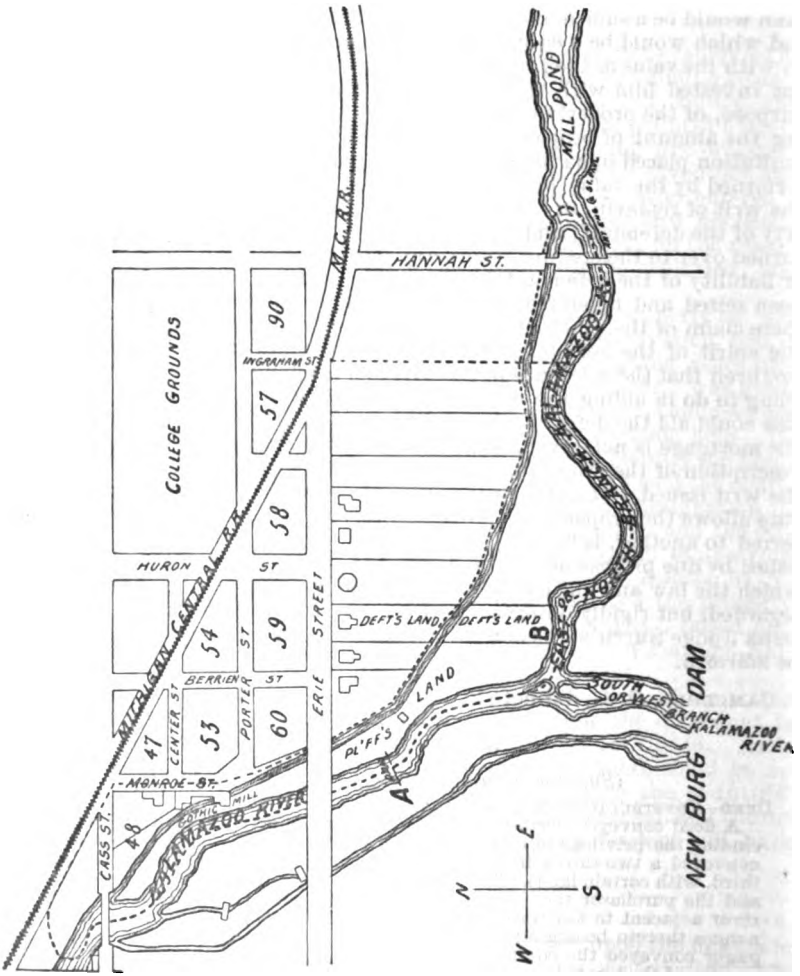
1. DEED—CONSTRUCTION—WATER PRIVILEGES.
A deed conveyed certain lands, and also water privileges on a certain river, including the privilege to erect dams and join to the opposite bank. The purchaser conveyed a two-thirds interest in these privileges, and mortgaged the other one-third, with certain lands. The land and privileges were sold under the mortgage, and the purchaser then conveyed to plaintiff part of the land to the middle of the river adjacent to the water privileges, with all "the hereditaments and appurtenances thereto belonging or appertaining." Before the mortgage sale, the mortgagor conveyed the equity of redemption in the one-third water privilege to the owners of the two-thirds, and after sale the purchaser conveyed the same by quit-

claim to the same parties. Defendant claimed title to the whole water privilege under these deeds. *Held*, that the deed to plaintiff conveyed only the land, and that the title to the whole of the water privileges, and right to erect dams, was in defendant.

2. WATERS AND WATER-COURSES—UNLAWFUL ERECTION OF DAM—ABATEMENT.
Where plaintiff claimed water privileges for milling purposes in a river, but the real title thereto was in defendant and another, and plaintiff erected a dam across the river, and thereby flowed defendant's lands, and, to prevent the flowage, defendant pulled down the dam, without permission, before plaintiff had acquired the right to keep it there by adverse user, *held*, the erection of the dam was unlawful, and defendant might abate it as a nuisance, and would not be liable in damages to plaintiff.

Case made from circuit court, Calhoun county; FRANK A. HOOKER, Judge.

Action by Dorcas A. Winchell against William Clark, for damages caused by defendant pulling down a stone dam across a river, erected by plaintiff. Plaintiff held under a deed conveying all the land inside the dotted lines on the accompanying map, but had conveyed to defendant the land at the point



B. Defendant and another claimed the water privileges in the river adjacent to plaintiff's land. The dam in question was at the point A. The further facts fully appear in the opinion.

M. D. Weeks, (*Frank Monfort*, of counsel,) for plaintiff. *N. B. Gardner*, (*Miner & Stace*, of counsel,) for defendant.

MORSE, J. The plaintiff sued in justice court for damages arising from an alleged trespass upon her property, in that the said defendant, with force and arms, entered her close, and tore down and destroyed a certain stone dam thereon, erected and maintained by her, and used to dam up the waters of the Kalamazoo river for manufacturing purposes. The defendant gave notice that, at the time of the alleged trespass, he was in possession of the premises where the dam was located; that the dam wrongfully overflowed his premises, and that if he committed any act, as charged in the plaintiff's declaration, such act was only committed in lowering said dam so that it would not cause an overflow of his premises, which he had a right to do; that plaintiff had no right or title to erect a dam there, and no color of right or title to any water-power at or below the forks of the Kalamazoo river, and that such dam was erected and maintained by plaintiff below such forks without right and unlawfully; and that the sole right to such water-power, and to erect dams at or below the forks, and all rights of flowage incident thereto, were at the time of the alleged trespass, and now is, indefeasibly vested in him and his copartner, one Manly S. Amsden; and that the estate of the plaintiff, if she has any, is servient to the estate of himself and Amsden. The case was thereupon certified to the circuit court for the county of Calhoun for trial.

The circuit judge filed the following finding of facts: "(1) On July 21, 1842, one George Hannahs became the owner of certain premises and water-rights on the Kalamazoo river at Albion, Calhoun county. The river is formed by the junction of two streams called, respectively, the East and West forks. The course of the river below the forks is north-west. This included land on both sides of the river extending from a point north of Erie street, a street crossing the main river below the forks east and west to a point some distance above Ingham street, a street crossing the East fork north and south some distance above the junction of the streams, a portion of that east of the river forming a triangle bounded north by Erie street, and south and west by the river and East branch. (2) The conveyance of these lands also conveyed the following in these terms, viz.: 'Together with all the rights, privileges, and immunities of water-power on the East branch of the Kalamazoo river, with all the rights ever possessed by parties of the first part hereto, of erecting a dam on said East branch of the Kalamazoo river, and also at or below the forks of said river: provided, nevertheless, that such dam below or at the forks shall not arise higher than a level of two inches below the foot of the apron of the present dam on the South branch of said stream, hereby giving and granting all rights and privileges necessary for the erection and maintenance of said dam or dams on said East branch, and at or near said forks, as aforesaid, and of joining them to the opposite bank.' (3) November 19, 1857, George Hannahs and wife conveyed to David and Walter Peabody a portion of these lands, viz.: 'The undivided two-thirds of the following, to-wit, beginning at the center of a culvert in the M. C. R. R., south of block 33, in the village of Albion; running thence south-easterly, along the south-westerly line of blocks 48 and 60 to the center of Erie street, to the center of the Kalamazoo river; thence north-westerly along the center of said river to a point opposite a stake standing at the mouth of a brook running under said culvert; thence northerly to said stake; thence north-easterly, to the place of beginning. Also the undivided two-thirds of block 48 in said village.' All of this land was included in the land described in the first finding, but it does not include the triangular piece of land therein described. Said deed further conveyed

'the undivided two-thirds part of so much land as may be necessary for the construction of one or more races or channels for water for the improving or using the water-power to be drawn from the East branch of the Kalamazoo river, or from said river at or below the forks thereof, extending from the center of Ingham street, with the necessary privileges of constructing, using, repairing, and enjoying the same. Also thereby giving, granting, and conveying the undivided two-thirds part of all the rights, privileges, and immunities possessed by the parties of the first part of the water-power on the East branch of the Kalamazoo river at or below the forks thereof, with the privilege of erecting and maintaining one or more dams on said East branch, and at or below the forks of said river, in accordance with the provisions of the deed to said George Hannahs: provided, that no such dam shall be erected or maintained in such a manner, nor of such a height, as to interfere with the use of the water-power at the Newburg mill owned by M. Hannahs and Edwin H. Johnson, with the water as it flows from said mill: and provided, further, that such dam at or below the forks shall not be constructed so as to raise the water higher than a level of two inches below the foot of the apron to the present dam on the South branch. The said party of the first part does also convey the undivided two-thirds part of all the rights and privileges necessary for the erection of such dam or dams on said East branch, and at or below the forks of said river, and joining the same to the opposite bank.' (4) Said Walter and David Peabody thereafter constructed a race about 12 feet wide from a dam above Ingham street across said triangular parcel to Erie street, or north thereof, where they erected mills. The triangular parcel was not otherwise occupied. (5) On January 21, 1859, George Hannahs executed and delivered to William Hannahs a mortgage upon the following, viz.: The undivided one-third of the Gothic mills, (being the same referred to in third finding,) with all the lands and appurtenances thereto belonging, known and described as commencing at the south-west corner of lot 7, in block 60, in Erie street, Albion village; thence west to the center of the Kalamazoo river; thence down the center of said river to the mouth of a brook which enters the said river near block 33; thence up said brook to the M. C. R. R.; thence east and south along said R. R. along the westerly side of blocks 38, 48, 55, and 60 to place of beginning, including block 48, being what is known as the 'Reservation for Mill Purposes' on the east side of said river, with all rights of water-power connected therewith. [This does not include the triangular parcel described.] Also a piece of land known as the 'Reservation,' containing eight acres, lying between the Kalamazoo river above Erie street and the mill-race of Hannahs and Peabody. [This is a portion of said triangular parcel.] Said mortgage included other premises not necessary to be described. The parcel described in plaintiff's declaration is a part of the triangular parcel of land and is covered by this mortgage. Said mortgage was for $4,000, payable in installments, all to become due at option of mortgagee if default for 10 days was made in principal or interest. (6) March 6, 1861, George Hannahs conveyed the undivided one-third of the premises to David and Walter Peabody, the description being in all respects the same as in his former deed to them; it did not include the triangular parcel, and was subject to the mortgage above referred to. (7) February 18, 1865, the mortgaged premises were conveyed on foreclosure sale by commissioner to Wm. Hannahs. The whole of the mortgaged premises appear to have been deeded, and both of the Peabodys were parties to the suit. It was conceded upon the trial that but one-third was conveyed. It was also conceded that the proceedings were regular. The description was identical with that in the mortgage. The parcel described in plaintiff's declaration was included. (8) On February 20, 1865, George Hannahs and wife, by warranty deed, conveyed to Dorcas A. Winchell, the plaintiff, for $1,100, all of the land between the race and the river, and extending from Erie to Ingham streets. (9) February 22, 1865,

William Hannahs by quitclaim deed conveyed to Dorcas A. Winchell, the plaintiff, the same premises specifically described as follows, viz.: Commencing at the center of the Kalamazoo river on the south line of Erie street; thence up the center of the river to the forks; thence up the South branch of said river to the line of Ingham street, or the west line of W. H. Brockway's lot; thence north to the race bank; thence down the south side of said mill-race to the south side of Erie street; thence west to the place of beginning,—containing about ten acres, be the same more or less, being known as the 'Reservation,' lying between the mill-race of Hannahs & Peabody (so-called) and the Kalamazoo river. The premises described in plaintiff's declaration are a portion of the lands above described. (10) May 17, 1865, the plaintiff and her husband conveyed a portion of the ten acres above described to Joseph William Clark, the defendant, said parcel extending from the race to the center of the river, excepting and reserving the rights and privileges conveyed from George Hannahs and wife by deed to David and Walter Peabody, November 19, 1857. (11) November 30, 1866, Walter Peabody and wife conveyed their interest in the premises to David Peabody, the description being the same as that in the deeds from George Hannahs to them. This was a quitclaim deed. (12) June 20, 1876, David Peabody and wife conveyed the same premises, by similar description, to James W. Sheldon. This deed provided that a mortgage held by Sheldon should not merge. (13) July 8, 1871, a deed upon foreclosure was executed by the circuit court commissioner to James W. Sheldon. David Peabody, Augusta A. Peabody, Adeline S. Peabody, William Hannahs, Marvin Hannahs, John W. Hall, and Adeline S. Peabody, as executrix of Walter Peabody, were parties to the suit. The premises were described as in the deeds to the Peabodys. (14) February 11, 1881, Wm. Hannahs and wife quitclaimed the same premises by a similar description to said James W. Sheldon. (15) March 10, 1881, said James W. Sheldon and wife deeded substantially the same premises, together with the water privileges, by identical description, to Manly S. Amsden and Joseph W. Clark, the defendant. (16) The premises described in the 10th finding bordered and included a portion of the river at and above the forks, and were higher up the stream than the premises described in plaintiff's declaration. (17) Some time after this deed was made and delivered to defendant, plaintiff erected a dam across said river below the forks extending from the premises described in her declaration to the opposite bank. Said dam was erected some time from 1865 to 1868, there being no proof to fix the time more definitely. It was built without defendant's consent and against his wishes. (18) This dam caused the water to flow defendant's land where water had not previously been accustomed to flow, above said dam, to the injury of the grass growing thereon. (19) This dam was maintained by the plaintiff until February, 1882, when it was torn down by the defendant without plaintiff's consent. (20) At this time plaintiff was in possession of the premises described in her declaration. (21) The plaintiff was damaged one hundred and seventy dollars by the destruction of said dam, if defendant had no right to destroy the same."

His conclusions of law were as follows: "(1) November 19, 1857, George Hannahs was seized in fee-simple of all the premises and rights of water described in findings of fact numbered 1 and 2. (2) The effect of the conveyance from George Hannahs to David and Walter Peabody was to vest in them in fee-simple the undivided two-thirds of the premises and water-rights described in the third finding of fact, (leaving the other one-third in said George Hannahs,) called subsequently, for convenience, the 'Gothic Mill Property.' George Hannahs remained sole owner of the land between the race, when dug, and river, subject to such water-rights as he by said deed conveyed to the Peabodys, including the land afterwards conveyed to Winchell. (3) The mortgage executed January 21, 1859, constituted a lien in favor of Wm. Hannahs upon the premises subsequently conveyed to Winchell above referred to,

and upon the undivided one-third of the premises and rights described in the deed to Peabody, belonging to George Hannahs. (4) The deed of March 6, 1861, from George Hannahs conveyed to David and Walter Peabody the equity of redemption in the undivided one-third of the premises and rights, two-thirds of which had been previously conveyed by said George Hannahs to them. It did not convey the equity of redemption in the other premises included in the mortgage, the same remaining in George Hannahs. (5) The effect of the foreclosure proceedings was to vest in William Hannahs the premises described in the mortgage, viz., undivided one-third of Gothic Mill property, and rights of water, and the premises afterwards conveyed to Winchell. (6) The deed from George Hannahs to Winchell, February 20, 1865, conveyed at most an equity of redemption in the premises therein described; she became owner in fee-simple of the same on receiving deed from William Hannahs, February 22, 1865, subject to the water-rights. (7) On February 22, 1865, the title was as follows, viz.: David and Walter Peabody owned undivided two-thirds of the Gothic Mill property with water-rights, including right to erect two dams. William Hannahs owned undivided one-third of same. Dorcas A. Winchell owned the land between the race and the river (*i. e.*, thread of stream) from Erie to Ingham streets, subject to the rights of Peabody, which neither Hannahs could convey. The deed from William Hannahs at *most* conveyed to Winchell the premises discharged of his share or interest in pre-existing water-rights. It did not convey any of these rights beyond those which ordinarily attach. Winchell acquired no right to flow any other land than her own, nor any right to connect a dam with the opposite bank, nor to erect a dam beyond the thread of the stream. The rights of the Peabodys were unimpaired, and whether they could abut a dam against Winchell's premises or not, they undoubtedly had right to flow same by erection of dam on their own land below. (8) May 17, 1865, deed from Winchell to Clark conveyed estate in fee-simple to defendant, construed in light of existing circumstances. Winchell excepted from the conveyance the rights of Peabody's two-thirds interest, but made no attempt to reserve or except the other one-third of the water-right. She has no right to flow defendant's land under that deed. (9) The effect of the deed from Walter Peabody to David Peabody, dated November 30, 1866; that from David Peabody and wife to James W. Sheldon, dated June 20, 1870; the mortgage therein described; the commissioner's deed on foreclosure, dated July 8, 1871; and the quitclaim deed from William Hannahs, dated February 11, 1871,—was to vest the fee to the mill property and mill privileges in James W. Sheldon, except as discharged by the deed from Hannahs to Winchell before mentioned, to which rights Manly S. Amsden and the defendant succeeded by deed dated March 10, 1881. (10) Amsden & Clark have the legal right to build a dam below or at the forks wherever they have or may acquire the right to join the east bank of the stream. (11) The dam erected by the plaintiff invaded their rights to the water privilege, and was unlawful as against them. (12) Clark having purchased the interest of the Peabodys, the effect is to give him the right to prevent the parcel brought from Winchell from being flowed by any one except his partner, Amsden. (13) In flowing this land and injuring the water privilege plaintiff's dam became a nuisance which defendant might lawfully abate. (14) Defendant's acts being lawful, judgment should be rendered in favor of the defendant for costs."

The first question to be examined and decided is whether the plaintiff, under the conveyances to her, acquired any right to the water privileges below the forks of the Kalamazoo river, and which were originally, as far as this record shows, in George Hannahs? I have set forth in full the finding of facts, as the facts therein are stated as clearly and concisely as they well could be. Mrs. Winchell derives her title to the land she holds through the mortgage executed by George to William Hannahs. At the time this mortgage

was made and delivered, George Hannahs had been dispossessed of two-thirds of these water privileges by his own voluntary deed to the Peabodys. In such deed he expressly conveyed these water-rights by describing them, and independently of the usual clause in a deed granting the "hereditaments and appurtenances thereunto belonging or in anywise appertaining," which clause was contained in this deed, and following the description of the lands and the water-rights conveyed. The mortgage also contained an express mention of the water privileges, although there was no specific description of the same. The commissioner's deed upon foreclosure sale followed the mortgage in this respect. In examining the description of the lands in the mortgage, and also in the commissioner's deed, it is found that the parcel of land conveyed to Mrs. Winchell, and known as the "Reservation," lying between the mill-race and the Kalamazoo river, is described separately by itself, and following, and not connected with, the sentence conveying the water-rights; the clause granting such rights being connected expressly with and to other lands. The warranty deed of George Hannahs and wife, and the deed of William Hannahs to plaintiff, make no mention whatever of any water-rights or privileges. It would seem as if there was no intention of granting any such rights with the lands conveyed to plaintiff.

We are inclined to think that the claim of defendant's counsel is correct, that the water privileges were intended to be, and were, severed and disconnected from this parcel of land by George Hannahs. This land did not pass to the Peabodys by the deed which granted to them two-thirds of these water-rights. And, as before said, in the mortgage, the remaining one-third was expressly mentioned as being appurtenant to other lands, and had no relation or connection in that instrument with this reservation land. The water-rights did not expressly pass to plaintiff by either of the deeds under which she holds. The most that her counsel claims is that it passed under the general appurtenant clause of William Hannahs' deed; for, when George conveyed to her in 1865, he had, before that time, (in 1861,) expressly conveyed the remaining one-third to the Peabodys by a deed executed in 1861, and his title was also cut off by the mortgage foreclosure. The deeds from George and William to Mrs. Winchell seem to bear out the claim that at the time these deeds were made the intention of the parties was to simply convey to her the bare land, without any water-rights as far as building dams and using water-power were concerned. The subsequent action of William Hannahs in deeding this right to others confirms this claim. It will also be seen from the first paragraph in the finding of the court that the right to all this water-power was specifically described in the deed by which George Hannahs obtained it, and such right was not made expressly appurtenant to this parcel of land or any other. The right of the Hannahs to sever this right to the water-power below the forks of the Kalamazoo river from this particular piece of land cannot now be doubted. *Hall* v. *Ionia*, 38 Mich. 493, 498, 499, and cases there cited. It will be seen by the third paragraph of the finding of facts that in 1857, when the conveyance of two-thirds of this water-right to the Peabodys was made, there was already located upon the east or north branch of the river, above the forks, a water-power known as the "Newburg Mill," with the use of which the Peabodys could not interfere by the express terms of the grant to them, and also a dam upon the south or west branch which restricted their use of the river at or below the forks, so that any dam they might erect should not be constructed so as to raise the water higher than a level of two inches below the foot of the apron to such dam upon the south or west branch. The race constructed by the Peabodys, and in full operation before the plaintiff obtained title or possession of her premises, ran from a dam on the east or north branch to a point on the south or west branch below the forks, and below the plaintiff's land, to help propel mills there erected and operated by the Peabodys. It may well be claimed, as it is by defendant's

counsel, that the existence of these two dams, restricting the use of water-power at and below the forks, as provided in the conveyance to the Peabodys, and the subsequent erection of these mills below the forks, and the building and maintaining of the race, and the conveyances by all the parties, are circumstances which, taken together, show an abandonment on the part of the owners of these water-rights of any idea of building any dam or using any water-power upon the river, where it abuts the land conveyed to plaintiff; and that the full use of the water-power intended under the different grants of the same, and by the owners of the water-rights, had been put in operation by the Peabodys in the building of the mills and the race aforesaid. They undoubtedly had the right to control the water in this way, if they saw fit, and, by withholding from Mrs. Winchell any right in the use of the water for mill or manufacturing purposes, in their deeds to her, prevent her from using any of the water-power, which they held absolutely and not appurtenant to any land. It is not claimed that she ever had any right to the two-thirds first deeded to the Peabodys, and William Hannahs, who held the other third, could convey it or not convey it to her, as he chose. The deed of the land did not pass it, as has been shown, and it was in our opinion never appurtenant to the premises held by her or any part thereof.

It follows further, in accordance with this view, and under the findings of the court, that this water-right or privilege is now the property of the defendant and his partner, Amsden. The defendant Clark obtained the strip of land bordering upon the river above the premises occupied by the dam of plaintiff, before said dam was built, and acquired such strip of the plaintiff. When he bought, therefore, his land was not burdened by any flowage from this dam, and his deed imposed no servitude upon his premises, except the water-rights of the Peabodys, which he and his partner now hold. The dam of plaintiff, at the time it was destroyed, had not been maintained long enough for her to acquire a right by adverse user to keep it there. It is not shown to have been built, for a certainty, before 1868, and it was torn down in 1882.

The circuit judge was right in holding, as a conclusion of law, that the dam erected by the plaintiff invaded the rights of Clark & Amsden to their water privileges, and that its maintenance as against them was unlawful. He was also correct in the proposition that the flowing of defendant's land and the injuring of his water privileges by the dam of plaintiff was a nuisance which he had the right to abate. Wood, Nuis. (2d Ed.) 976, 977; *Adams* v. *Barney*, 25 Vt. 231; *Hodges* v. *Raymond*, 9 Mass. 316; *Colburn* v. *Richards*, 13 Mass. 420; *Elliott* v. *Railroad Co.*, 10 Cush. 195.

The judgment of the court below is affirmed, with costs.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

HARROUN *v.* CHICAGO & W. M. RY. CO.

(*Supreme Court of Michigan.* January 19, 1888.)

TRIAL—PERMITTING JURY TO TAKE MEMORANDA MADE BY COUNSEL.

In an action against a railroad company for the killing and injury of several head of stock, the evidence was conflicting as to the value of the animals killed and injured; defendant's witnesses estimating it at a much lower figure than that of plaintiff's witnesses. The court allowed plaintiff's counsel to give to the jury on retiring a slip of paper containing the highest estimates made by plaintiff's witnesses, at the same time telling defendant's counsel he might do the like. *Held* error, but, under the circumstances, harmless; overruling *Millar* v. *Cuddy*, 43 Mich. 274, 5 N. W. Rep. 316.

Error to circuit court, Newaygo county; C. C. FULLER, Judge.

Action by Harple M. Harroun for damages for killing and injuring stock. There was a verdict and judgment for plaintiff, and defendant brings error.

Smith, Nims, Hoyt & Erwin, for appellant. *Stone & Hyde*, for appellee.

MORSE, J. The plaintiff sued the defendant in the circuit court for the county of Newaygo, for the value of an ox, a horse, and a mule killed by the cars of the defendant, and a horse and a mule injured and damaged by defendant's train. Testimony was offered and received on both sides showing the value of the animals killed, and the damage to those injured. At the close of the charge of the court to the jury, one of the attorneys of the plaintiff said: "Here is a statement of what we claim, I would like to have the jury have." Defendant's counsel objected. *The Court.* "If the jury desire it they can take it; it is merely a memorandum of the highest amounts given by any witness." *Defendant's Counsel.* "I do not think it ought to go to the jury." *The Court.* "I will allow defendant's counsel to make a statement of the lowest amount sworn to by any witness." *Defendant's Counsel.* "I don't think my position on that question would warrant me in doing that." *The Court.* "The instructions given the jury will prevent the paper doing any hurt." *Defendant's Counsel.* "Here are several animals, and if it will aid the jury they can write down the names of each, but the value or extent of the injury I think is for the jury." *The Court.* "I don't think we will prolong the discussion. If the jury want the paper they can have it; otherwise not." The jury thereupon took the paper. Defendant's counsel excepted to the ruling of the court permitting the jury to take this statement. This is the only error assigned upon the record. The jury were authorized by the court to compute interest upon the amount of the injury, from the time the animals were killed or injured up to the date of their verdict. They found for the plaintiff in the sum of $621.

Quite a large number of witnesses were sworn upon the part of each party as to the damages; and, in order to ascertain whether any harm was done to the defendant by this ruling of the court below, I have carefully examined the testimony of each witness upon this branch of the case. Upon such examination I find that the plaintiff's own testimony fixed his loss, without interest, at about $585, while an average of the evidence in his behalf, including his own, would be, without interest, about $605. The testimony on the part of the defendant averages the value of the animals killed at about $250, while there is no *data* of its witnesses from which to estimate the damage on account of the horse and mule injured, but not killed. The jury were entitled, if they saw fit, to take the highest or the lowest estimate of damages, or the testimony of any one witness as to the loss on each animal. The stock was killed and injured in the fall of 1886,—the ox on the fifteenth of October, and the others on the twenty-eighth of the same month. The verdict was rendered on the twenty-fifth day of July, 1887. Interest was therefore allowable for about 10 months at 7 per cent. The jury, therefore, it is evident, found the value a little less than the average of the witnesses for the plaintiff. We are satisfied that the statement did not prejudice the defendant's case.

I do not think there was any error in allowing the jury to take this *memoranda*. It came clearly within the opinion of this court in *Millar* v. *Cuddy*, 43 Mich. 274, 5 N. W. Rep. 316. But my brothers are of the opinion that it was error; they do not understand the practice to be as laid down in that opinion. Nor do they deem such practice correct or desirable. They hold that the principle upon which jury trials proceed is that the jury shall render a verdict upon their own unaided views of what the testimony is; and, after they leave the jury-box to deliberate upon their verdict, no communication shall be made to them, orally or otherwise, by counsel in the case. If they may take a written statement from counsel of their claim, there is no good reason why they may not take a written argument in support of such claim. When the law is that no communication, orally or otherwise, shall be made to them, the jury cannot be justified in taking from one of the parties a communication, which, in effect, repeats to them continually: "This is my claim;

here are the figures; I ask your verdict for this amount." Such communication is intended to influence the minds of the jury; otherwise it would be idle to give it to them. In many cases it does influence them. It is no answer to say that a jury may take *memoranda* of the testimony to aid their memory, during the trial, and carry the same with them to the jury-room when they retire to consult upon their verdict. This is proper enough, but it does not follow that a party to the cause, or his counsel, who is interested in the result, may hand to the jury *memoranda* to aid or refresh their memory. The true rule should be, so my brothers hold, that *memoranda* or statements made by counsel shall not be given to the jury, unless by consent of the attorney of the opposite party, to be used by them in the jury-room. The only exception to this rule exists in cases involving the investigation of long accounts, where numerous items are to be passed upon. In such cases, if there are no bills of particulars, it might be proper, in the discretion of the trial judge, to allow the jury to take to the jury-room lists of the items claimed on both sides. We are all agreed, however, that there was no harmful error in this case, and that the circuit judge was justified in his ruling, under the decision in *Millar* v. *Cuddy*. As this is a matter of practice which ought to be settled, I join with the balance of the court in declaring the rule to be as they hold, and in qualifying the case of *Millar* v. *Cuddy*, in so far as it conflicts with the doctrine here established.

The judgment of the court below is affirmed, with costs.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

POTTER *v.* SMITH *et al.*

(Supreme Court of Michigan. January 19, 1888.)

GIFT—PAROL GIFT OF LAND—VALIDITY AS AGAINST SUBSEQUENT PURCHASERS.

In an action to quiet title to real estate, the evidence showed that plaintiff's title had been acquired by a parol gift from her father, followed by immediate and continued possession. *Held*, that her title was good as against all subsequent grants or incumbrances of the donor, except such as had been recognized and acquiesced in by her while the title stood in the name of the donor.[1]

Appeal from circuit court, Berrien county, in chancery.

This is a bill to quiet title to certain lots in St. Joseph, filed by Sophronia Potter, against George E. Smith, Warren Chapman, Susan V. Hoyt, Grace Hoyt, and Joseph W. Brewer, assignee in bankruptcy of Benjamin C. Hoyt. The circuit court dismissed complainant's bill as to two of the lots, and decreed the title to the other in her, and that defendants Smith, Brewer, and Chapman release and quitclaim the same to her. Both parties appeal.

Clapp & Bridgman, for plaintiff. *Edward Bacon*, for defendants.

MORSE, J. The complainant files her bill to quiet her title to lots 300, 301, and 302, in the village of St. Joseph. She claims that her father, Benjamin C. Hoyt, made a gift in parol of these lots to her in the year 1859; that she moved into the dwelling-house upon one of them, and has resided there ever since with her husband and family, claiming and holding the same adversely against all the world, the three lots being inclosed by one fence. The proofs show that, under some arrangement with her father, she did move into the house, and take possession of the premises, some time in the year 1859, and that she has lived there ever since, claiming the same as her own, at least ever since the year 1874. The bill of complaint was filed July 10, 1882. The

[1] Equity protects a parol gift of land, equally with a parol agreement to sell, if accompanied by possession, and the donee, induced by the promise, has made valuable improvements on the property. Dawson v. McFaddin, (Neb.) 34 N. W. Rep. 338; Poullain v. Poullain, (Ga.) 4 S. E. Rep. 92. See Anson v. Townsend, (Cal.) 15 Pac. Rep. 49.

character of her occupancy of the premises prior to 1874 is not as definitely and satisfactorily established as we could wish. The testimony of Benjamin C. Hoyt, her father, was not taken, although he is now living at Aberdeen, Mississippi. The complainant testifies that her father called at her house, and asked her and her husband to go up and look at the place. "He said, if I liked it, I might have it for a home; if I liked it, I might move into it, and have it for a home." When she asked him afterwards for a deed, her father said she should have it some time, but that it was better as it was then, as she might sell it and be without a home. Her husband, F. A. Potter, corroborates her as to the gift. But it appears that on the fifth day of July, 1859, Benjamin C. Hoyt borrowed $500 of Daniel N. Hoyt and George V. Griffin, his brother and brother-in-law, and gave his note therefor. He secured this note by a mortgage of the same date upon lots 300 and 301. The giving and existence of this mortgage was ascertained soon after by both complainant and her husband, and no steps were ever taken, previous to the filing of the bill of complaint in this cause, by either of them, in disaffirmance of said mortgage. The interest upon the mortgage was paid by Hoyt or some one up to November 5, 1872. F. A. Potter testifies that when he learned of the mortgage he spoke to Mr. Hoyt about it. Hoyt said to Potter that he only borrowed the money for a short time; that he did not put the mortgage on any of his lots, because they were for sale, and it might interfere with the sale of them; and that Potter need give himself "no uneasiness about the mortgage, as he should remove it soon anyway. This mortgage was foreclosed by advertisement by Hoyt and Griffin, the premises sold, and bid in by them, and a sheriff's deed upon such sale issued to them August 11, 1874. After such foreclosure and sale, and before the redemption expired, negotiations were entered into between the complainant, by her husband and his brothers, who were acting as her attorneys, and Mr. Griffin, looking towards the payment of the mortgage by complainant, and the deeding of the premises to her by quitclaim on the part of the mortgagees. These negotiations were not concluded; but at no time while they were going on did complainant, or any one acting in her behalf, intimate that the mortgage was not a valid lien upon the premises. In 1873, Benjamin C. Hoyt failed. About this time he executed a deed of assignment of his property, for benefit of his creditors, to one Lyman Collins. In this deed he mentioned and conveyed the three lots in controversy here. The deed bore date of November 28, 1883. March 24, 1869, Hoyt conveyed lot No. 300 to his son Enoch C. Hoyt. This deed was found among Enoch's papers after his death, and then recorded on the third day of March, 1874. June 1, 1874, Benjamin C. Hoyt was adjudicated a bankrupt in the United States court, and Joseph W. Brewer appointed his assignee. Such assignee has never been discharged. July 23, 1874, Benjamin C. Hoyt, then residing in Aberdeen, Mississippi, executed a quitclaim deed of these lots to the complainant; said deed reciting that he did on or about the tenth day of April, 1858, make to said complainant a parol gift of the said lots; and that she did, immediately upon the making of such parol gift, take possession of said premises, and has since then occupied the same uninterruptedly, adversely, and exclusively as her own property. Therefore, in confirmation of said parol gift, and in consideration of one dollar, the quitclaim is executed. In March, 1882, for a valuable consideration, Griffin and Daniel N. Hoyt assigned the mortgage to George E. Smith, and also conveyed the premises to him by a quitclaim deed. Before this time, and in 1876, Hoyt and Griffin commenced an ejectment suit to recover possession of the premises. February 1, 1879, a verdict and judgment was rendered in favor of defendant upon the sole ground that the foreclosure was void because of the sale of the three lots in one parcel. No motion has ever been made in the suit for a new trial. George E. Smith is made a defendant in the present suit, because of his ownership of the mortgage, and his possession of the

quitclaim deed from Hoyt and Griffin. He also claims title under execution sales growing out of attachment levies upon the premises, as the property of Benjamin C. Hoyt, in October, 1873. Brewer is a defendant, as assignee in bankruptcy of Hoyt. Susan V. Hoyt is the widow, and Grace Hoyt is the daughter and sole heir, of Enoch C. Hoyt. Chapman claims title under an attachment against Benjamin C. Hoyt.

The circuit court for the county of Berrien, in chancery, dismissed the complainant's bill as to lots Nos. 300 and 302, and decreed that she had no title to them. It further decreed that, in law and equity, she was the owner of lot 301, upon which the dwelling-house is situated; and that the defendants Smith, Brewer, and Chapman should release and quitclaim said lot to her. We think the decree cannot be sustained. Both parties appeal to this court. We are disposed to find that complainant's father made the gift of these lots to her as claimed. She entered into possession of them April 10, 1859, and made various improvements upon them in reliance upon such gift. She has ever since that time claimed the premises as her own, and held adverse possession, as against every claim except this mortgage. She is entitled to all three of the lots, as against all the defendants except Smith, and against him excepting his mortgage lien. We think lots 300 and 301 must be held as subject to the lien of the mortgage to Hoyt and Griffin, and now held by Smith. She knew of the same being executed by her father, while the title stood in his name, and took no steps to acquaint the mortgagees with any claim of its invalidity, as against her occupancy or title to the premises. She, and her husband, acting as her agent, not only acquiesced in but recognized this mortgage as an existing and valid lien upon the premises. It is too late now for her to impeach or disclaim it. The decree of the court below will be reversed, and a new decree entered here declaring and decreeing the title in fee of all the lots in the complainant. She must pay, or cause to be paid, to the defendant Smith, the amount due upon the note and mortgage, on or before the fifteenth day of July, 1888, or, in case of default in such payment, the lots 300 and 301 may be sold by any circuit court commissioner of said county of Berrien in like manner, and with the same effect, as is usual in foreclosure of mortgages in chancery,—lot 300 to be first sold, for the purpose of paying from the proceeds of such sale the sum due upon said mortgage. The defendants, except Smith, must release and quitclaim to said complainant their claim of title to any or all of said lots within 30 days from the entry of final decree in this court, or such decree shall operate as such conveyance. Smith must also release all claim of title save his mortgage interest.

The complainant will recover costs of both courts of the defendants, excepting Smith, who must be given costs of both courts against complainant.

SHERWOOD, C. J., and LONG and CHAMPLIN, JJ., concurred. CAMPBELL, J., did not sit.

PHILLIPS *v.* TOWNSHIP OF NEW BUFFALO.

(*Supreme Court of Michigan.* January 19, 1888.)

TAXATION—COLLECTION—EXPIRATION OF WARRANT—REVIVAL.

Suit was brought to recover taxes collected upon a warrant which had expired, and no legal action taken by the township board to extend the time of collection. *Held*, that act Mich. 1885, No. 8, providing for the extension of time for collection of taxes, did not revive the warrant, and that judgment for plaintiff was properly entered.

Appeal from circuit court, Berrien county; ANDREW J. SMITH, Judge.

This was an action of trespass on the case by John V. Phillips against the township of New Buffalo, to recover $50.92 taxes, which plaintiff claimed

were unlawfully assessed and collected from him by defendant. Judgment for plaintiff, and defendant appeals.

Van Riper & Worthington, for appellant. *Clapp & Bridgman*, for appellee.

LONG, J. This is an action of *assumpsit*, brought in the circuit court for the county of Berrien, to recover a tax paid by plaintiff, under protest, to the treasurer of the township of New Buffalo. It appeared upon the trial of the cause that one Irving Paddock, treasurer of said township, had in his hands the tax-roll of said township for the year 1884, with proper warrant indorsed thereon, for the collection of the taxes thereon assessed. Appearing upon such roll was the following tax, assessed against the plaintiff: For state taxes, $1.54; for county taxes, $2.92; for township taxes, $1.99; for highway taxes, $1.54; for school taxes, $17.55; for judgment, $22.23; for collection fees, $1.90; for making levy; $1.25,—total, $50.92. No proceedings were taken to collect such tax till the twenty-first day of February, 1885, at which time, the plaintiff refusing to pay the same, the treasurer of the township levied upon personal property of the plaintiff, who, for the purpose of relieving his property from such levey, paid the amount demanded under protest, one portion of which protest is as follows: "That the extension of time for the collection of taxes, from and after the first day of February, 1885, was not granted by any legal action of the township board thereon, and no evidence of such extension appears on the warrant to said roll, and it does not appear from the records of the township that any extension was ever applied for by the treasurer for the collection of the taxes of any part of said township." It was conceded, on the trial of the cause, by defendant, that no valid extension of time for collection of taxes in said township was granted by the township board, and that the time limited in the warrant for such collection was February 1, 1885; but defendant claimed that the time was extended, and the warrant annexed to said roll was revived and given force, by act No. 8, Sess. Laws 1885. The court held that said act did not operate to extend the time for the collection of the tax, and directed a verdict for the plaintiff for the tax so paid, for $50.92, and defendant brings error. This presents the only question in the case.

At the time the plaintiff paid the tax, February 21, 1885, the warrant attached to the roll in the hands of the treasurer had expired, and act No. 8, Laws 1885, which came in force February 26, 1885, did not revive it, or give it any force whatever. The purpose of the legislature was simply to extend the time of the warrants, which were then in force in all except certain specified counties in the state, and the time for the collection of taxes thereon to March 25, 1885. Nothing in the title, nor in the act itself, indicates anything more. It reads "that the time limited for the collection of taxes be and the same is hereby extended to the twenty-fifth day of March, 1885." It is a sound rule of construction that legislation is to have a prospective operation only, except where the contrary intent is expressly declared, or is necessarily to be implied from the terms employed. *Harrison* v. *Metz*, 17 Mich. 377; *Smith* v. *Auditor Gen.*, 20 Mich. 405; *Auditor Gen.* v. *Monroe*, 36 Mich. 75; *Finn* v. *Haynes*, 37 Mich. 65; Cooley, Const. Lim. 370; *Daniels* v. *Watertown*, 28 N. W. Rep. 673.

In the present case, the time limited in the warrant for the collection of the tax had expired at the time the treasurer seized the plaintiff's property. The plaintiff paid the tax under protest, and his right to recover the amount paid was at once vested. This act, passed five days after this, could not divest him of this right.

The court properly directed a verdict for plaintiff. The judgment of the court below is therefore affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

STRAIGHT *v.* CRAWFORD *et al.*, Commissioners of Pharmacy.

WEBER *v.* SAME.

(*Supreme Court of Iowa.* January 25, 1888.)

INTOXICATING LIQUORS—ILLEGAL SALES BY PHARMACISTS—POWERS OF BOARD OF PHARMACY.

Plaintiffs were tried before the commissioners of pharmacy on *ex parte* testimony, and convicted of making unlawful sales of intoxicating liquors, their certificates as pharmacists canceled, and their names stricken from the registry. *Held*, that the commissioners exceeded their jurisdiction; their action being in conflict with Acts 21st Gen. Assem. Iowa, c. 83, § 2, providing that the name shall be stricken from the register "upon receipt of transcript of conviction transmitted by or on the order of the court before whom conviction is had," which was enacted subsequently to chapter 75, § 8, the two sections being repugnant.

Appeals from district court, Polk county; W. F. CONRAD, Judge.

Plaintiffs were registered pharmacists, doing business in Atlantic. Certain citizens of Cass county filed complaints against them before the commissioners of pharmacy, accusing them of having made repeated sales of intoxicating liquors for unlawful purposes. They were served with notice of the complaints, and were required to show cause why their names should not be stricken from the register. They appeared in obedience to the citation, and answered the complaints, and they and the complainants were permitted to introduce evidence in the form of affidavits; the evidence being taken in that form, under a regulation adopted by the commissioners. Upon the hearing the commissioners found that they had each "violated their trust, by repeatedly selling alcoholic and intoxicating liquors as a beverage, and to persons in the habit of becoming intoxicated;" and an order was entered revoking their certificates, and directing the secretary of the commission to strike their names from the registry. They then applied to the district court for writs of *certiorari* to review this action of the commissioners. In their return the commissioners set out fully the proceedings had in the case, together with the findings of fact and order made by them. On the hearing the district court entered judgment affirming the action of the commission, and plaintiffs appealed. The causes were submitted on the same abstract, and will be disposed of in one opinion.

L. L. Delano and *Rockafellow & Scott*, for appellants. *George F. Henry* and *H. G. Curtis*, for appellee.

REED, J., (*after stating the facts.*) Section 8, c. 75, Acts 18th Gen. Assem., contains the following provisions: "Provided, that nothing herein contained shall be construed so as to shield an apothecary or pharmacist who violates, or in anywise abuses, this trust, for the legitimate and actual necessities of medicine, from the utmost rigor of the law relating to the sale of intoxicating liquors, and in addition thereto his name shall be stricken from the register." The twenty-first general assembly repealed that section, and, in lieu of the provisions quoted, enacted the following: "Provided, further, that nothing herein contained shall be so construed as to shield the person who in anywise abuses this trust for the legitimate and actual necessities only, from the utmost rigors of the law, now or hereafter in force, relating to intoxicating liquors, and in addition thereto his name shall be stricken from the register by the commissioners of pharmacy upon receipt of transcript of conviction, which shall be transmitted by the court or by order of the court before whom conviction is had." Section 2, c. 83. Section 9 of the original act contains the following provision: "Nor shall it be lawful for any licensed or registered pharmacist or druggist to retail or sell or give away alcoholic liquors or compounds as a beverage, and any violations of the provisions of this section shall make the owner or principal of said store or pharmacy liable to a fine of not less than twenty-five dollars, and not more than one hundred dollars, to be

collected in the usual manner; and in addition thereto, for repeated violations of this section, his name shall be stricken from the register." Other provisions of the section establish restrictions and regulations as to the sale of certain poisons, and prohibit the sale of such poisons, except under such regulations and restrictions.

The important question in the case is whether the commissioners have the power to revoke the certificate, and strike the name of a registered pharmacist from the register, on the ground that he has sold intoxicating liquors contrary to law, except upon proof of his conviction of the offense by the record of such conviction, and the question depends upon the construction which shall be placed upon the provisions of section 2, c. 83, Acts 21st Gen. Assem., and of section 9 of the original act quoted. If the question depended for its solution upon the language alone of either one of the provisions, there would perhaps be but little difficulty in determining it; but both provisions are part of the same statute, and they relate to the same subject, and the language of both must be considered in determining the legislative intent. It is reasonably clear, we think, that the commissioners, before the enactment of chapter 83, possessed the power which in the present case they attempted to exercise. By the provisions of both sections 8 and 9, it was the fact that the party had violated the law with reference to the sale of intoxicating liquors that subjected him to the additional penalty of having his name stricken from the registry; and neither section contains any provision prescribing any particular character of evidence as essential for the establishment of the fact. The record of a conviction would be competent, and, as against the party, conclusive, evidence of the fact; but it would by no means be exclusive. As the question depended simply upon whether a particular fact existed, any evidence which, under the ordinary rules of law, would be competent for the establishment of that fact, would be admissible upon the investigation.

But we are of the opinion that the provision quoted from chapter 83 has the effect to establish a different rule. Under that provision, the name of the pharmacist is to be stricken from the register for a second violation, and the commissioners are empowered to act upon the receipt of the transcript of conviction. While the ground of the action remains substantially as before, the only modification being that a second violation must be established, a rule is created as to the character of evidence by which the fact of violation may be proven. The record of conviction is now the only competent evidence of that fact. It is true that the provisions of section 9 of the original act is not expressly repealed or modified by chapter 83. The latter, however, works a modification by implication. Section 9 prescribes a penalty for a particular offense against the statute relating to the sale of intoxicating liquors, viz., for selling such liquors as a beverage; but chapter 83 is a general provision, prescribing the penalty which shall be imposed upon a pharmacist for any violation of that statute. The particular offense denounced by section 9 is included in the general provision of chapter 83. The latter is the subsequent enactment. It does not prescribe a new or additional penalty to that prescribed by the former act, but enacts merely a new condition upon which the same penalty shall be imposed for the same violation. The two provisions are repugnant. The one provides that upon proof, by any competent evidence, of a single offense by the pharmacist, his name shall be stricken from the register; the other, that, upon proof of a second offense being made by the prosecution of the record of conviction, the same penalty shall be imposed. The rule in such case is that the latest expression of the legislative will shall control. Potter's Dwar. St. 155; Sedg. St. & Const. Law, 104; *Com.* v. *Kimball*, 21 Pick. 373.

Another consideration, leading to the same result, is found in the construction which had been placed upon section 9 before the enactment of chapter 83. In *Hildreth* v. *Crawford*, 65 Iowa, 339, 21 N. W. Rep. 667, we held that

the provision of that section as to repeated offenses applied to other violations of the law than the sale of intoxicating liquors, and that under it, the name of the pharmacist might be stricken from the register on proof of a single sale of liquor in violation of law. That construction was necessary in order to harmonize that section with section 8. The provision of the latter section authorized the imposition of the penalty on proof of a single offense; while the language of section 9, if applicable to the same subject, provided for imposing the penalty only on proof of "repeated violations." It is manifest that the provisions were in conflict if they were both applicable to the same subject, and that difficulty was avoided by the holding that the provision of section 8 was applicable to all cases of violation of the law with reference to the sale of intoxicating liquors; while that of section 9, as to "repeated violations," related to the other offenses enumerated. Under that construction, section 8 contained the rule with reference to offenses of that character. But chapter 83 contains a substitute for section 8. That it created a different rule on the subject from that contained in the original section there can be no doubt; but before its enactment that section contained the rule on the whole subject, and the substitute is necessarily applicable to the whole subject. It was contended, however, that the power to revoke the certificate and strike the name of the pharmacist from the register is included in that exercised originally by the commissioners where they granted the certificate, and that, as they might have withheld it for the same reason originally, they could revoke it without any express statutory authority. But that argument proceeds upon a mistaken theory as to the nature of the powers exercised by the commissioners. They are not possessed of any original powers, but are the instrumentality, merely, by which the state seeks to effect one of the objects of government. They are public officers, possessing such powers only as have been conferred upon them by statute, and exercising them in the manner prescribed by law.

As the privileges enjoyed by the pharmacist under his certificate and registration are conferred by the state, it may provide, doubtless, for their forfeiture for any sufficient reason; and perhaps they could be withdrawn at its will, arbitrarily exercised. But it is sufficient for the present to say that causes for revocation are pointed out by statute, and the manner in which the power to revoke shall be exercised is prescribed, and it can be exercised only in that manner.

We are of the opinion that the commissioners exceeded their jurisdiction in the matter in question. Reversed.

STATE *v.* NOEL *et al.*

(*Supreme Court of Iowa.* January 25, 1888.)

INTOXICATING LIQUORS—UNLAWFUL SALE—FINE—APPLICATION OF—BOARD OF PHARMACY.

The defendant was indicted under Code Iowa, § 1523, and other statutes, declaring the keeping of a place for the unlawful sale of intoxicating liquors a nuisance, and the judgment directed that 25 per cent. of the fine imposed be paid to the state treasurer for the benefit of the board of pharmacy. *Held* error; such action not being contemplated by Acts 18th Gen. Assem. c. 75, and acts amendatory thereto, regulating the practice of pharmacy.

Appeal from district court, Clark county.

Defendant, O. A. Noel, was indicted and convicted for the crime of keeping a nuisance, committed by maintaining a drug-store wherein he kept and sold intoxicating liquors in violation of the statute. He was fined in the sum of $300. The judgment orders that 25 per centum of the fine be paid to the state treasurer for the benefit of the board of pharmacy. From this order the state and defendant, Noel, both appealed.

C. C. McIntire, for the State. *W. M. Wilson*, for defendant, appellant. *R. S. Parrish* and *George F. Henry*, for commissioners of pharmacy, appellees.

BECK, J., (*after stating the facts as above.*) 1. The indictment in this case was found under Code, § 1523, and other statutes, declaring the keeping of a place for the unlawful sale of intoxicating liquors a nuisance, and providing for punishment thereof. It is unnecessary to refer more explicitely to these provisions, or to say more than that the statutes relating to the organization, duties, and powers of the board of pharmacy contains no provision declaring a place kept for the unlawful sale of intoxicating liquors a nuisance, and providing for penalties therefor. Chapter 75, Acts 18th Gen. Assem., being "An act to regulate the practice of pharmacy, and the sale of medicines and poisons," creates the board of commissioners of pharmacy, and prescribes their powers and duties, and contains sundry regulations pertaining to the subject of the act, and, among them, certain restrictions as to the sale of intoxicating liquors. But this act, and the amendments thereto, provide no penalties for the keeping and selling of intoxicating liquors in violation of law, nor do they declare that places wherein such liquors are so kept or sold are nuisances. The indictment, therefore, was not found under these statutes, but, as we have said, under the provisions of the statutes relating to intoxicating liquors, and providing for the suppression of the sales thereof for use as a beverage.

Chapter 83, Acts 21st Gen. Assem., contains certain amendments of chapter 75, Acts 18th Gen. Assem., relating to the practice of pharmacy, and the powers and duties of the commissioners of pharmacy. It provides a substitute for section 8 of the last-named act, containing this provision: "Twenty-five per cent. of all moneys recovered as fines under the provisions of this act shall be paid into the state treasury, and reported to the state auditor, and held subject to the order of the commissioners of pharmacy as needed, to be by them used solely to defray the expenses of prosecutions under and the enforcement of this act, or acts to which this is amendatory."

2. This provision directs that a part of the fines recovered under "this act" shall be set apart for the use of the commissioners of pharmacy as prescribed. The words "this act" refer either to the act containing them, or to the statute as amended by it. We need not determine to which, for certain it is that, in either or both, no provision is found prescribing penalties for nuisances committed by keeping intoxicating liquors for unlawful sale; and the indictment in this case, as we have said, was found under other statutes. The last statute enacted contains no provisions for penalties; certainly none independent of the act of which it is amendatory. The two statutes, regarded together, do contain provisions declaring acts unlawful, the violation of which is elsewhere declared to be misdemeanors, and punishable as such. See Code, §§ 3966, 3967, and sections 1, 2, and other sections, of chapter 75, Acts 18th Gen. Assem. The provision in the last statute directing a part of the fines to be paid for the use of the commissioners of pharmacy is applicable to penalties prescribed by the acts to which it is amendatory. The position of counsel for appellees to the effect that, unless it be held applicable to fines imposed under other statutes relating to intoxicating liquors, it will be without force or effect, is not sound.

3. Counsel for appellants insist that the provision in question is in conflict with the constitution. This objection we are not required to consider, in view of the conclusion we have just announced. We will never inquire into the constitutionality of a statute unless it be necessary for the decision of a case wherein its validity is brought in question.

We are of the opinion that the order of the district court directing a part of the fine adjudged against defendant to be paid for the use of the commissioners of pharmacy ought to be reversed.

BONESTEEL *v.* DOWNS *et al.*

(*Supreme Court of Iowa.* January 25, 1888.)

INTOXICATING LIQUORS—FINES—LIEN ON PROPERTY—WHEN ATTACHES.

Under Code Iowa, § 1558, declaring fines, costs, and judgments against any person for unlawful sales of liquor a lien on all property used or occupied for such purposes with the owner's knowledge, no lien attaches until the fines and costs are assessed, or the judgments rendered; and an injunction to restrain the sale of property alleged to have been so used and occupied, pending proceedings for such unlawful sales, was properly dissolved on motion.

Appeal from district court, Cass county; C. F. LOOFBOUROW, Judge.

Action by N. G. Bonesteel against E. B. Downs and others to recover penalties prescribed by the statute for the unlawful sale of intoxicating liquors to persons in the habit of becoming intoxicated. A temporary injunction was allowed restraining the defendants from disposing of and selling the real estate and personal property used in connection with the sale of the intoxicating liquors. The injunction was, upon motion, dissolved, and from the order of dissolution plaintiff appeals.

H. G. Curtis, for appellant. *Willard & Fletcher* and *F. J. Macomber*, for appellees.

BECK, J. 1. The petition in separate counts alleges 58 distinct acts in violation of the statute, by the unlawful sale of intoxicating liquors to persons in the habit of becoming intoxicated. It also alleges that defendant E. D. Downs is a druggist, and used his stock of drugs to cover the unlawful sales of intoxicating liquors, thereby pretending to comply with the law; that specified property was used by him in the violation of the law; and that the real estate occupied and used by him for such unlawful sales is owned by C. M. Downs; and such use and occupation was with the owner's knowledge. The petition prays that an injunction be allowed restraining defendants from disposing of the real estate used for the unlawful sales of intoxicating liquors, and from selling the personal property except in the usual and ordinary course of trade. A temporary injunction was allowed, which, upon motion, was subsequently dissolved. The questions in the case involve the correctness of this action of the district court.

2. Code, § 1558, or, rather, the substitute therefor by chapter 66, § 12, Acts 21st Gen. Assem., in reference to the enforcement of judgments for fines and penalties incurred by reason of the unlawful sales of intoxicating liquors, contains this language: "For all fines and costs assessed or judgments rendered, of any kind, against any person, for any violation of the provisions of this chapter, or costs paid by the county, on account of such violations, the personal and real property, except the homestead and the personal property of such person which is exempt from execution, as well as the premises and property, personal or real, occupied and used for the purpose, with the knowledge of the owner thereof or his agent, by the person manufacturing, or selling, or keeping with intent to sell, intoxicating liquors contrary to law, shall be liable, and all such fines, costs, and judgments shall be a lien on such real estate until paid." This language very clearly provides for no lien which shall exist before judgment. It declares that the personal property of the offender, and his real estate, and the real estate used in the violation of the law with the knowledge of the owner, shall be liable for fines and costs assessed, and judgments rendered, for the violation of the statute. It then proceeds to declare that "all such fines, costs, and judgments shall be a lien on such real estate until paid." This language clearly means that the liens arise upon the fines and costs assessed and judgments. A fine only exists after judgment. One may be liable to a fine before judgment, but it is imposed only by a judgment. So, costs are assessed by judgments. It is very plain that the lien

arises upon and after judgment, and not upon and after liability incurred therefor.

3. But counsel argue that under this interpretation the provision gives no additional remedy, for without it a judgment would be a lien upon the real estate, and it is not to be presumed that the legislature intended by the enactment to create no additional remedy. But, in reply to this, it is sufficient to say that it does provide an additional remedy, in that it declares the "fines, costs assessed, and judgments rendered" shall be liens upon real estate used for the purpose of violating the law with the knowledge of the owner.

4. As no lien is provided for by the statute except upon judgments, the courts cannot interpose by injunction, an equitable remedy, to restrain the disposition of property before judgment, and thus secure the enforcement of the lien which arises only after judgment. We think it is a settled rule that a judgment must exist before a debtor will be restrained by injunction from disposing of his property; and we know of no principle which will exempt from this rule liabilities incurred for fines, penalties, and costs. In support of this conclusion, we cite the following authorities: *Buchanan* v. *Marsh*, 17 Iowa, 494; *Goodenough* v. *McCoid*, 44 Iowa, 659; *Adler* v. *Fenton*, 24 How. 407; *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144; *Moran* v. *Dawes*, 1 Hopp. Ch. 365; *Phelps* v. *Foster*, 18 Ill. 309; *Bigelow* v. *Andress*, 31 Ill. 322; 1 High, Inj. §§ 26, 27, 250, and cases cited in notes.

We reach the conclusion that the district court rightly dissolved the injunction. Affirmed.

CASSIDY *et ux.* v. CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin.* January 10, 1888.)

RAILROAD COMPANIES—CONTRACT FOR LAND FOR DEPOT—DEED IN ESCROW—UNAUTHORIZED RECORDING—PLEADING.

The complaint alleged that the defendant railroad company had agreed in parol to locate a station upon plaintiffs' land in consideration of a quitclaim to the ground necessary for such a building and the right of way; that the agreed value of the land was $500, and that amount was to be paid plaintiffs therefor if the depot was not put up as agreed; that the deed had been executed and delivered to defendant's agent with the understanding that it was not to be recorded until the station was established, but that the agent had put it of record over plaintiffs' protest and disclaimer, and that, as recorded, it showed interlineations, unlawfully made by the agent, and conveyed more land than was contracted for; that the company had "taken possession," and, although three years had elapsed since it went in, no station had been erected, nor any money paid; to plaintiffs' damage, etc. *Held*, on demurrer, that the complaint was bad, whether considered as an action of tort or of contract; because, if the first, there was no allegation of a wrongful taking, and the plaintiffs' remedy was, therefore, not by action, but by proceedings under Rev. St. Wis. *c.* 87, § 1852; and, if the second, because there was no tender of a deed upon payment of the purchase price, and the company had acquired no title under the deed delivered in escrow, and subsequently unlawfully interlined and recorded.

Appeal from circuit court, Iowa county; CLEMENTSON, Judge.

Action by Henry Cassidy and wife to recover the value of a certain part of their homestead alleged to have been taken by the respondent railroad company, and appropriated to its use. A demurrer to the complaint was sustained, and plaintiffs appealed.

M. M. Cothren, for appellants. *Jenkins, Winkler, Fish & Smith*, for respondent.

TAYLOR, J. This is an appeal from an order sustaining a demurrer to the complaint of the plaintiffs and appellants. The material parts of the complaint are the following: "That the said Chicago & Tomah Railroad Company surveyed, located, and established a proposed line of railway upon and through the lands of plaintiffs, a part of which was and is the homestead of plaintiffs, said land being described as the east half of the south-west quarter of section No. three, in township No. six north, of range No. three east, in Iowa county,

Wisconsin. That, for alleged depot purposes, said corporation surveyed and located upon said tract of land a strip 500 feet in length, and 300 feet in width, which commenced near the south line of said tract, and ran in a north-easterly direction the said 500 feet on said tract, and then continued on, at the breadth of 100 feet, entirely through said tract, embracing and passing over, as it ran, the homestead of plaintiffs; the said strip 100 feet wide being for alleged right of way. That the said Chicago & Tomah Railroad, by and through its agent, Wallis K. Cook, agreed with plaintiffs that said corporation should pay to plaintiffs the sum of $500 for the right of way, and the use of land for depot purposes, as aforesaid, or, instead of paying said sum, should erect a depot building on the south line of plaintiffs' said tract of land in such wise that one-half of said depot building should be on plaintiffs' said tract of land, and one-half on the adjoining tract. That the erection of said depot building as a station-house on plaintiffs' said tract was agreed to be equivalent to the sum of $500 in the increased value of the land adjoining the depot tract for laying off into village lots. Plaintiffs allege that, after said agreement was made, the said Cook prepared a deed which plaintiffs signed with the express condition that the same should not be recorded as a deed of plaintiffs until the said corporation should erect its depot building as a station-house upon the south line of their said land. That the land described in said deed did not embrace a small triangular piece of ground lying on the north-westerly side of the proposed road-bed where it intersects the south line of said tract of plaintiffs, as surveyed and laid out by said corporation. That said Cook, after the plaintiffs had signed said deed, proposed to make an interlineation therein, so as to make it read differently, and embrace more than it did when plaintiffs signed it. That plaintiffs objected to any interlineation being made in said deed; but that said Cook, in opposition to plaintiffs' objection, interlined certain words in said deed, changing the effect and meaning of said deed, and plaintiff, Henry Cassidy then declared to said Cook that the deed was not his act and deed, and forbid the recording of it, or the use of it for any purpose. And plaintiffs allege that said Cook, for the purpose of defrauding plaintiffs out of the lands described in said deed, procured it to be recorded without said corporation paying anything for the land therein described, and without erecting a depot building on the south line of plaintiffs' land. And plaintiffs allege that the defendant, the Chicago & Northwestern Railway Company, well knowing the premises, took possession of said strip of land, 500 feet by 300 feet, and also the strip of land extending therefrom in a north-easterly direction 100 feet wide, through plaintiffs' said land, and through plaintiffs' said homestead, in the year 1883, and also took possession of another piece or parcel of land, not described in the deed signed by plaintiffs, running to the Chicago & Tomah Railroad Company, of a triangular shape, and lying north and west of the point where the road-bed of the defendant's said road enters the south line of the plaintiff's said tract of land, as above described, where said road is running in a north-easterly direction, and has continued in the possession of the same ever since, and never paid anything therefor, and has never erected a depot station building on plaintiffs' said land, but has and occupies a depot building away off from plaintiffs' land. And plaintiffs allege that the defendant claims the right to use, occupy, possess, and own said strip of land without paying anything therefor, and under such claim has appropriated the same to its own use. And plaintiffs allege that they have never been paid any sum whatever for said land, so taken, by any corporation interested therein, or by any person, and that no depot building has ever been erected on plaintiffs' land, as agreed. And plaintiffs allege that the damage to plaintiffs for taking and using such land is $1,000. And plaintiffs allege that the defendant's principal and general office is in Chicago, Illinois, as they are informed and believe. And plaintiffs allege that the recording of said deed by said Cook was and is a fraud, and plaintiffs are not bound thereby. And plain-

tiffs allege that the value of the land taken and appropriated to its own use by the defendant is $1,000. And although the defendant has often been requested to pay plaintiffs for said land, defendant has wholly neglected and refused to do so. Wherefore the plaintiffs demand the judgment of this court that they do have and recover of and from the defendant the sum of one thousand dollars and their costs. M. M. COTHREN, Attorney for Plaintiffs."

The fourth, fifth, and sixth paragraphs of the complaint simply show that the defendant company is the successor of the Chicago & Tomah Company, and have assumed all the liabilities incurred by said company.

The ground of the demurrer is that the complaint does not state facts sufficient to constitute a cause of action. We think the demurrer was properly sustained, for the reasons stated by the learned circuit judge. (1) If the complaint be construed to be an action to recover damages of the railway company for wrongfully entering into and holding the possession of the lands of the plaintiffs without making compensation therefor, then the action cannot be sustained for the reason that it appears from the complaint that the company took peaceable possession of said land about three years before the commencement of this action, and have constructed their railroad on and over the same; and the complaint does not allege that such taking was wrongful or against the consent of the plaintiffs. Under these circumstances, and leaving out of consideration the fact of the making a deed of at least part of the lands to the railway company, and treating the case as though no deed had ever been made, then the plaintiffs' only remedy is by taking proceedings under section 1852, Rev. St., to recover compensation for the lands so taken. This is well settled by the decisions of this court. See *Sherman* v. *Railroad Co.*, 40 Wis. 645–651; *Bohlman* v. *Railway Co.*, 30 Wis. 105–108; *Buchner* v. *Railway Co.*, 56 Wis. 403–419, 14 N. W. Rep. 273; *Same* v. *Same*, 60 Wis. 264, 19 N. W. Rep. 56; *Hanlin* v. *Railway Co.*, 61 Wis. 515, 521, 522, 21 N. W. Rep. 623; *Railroad Co.* v. *Strange*, 63 Wis. 178, 23 N. W. Rep. 432; *Taylor* v. *Railway Co.*, 63 Wis. 327, 24 N. W. Rep. 84. These cases very clearly show that the complaint does not state facts sufficient to constitute a cause of action to recover damages for the wrongful taking and holding possession of the lands of the plaintiff.

The learned counsel for the appellant upon the hearing of this appeal claims that the action is an action upon contract, to recover the price agreed to be paid by the company for the land they have taken possession of, and not an action of tort to recover damages for a wrongful entry and possession by the defendants, so that we need not further discuss that question. There are two objections to a recovery upon such alleged contract. The first objection is that the plaintiff does not tender or offer to make a deed for the land, upon the payment of the alleged purchase price. And the facts alleged in the complaint, which must be taken as true upon demurrer, show that the railway company has never acquired any title to the land in question. If the plaintiff is satisfied to ratify the deed mentioned in the complaint made to the railway company, notwithstanding it was wrongfully altered and delivered by the agent of the company, he should have alleged his willingness to do so, or at least have omitted to allege facts which show that the deed was void, and conveyed no title to the company. He cannot avoid the deed by his allegations, and still claim the consideration for which it was intended to be given. Having alleged facts which show that the railway company has no title to the lands in controversy, he cannot recover upon a parol agreement by the company to pay $500 for the same, without offering to convey the land to said company.

The order of the circuit court is affirmed, and the cause is remanded for further proceedings.

SHAFER *v.* HOGUE.

(*Supreme Court of Wisconsin.* January 10, 1888.)

1. ATTACHMENT—POWER OF SHERIFF TO LEVY ON LOGS IN ANOTHER COUNTY.
The right to make a constructive levy of an attachment upon logs on the Chippewa river and its tributaries, vested in the sheriff by Laws Wis. 1880, *c.* 222, is confined to logs in the sheriff's county. A warrant of attachment issued by the municipal court of Chippewa, and levied by the sheriff of that county, on logs "in the Jump river, a tributary of the Chippewa river, in Taylor county," therefore creates no lien.

2. SAME—FAILURE OF ATTACHMENT—PERSONAL JUDGMENT.
Under Rev. St. Wis. § 3340, Laws Wis. 1882, *c.* 319, § 5, and Laws Wis. 1885, *c.* 469, § 6, the fact that the logs attached are not within the county, and the plaintiff is therefore entitled to no lien upon them, does not prevent the court issuing the writ from entering judgment against a defendant, personally served, for the amount found due, with costs as in ordinary civil actions; the costs for executing the attachment being adjudged against the plaintiff.

3. SAME—REVIEW OF PROCEEDINGS—CERTIORARI.
Where, upon common-law *certiorari* in a log-lien attachment, it appears that the proceedings of the inferior court are correct as to the personal judgment against the defendant, but erroneous as to the adjudication of a lien for the amount thereof upon the logs, that part of the judgment giving the lien should be quashed, as well as that awarding costs, and the remainder affirmed.

4. VENUE IN CIVIL CASES—TRANSITORY ACTION—WORK AND LABOR ON LOGS.
An action for work and labor done upon logs is transitory, and, under Laws Wis. 1885, *c.* 301, § 3, an action for such work and labor done upon logs in Taylor county, is within the jurisdiction of the municipal court of Chippewa county, where personal service is had upon the defendant.

Appeal from circuit court, Chippewa county; S. H. CLOUGH, Judge.

Log-lien attachment by Samuel Shafer, an infant, by his next friend, Pha'on Shafer, appellant, to recover $30.75 for work and labor done by him in Taylor county upon logs in said county belonging to the respondent, Hugh W. Hogue.

Arthur Gough, for appellant. *Rusk & Boland*, for respondent.

COLE, C. J. The plaintiff below commenced this action in the municipal court of Chippewa county to enforce a lien for his labor upon logs. The warrant of attachment was issued to the sheriff or any constable of the county; and the sheriff, by his deputy, made return that he executed the writ by levying upon certain logs of the mark described therein, which were "situated in and along the banks of the Jump river, a tributary of the Chippewa river, in Taylor county," and that he personally served the writ upon the defendant in Chippewa county. On the return-day of the writ the parties appeared, and, by consent, continued the case to a subsequent day, when they again appeared, put in their pleadings, and went to trial upon the merits. After hearing the evidence, the municipal court found that the defendant was indebted to the plaintiff, for labor done upon the logs described in the complaint, in the sum of $30.75, and gave a personal judgment for that amount against the defendant, and also adjudged that the same be a lien upon the logs seized on the warrant of attachment. The defendant took the case to the circuit court by common-law *certiorari*, where the judgment of the municipal court was reversed *in toto*. The case is brought to this court for a review of that decision.

We do not see any material error in the proceedings before the municipal court, except in that part of the judgment which attempted to give a lien upon the logs. The property was in Taylor county; consequently was not within the jurisdiction of the municipal court. It is suggested by the learned counsel for the plaintiff that chapter 222, Laws 1880, authorized the sheriff to levy upon the logs though they were not found in his county; but we do not think this is the intent of that law. That statute does not enlarge the jurisdiction of the municipal court, nor extend the power of the officer, but it merely enables the sheriff to make a valid constructive levy, upon logs in his county, in the manner therein prescribed, without the necessity of an actual view of the

property. Ordinarily, he would have to make a levy upon an actual view and taking possession. The law dispenses with this, and makes a constructive levy good. It is clear that the municipal court exceeded its jurisdiction in adjudging the amount of its judgment a lien upon logs which were not within the limits of Chippewa county. The judgment as to the lien should have been quashed by the circuit court; but as to the personal judgment, which was clearly correct, it should have been affirmed. The counsel for the defendant insists that the municipal court had no jurisdiction to give such a judgment, because the logs attached were not within Chippewa county. But this is a mistake. The proceeding under our statute serves a twofold purpose: Chiefly and primarily to enforce a lien upon logs and timber for labor done upon them, and also to obtain a personal judgment for the amount due the plaintiff. So, where the court or jury which tries the case find that the amount due the plaintiff for labor is a lien upon the property, judgment is rendered in accordance with that finding; but, where it is found that such amount is not a lien, then the property is released from the attachment, where it has been legally seized, but the plaintiff has a personal judgment for the amount so found due, with costs as in ordinary civil actions, but recovers no costs for executing the attachment, but has to pay them. This is the express language of the statute upon the subject. Section 5, c. 319, Laws 1882; section 6, c. 469, Laws 1885; section 3340, Rev. St. Here the action for services rendered was of course transitory. The municipal court had jurisdiction of it. Section 3, c. 301, Laws 1885. There was personal service of process, and the defendant appeared on the trial. What possible objection was there to the personal judgment thus rendered for the amount due the plaintiff, regardless of all question as to his right to a lien? None whatever, and the statute clearly authorized the rendering of such judgment under the circumstances. That part of the judgment which gave a lien upon the logs is distinct and separate from that which gave a personal judgment; consequently, the circuit court should have quashed that part, and affirmed the remainder. This is the rule which has been laid down in this court as the correct one in such cases. "On common-law *certiorari*, the judgment of the inferior court is reversed in whole or in part, as the case warrants." *Bandlow* v. *Thieme*, 53 Wis. 59, 9 N. W. Rep. 920; *Hurlbut* v. *Wilcox*, 19 Wis. 420; and the authorities cited in the opinions. But where the several parts of the proceedings are connected together, and depend upon each other, there the whole must be quashed, and not a part. *Com.* v. *Turnpike*, 5 Mass. 420. In *Com.* v. *Bridge*, 13 Pick. 196, SHAW, C. J., says: "It appears to be well settled that, upon a return of a writ of *certiorari*, the court will not enter a new judgment, where the proceedings are found erroneous; but if the proceedings are so independent of, and disconnected with, each other, that a part may be quashed, and leave the remainder an entire, beneficial, and available judgment for the purpose for which it was intended, the court may quash that which is erroneous, and affirm the remainder." Applying this rule to the case before us, it follows that the circuit court should have quashed that part of the judgment of the municipal court, which gave a lien as well as that which gave costs, because illegal costs here included or taxed which could not be separated in the superior court, and should have affirmed the remainder of the judgment.

Therefore we reverse the judgment of the circuit court, and remand the cause, with directions to that court to enter such a judgment as is indicated in this opinion.

WARD v. NECEDAH LUMBER CO.

(*Supreme Court of Wisconsin.* January 10, 1888.)

EJECTMENT—DEED FROM COUNTY—AUTHORITY OF CLERK TO EXECUTE—RECITALS.

The recital in a deed executed by the county clerk, as such, conveying the interest of the county in lands bought in by it at a tax sale, that the deed was made in

pursuance of a resolution of the county board, as required by Rev. St. Wis. § 653, is not *per se* evidence of the existence of such a resolution; and, in ejectment by the remote grantee of such lands, the mere production of the deed containing such a recital, without proof of the resolution itself, establishes no title, and the plaintiff should be nonsuited.

Appeal from circuit court, Wood county; CHARLES M. WEBB, Judge.

Ejectment by Lawrence Ward, to recover of the Necedah Lumber Company, the N. W. ¼, section 3, township 22, and S. W. ¼, section 34, township 23, all in range 3 E. There was a verdict and judgment for plaintiff, and defendant appealed.

Prentiss, Hughes & Miller and *S. N. Pinney*, for appellant. *Gardner & Gaynor*, for respondent.

COLE, C. J. This is an action of ejectment. The plaintiff bases his title to the land in question upon a quitclaim deed from Wood county to him, dated September 20, 1886. The defendant claims title to the same lands under certain tax deeds and other conveyances, which are set up in the answer. The case was tried by the court without a jury; and the circuit court found, upon the evidence, that the plaintiff was the owner of the lands in fee-simple, and was entitled to the possession, and gave judgment accordingly. The defendant, in its answer, claimed the benefit of the statute of limitations, as it and its grantors had been in possession under recorded tax deeds for more than three years before the commencement of the suit, and also relied on the 10-years statute of limitations. The title of the defendant was attacked on the ground that the deeds from the county to Baker and Powers, its remote grantors, were absolutely void, and conveyed no title under chapter 276, Laws 1864, which was in force when these deeds were executed. Powers was the county clerk, and executed a deed of release from the county to Baker, his deputy, it is said, for his own benefit; at the same time transferring certain tax certificates owned by the county, upon which he afterwards procured a tax deed. In answer to this objection, it is insisted that the evidence shows a settlement by the board of supervisors with Powers for the tax certificates, and of all matters relating to these lands; so that, if there had been any violation of chapter 276 in the original transactions, the defect in the title was cured by this settlement. From the view which we have taken of the case, it becomes unnecessary to determine the real scope and intent of chapter 276, or to consider any questions growing out of the alleged settlements, and we shall express no opinion upon these points.

The law is elementary that, in ejectment, the plaintiff must recover on the strength of his own title, and not upon the weakness of the title of his adversary. In this case the plaintiff utterly failed to show any title to the lands in controversy. We have said that he based his right to recover the lands upon a quitclaim deed from the county to him. The county had bid off the land at tax sales, and subsequently took tax deeds for them, as it lawfully could do. These tax deeds were executed, one in July, 1869, and the other in October, 1870, and were both recorded in 1870. Assuming, as we may, for the purposes of this case, that the title of the county, acquired by the tax deeds, remained in it unaffected by any conveyance under which the defendant claims, still there is a fatal defect in the plaintiff's title, because he failed to prove that the county clerk had authority to execute the deed under which he claims. The establishment of that fact was absolutely essential to his case. The county clerk could only convey the interest of the county upon being authorized by a resolution or ordinance of the county board. Section 653, Rev. St.; *Woodman* v. *Clapp*, 21 Wis. 364; *Bemis* v. *Weege*, 67 Wis. 435, 30 N. W. Rep. 938. It is true, in this case, the deed to the plaintiff recites, in effect, that the board of supervisors on the tenth of November, 1869, passed a resolution that the clerk be, and was thereby, authorized and empowered to sell and convey to any person purchasing the same, any land on which the

county had, or might thereafter have, a tax deed. But this recital is not evidence that the clerk was authorized by a resolution of the board to execute the deed, since we know of no statute which makes such recital *per se* evidence of the existence of such a resolution. The authority of the clerk should have been proven on the trial by the production of the resolution itself, and it could not be presumed from the fact that the deed was executed by the clerk, or from the recital contained therein. *Bemis* v. *Weege*, *supra*; *Semple* v. *Wharton*, 68 Wis. 628, 32 N. W. Rep. 690.

It follows, from these views, that the plaintiff showed no title to the lands which he recovered, and the judgment should have been given for the defendant. The judgment is therefore reversed, and the cause is remanded, with directions to the circuit court to render judgment according to this opinion.

ADDY v. CITY OF JANESVILLE.

(*Supreme Court of Wisconsin.* January 10, 1888.)

1. MUNICIPAL CORPORATIONS—UNAUTHORIZED CHANGE OF GRADE—DAMAGE FROM SURFACE WATER.
   Under the charter of the city of Janesville, (Laws Wis. 1882, c. 221, *subc.* 7, § 1,) prohibiting the council from changing the grade of a street, when once established, without the recommendation of a majority of the adjacent lot-owners, it is no defense to an action by such owner, who has improved his lot subsequent to the establishment of the grade, to recover damages for injury to his property, caused by an accumulation of water thereon, resulting from a raising of the grade, done without such recommendation, and without proper outlets, that such water is surface water merely.
2. SAME—STREET COMMISSIONER—DECLARATIONS OF—HARMLESS ERROR.
   Under the charter of the city of Janesville, (Laws Wis. 1882, c. 221, *subc.* 2, § 2,) the street commissioner is an officer of the city, and in an action against the city by an abutter, to recover damages for injuries resulting from an unauthorized change of grade, it may be shown by parol that the person in charge of the work was the street commissioner; and where this fact is abundantly established by other evidence, it is harmless error that part of the testimony introduced was a conversation with such commissioner, since deceased.
3. SAME—COMMISSIONER'S REPORTS—EVIDENCE.
   Where in such a case, it is made to appear that the person in charge of the grading made a report referring to such work every two weeks, which report was received and filed in the office of the city clerk, such reports are competent evidence, the presumption being that they were made by such person in his capacity of street commissioner.
4. SAME—PLEADING—EVIDENCE.
   In such case, where it is alleged that defendant city wrongfully allowed water from a certain direction to flow upon the lot, "without providing proper escapes for carrying it off," evidence as to the insufficiency of a culvert, at a point where such water could have been caught and conducted away, is competent.
5. SAME—INSTRUCTIONS—LAW OF WATER-COURSES.
   Where, in an action against a city by an abutter to recover damages for injuries to property caused by an accumulation of water, resulting from an illegal and negligently constructed change of grade, it is admitted, on both sides, that such water is surface water merely, it is not error to refuse instructions for the defense as to the law applicable to a water-course.

Appeal from circuit court, Rock county; JOHN R. BENNETT, Judge.

Action by Barbara A. Addy against the city of Janesville, to recover damages for injuries by surface water to certain property owned by her in said city. There was a verdict for plaintiff for $500, and defendant appealed.

Charles E. Pierce, for appellant. *Wilson Lane* and *Fethers, Jeffries & Smith*, for respondent.

COLE, C. J. The first two errors assigned are: Overruling the objection to any evidence under the complaint, and denying the motion for a nonsuit. The first inquiry, then, is as to the sufficiency of the complaint. The plaintiff owns, and has for several years resided in, a dwelling-house situated on lot 6, block 38, on North Main street, in the city of Janesville. It is alleged in the

complaint that the defendant city from time to time, during the last five years, and more particularly during the spring and summer of 1882, wrongfully, unlawfully, and negligently, to the great damage and injury of the plaintiff, hauled, or caused to be hauled, a great quantity of gravel, earth, and other material, and caused the same to be deposited upon the street adjacent to her premises, thereby raising the street from one to three feet above the lawfully established grade; that the defendant wrongfully and negligently allowed the water flowing from the north and east of the plaintiff's premises to flow in upon her lot, by reason of the unlawful height of the street, no proper escape having been provided for carrying off such water, which accumulated, during portions of each year, in great quantities, in and upon her lot, filling the cellar of her house; undermining and injuring the same; discommoding the plaintiff in the use and enjoyment of her property; rendering the residence unhealthy and depreciating its value. These are the principal averments of the complaint upon which damages are claimed. It was objected here, as it was in the court below, that no actionable injury is stated. The objection was overruled by the trial court, and we think properly so. It is said the complaint claims damages only for injuries caused by the defendant permitting surface water to flow upon the premises, and to become dammed up thereon, and that, for an injury caused by surface water purely, no damages can be recovered. But the allegation is that the earth and material were unlawfully and negligently deposited in the street, adjacent to the premises, so as to raise it above the lawfully established grade, and that this caused the injury. The fact is proven beyond all dispute that the grade of North Main street was established by the common council in September, 1855. In 1867, the dwelling-house was erected, and improvements made upon the lot, conforming to this grade. The lot was then considerably above the grade, and whatever surface water came upon it flowed off over the street, west, to the river. True, it does not appear that the street was worked by the city to the established grade, nor do we deem that a material fact. Owners of lots on the street had the right to make improvements upon the faith that the grade would be permanent, or at least only changed according to the provisions of the charter. There is no pretense whatever that the city officers complied with the provisions of the charter which authorized a change of the established grade. See subchapter 7 of the charter, (chapter 221, Laws 1882.) Consequently the city became liable to a lot-owner for damages to his lot sustained by reason of such change. Section 1, *subc.* 7, *supra*. This was the doctrine laid down in *Crosset* v. *City of Janesville*, 28 Wis. 420, under this provision of the city charter. There the common council attempted to change the established grade, without the recommendation of a majority of the adjacent lot-owners, of property situated on the street, which authorized the grading according to the changed grade; and this court held the city liable to the lot-owner for the injury to his lot caused by such grading. The principle of that decision is strictly applicable to the case at bar. The same doctrine is affirmed in *Meinzer* v. *City of Racine*, 68 Wis. 241, 32 N. W. Rep. 139, where it is held that an action will lie against a city for injuries to a lot caused by a change of the grade of a street, otherwise than is authorized by law, and in violation of the restrictions of the charter. So the question of the liability of the city, under such circumstances, may be deemed settled by these decisions, and does not require further discussion. But the contention of the appellant's counsel is, that, upon well-settled principles of law, the city had the clear right to prevent surface water which accumulated on lots adjoining its streets from flowing onto such streets; the same right that an adjoining owner has to prevent the surface water from another adjoining owner's land from coming upon his premises. The decisions of *Hoyt* v. *City of Hudson*, 27 Wis. 656; *Waters* v. *Village of Bay View*, 61 Wis. 642, 21 N. W. Rep. 811; and *Heth* v. *City of Fond du Lac*, 63 Wis. 228, 23 N. W.

Rep. 495, are cited in support of that proposition. These cases are inapplicable to the present, for the obvious reason that here the common council had no authority to change the grade, without taking the steps prescribed by the charter to give them power so to do. The complaint states that they proceeded, unlawfully and negligently, in depositing the material in the street, and so raising it as to prevent the surface water from flowing off over the street, as it was accustomed to do, without providing proper escapes to carry off the water, and this allegation is abundantly sustained by the proof. The charter clearly prohibited the common council from changing the grade without the requisite recommendation of the lot-owners asking for such change. No such restriction upon the power of the city or village authorities existed in the cases above cited. The city authorities could not raise the grade of the street, except as authorized in order to prevent the flow of surface water over it. Their power in that regard was restricted as we have already pointed out. And, as was said by the learned circuit judge, it becomes immaterial to state or consider what the law would have been as to their right to guard the street against surface water if they had taken the requisite steps under the charter to raise the grade. As the case stands, the city authorities proceeded unlawfully and in direct violation of the provisions of the charter, in doing this work.

The third and fifth errors assigned relate to admitting in evidence, against the defendant's objection, conversations had by the plaintiff with James Church, since deceased, and the oral testimony to prove that Church held the office of street commissioner in 1881–82. Church was the street commissioner who attended to the work of filling the street in front of the plaintiff's premises. The plaintiff testified that she remonstrated with him, and tried to stop the filling, because it would "drown her out." This evidence was objected to because Church, being dead, could not testify in the matter. We do not deem this testimony at all material. Its plain object was to show that the work had been done by the authority of the city. But this fact was established by overwhelming testimony and could not be gainsaid. Church was an officer of the city, (section 2, *subc.* 2, city charter,) and it was competent to show by parol that he acted as street commissioner. Indeed, it appears that he employed laborers, who worked under him, and who were paid out of the city treasury. As street commissioner he made a report to the common council, referring to this filling and grading of North Main street, which report was received and placed on file in the city clerk's office. The report was competent evidence in the case, because it was, presumably, made by Mr. Church while he was an officer of the city, and acting as street commissioner. The labor done, under the supervision of the street commissioner, upon the streets that year was paid for every two weeks, as the city clerk testified; and the labor and expense of filling the street adjoining the plaintiff's lot was doubtless paid for by the city. It seems like trifling with the intelligence of a court to claim, upon the evidence in this record, that it does not appear that the filling of the street adjoining plaintiff's lot was done by the authority of the city. And we may remark, in this connection, that the witness Nowland—who was a member of the street and bridge committee—testified that Main street was raised in 1881–82 to prevent the water of the river from backing up into it. So it appears this work was not done to guard the street from surface water, as the city attorney now claims. Again, it is said the court erred in permitting proof to be made as to the insufficiency of the culvert on Main and North Fifth streets, because no foundation for such evidence was laid under the allegations of the complaint. But the complaint certainly alleged that the defendant wrongfully allowed water, flowing from the north and east of plaintiff's premises, to flow upon her lot without providing proper escapes for carrying it off. This shows that the objection to the evidence was not well taken.

The court was asked to give some instructions on behalf of the defendant which it refused to give. This ruling is assigned as error. All the law in these instructions which is pertinent to the case is embraced in the general charge. It was idle to confuse the jury with the law as to a water-course, since it was not pretended by any one that the water in question was anything but surface water. The court did distinctly charge the jury that the water coming upon the plaintiff's premises was surface water, and was not a creek or water-course; but though it was mere surface water, still if there was a raising of the street in question above the legally established grade, without sufficient culverts being provided to allow the surface water to pass off as it did before the street was raised, and by such means the surface water was set back upon the plaintiff's lot, and retained there longer than it was prior to the raising of the street, rendering her premises less valuable than they were before, the plaintiff was entitled to recover for all damages which naturally resulted to her from such flowage or retention of the waters upon her premises. This charge is excepted to, but it is so obviously correct that it needs no comment. The court further charged that the city had shown no authority whatever for raising the grade; and if such raising of the grade without sufficient culverts or gutters to carry off the waters as rapidly as they were carried off before, produced injury to the plaintiff, the raising was, as to her, unlawful; and if done by the city, or if the city ratified the raising of the grade after it was done, by paying for the work, the city was liable to her for all damages which naturally resulted from the raising of the grade, with its insufficient gutters or culverts to conduct the waters as rapidly as they flowed off before the grade was so raised; that the city had shown no authority for raising the grade, and the evidence tends to show that the requisite steps had not been taken authorizing the city to raise the grade of the street. This charge is likewise excepted to, but it is clearly in harmony with the views which we have expressed above, and therefore needs no further comment.

This disposes of all the material points in the case, and it follows that the judgment of the circuit court must be affirmed.

STATE *v.* WITHAM.

(*Supreme Court of Wisconsin.* January 10, 1888.)

1. HUSBAND AND WIFE—ABANDONMENT OF WIFE—PENALTY.
   An abandonment of his wife by a married man occurring before Laws Wis. 1885, c. 422, took effect, (viz., April 18, 1885,) but willfully continued down to the time of trial, subjects him to the penalty denounced by that act.
2. SAME—ABILITY TO SUPPORT WIFE—CAPACITY TO EARN WAGES.
   The words "being of sufficient ability," as used in section 2 of said act, refer as well to the husband's capacity to earn wages or salary as to the property actually owned by him.
3. SAME—TRIAL TO COURT—FINDINGS—CERTIFIED CASE TO SUPREME COURT.
   Where a criminal proceeding for abandonment of wife is tried to the court, and the facts as found show the accused to be liable for the penalty denounced by the statute, such finding is equivalent to the verdict of a jury, and the case may be certified to the supreme court, under Rev. St. Wis. § 4721.

Certified case from municipal court, Rock county.

Information under Laws Wis. 1885, c. 422, for abandonment of and refusal to provide for wife.

C. E. Estabrook, Atty. Gen., *L. K. Luse*, Asst. Atty. Gen., *Wm. Smith*, and *B. M. Malone*, for the State. *Geo. G. Sutherland*, for defendant.

COLE, C. J. This action was commenced by an information filed by the district attorney of Rock county, in the municipal court of said county, charging, in the first count, that the defendant did on the first day of May, 1885, at the city of Janesville, abandon his wife, leaving her in a destitute condition,

and has since that date continued to leave her in a destitute condition; in the second count, that, at the time above mentioned, the defendant, being of sufficient ability, refused and neglected, and continues to refuse and neglect, to provide for the support of his wife. The municipal judge tried the cause without a jury, and has reported, under section 4721, Rev. St., for the decision of this court, the following questions: (1) Is the defendant liable to the penalty prescribed by chapter 422, Laws 1885, which was published April 18, 1885; the abandonment of his wife having occurred before the law took effect, but having been willfully continued to the time of the trial? (2) Do the words "being of sufficient ability," as used in section 2 of said chapter, include capacity to earn wages or salary, or to produce or create value by skill and labor, or is the application limited to property possessed?

Section 2 of chapter 422 provides for two cases: (1) It makes it a misdemeanor for a husband to abandon his wife, leaving her in a destitute condition; (2) or, being of sufficient ability, the refusal or neglect to provide for her. By the act of abandonment, leaving his wife in a destitute condition, the husband incurs the penalty. He also incurs the penalty when, being of sufficient ability, he refuses or neglects to provide for her support. In the present case, while the abandonment occurred before the law took effect, still the willful refusal to provide for his wife continued to the time of trial. This rendered the defendant liable, under the statute, for the penalty incurred or imposed for such neglect. This seems to be the plain meaning and intent of the law. The first question submitted is therefore answered in the affirmative.

The words "being of sufficient ability," as used in the statute, we have no doubt refer as well to capacity or skill to earn or acquire money as to property actually owned. A husband may earn money by his industry or labor, or he may, and often does, gain a fortune, or receive a large salary, in consequence of his skill in some direction, and thus becomes able to support his wife and family. Ability and refusal to support constitute one act of delinquency; and where a man has physical and mental power to acquire means he comes within the intent of the law. It would be an unreasonable construction to confine it to a case where the husband had actually acquired property; for, as we have said, his ability to support his wife—to discharge that most sacred of all social duties—might be as ample and complete where he had capacity to earn wages or a salary, or skill to acquire wealth, as when he possessed money itself. So, the answer to the second question is that the law is not limited or confined to property actually possessed by the husband, but includes his capacity to earn or obtain means to support his wife.

The attorney general suggests there may be a doubt as to whether the case is properly before us, because there has been no conviction. The court, however, has found the facts which show that the defendant is liable for the penalty of the statute, and this finding may be treated as equivalent to the verdict of a jury. At all events, we have deemed it best to give our decision upon the questions certified by the municipal court.

The case is remanded to the municipal court, with a certified copy of this opinion, for further proceedings according to law.

BOLDT v. STATE.

(*Supreme Court of Wisconsin.* January 10, 1888.)

1. INTOXICATING LIQUORS—APPEAL FROM JUSTICE—CHANGE OF VENUE.
One convicted before a justice of the peace of selling intoxicating liquors without a license is not entitled, on appeal to the circuit court, to a change of venue under Rev. St. Wis. § 4680, granting that right "to any defendant in an indictment found or information filed."

2. SAME—QUALIFICATIONS OF JURORS—MEMBERS OF LIQUOR CLUBS.
On the trial in the circuit court on appeal from a conviction before a justice for selling intoxicating liquors without a license, the examination of a number of the jurors as to qualification showed that they had been or were members of a club which seemed to have been formed for the purpose of obtaining liquor, and which the accused had been active in organizing, or with which he was connected in some way. These jurors having sworn that they were sensible of no bias, etc., they were accepted. The accused then objected generally to the jurors, to the manner of selecting them, and finally challenged the array. *Held*, that the objection and the challenge were both without merit; the inference to be drawn from the facts, if any, being that of prejudice in favor of the accused.

3. SAME—INDICTMENT—DUPLICITY.
The complaint charged that the defendant did on June 11, 1886, unlawfully sell, deal, and traffic in, and for the purpose of evading the law did give away, certain spirituous, malt, and intoxicating liquors, without first having obtained a license therefor. *Held*, (1) that the indictment charged an offense under the statute; and (2) that it was not bad for duplicity, the very language of the statute (Laws Wis. 1885, *c.* 296, § 4) being used, and the several acts, stated conjunctively, constituting but one offense, for which there could be but one conviction and punishment.

4. SAME—EVIDENCE—SALES NOT LIMITED TO TIME CHARGED.
Under a complaint charging sales of intoxicating liquors without a license on June 11, 1886, the prosecution may show sales about June 10, 1886, to one person, and sales to others between May 10, 1886, and June 11, 1886.

5. SAME—PROCURING LIQUORS AS AGENT—RECEIVING PAY.
The accused, in a prosecution for selling liquor without a license, set up the defense that he was acting merely as the agent of the persons who got the liquor of him. It was proven conclusively, however, that such persons paid him for what they got, and at the time they got it. *Held*, that instructions for the defense upon the liability of such an agent were not applicable to the evidence, and were properly refused.

6. SAME—REMARKS OF COUNSEL—COMMENTS ON EVIDENCE.
It is not ground for a new trial that the attorney for the state, in his address to the jury on the trial of a prosecution for selling intoxicating liquors without a license, was permitted to make very exaggerated statements as to the strength of the evidence on the part of the state, and other remarks of a similar rhetorical character.

7. SAME—REMARKS OF TRIAL JUDGE—BIAS OF JURORS.
The jury impaneled for the trial of a complaint for selling intoxicating liquors without a license was made up, in part, of men who were members of a beer club which the accused was active in forming. It was understood among the members that the club would see to it that, if the accused was prosecuted, he should lose nothing, and come to no harm. These jurymen had sworn on the *voir dire* that they were without bias, etc., and the judge in his charge referred to the inconsistency, and remarked that it was singular that the prosecution had not challenged them. *Held*, that the conduct of the trial judge was not ground for a new trial.

Error to circuit court, Langlade county.

Prosecution under Laws Wis. 1885, *c.* 296, for selling intoxicating liquors without a license. The plaintiff in error, Henry Boldt, was convicted, and, a new trial having been refused, took this writ; assigning as error, *inter alia*, certain remarks of the prosecuting attorney in his address to the jury, and part of the charge of the trial judge. The remarks of counsel for the state objected to were these: "If there is a disagreement in this case, it may go to indicate that when a gentleman spoke of a Dutchman it had some weight." "If Boldt cannot be convicted, the evidence is not strong enough to convict; if it was an angel from heaven, he could not be convicted, even though twelve demons sat upon the jury to try him. He says he never tampered with the jury; he never talked with a juryman, he never talked with any juror, about this case,—about my case." The part of the charge referred to was as follows: "Now, gentlemen of the jury, this has been quite a peculiar case, and in some respects one of the most peculiar I have witnessed in this state or elsewhere, and I have witnessed trials in a number of states. The testimony on the part of the state tends to prove that about the eleventh day of June last, and previous to that time for some time, the defendant had been engaged in vending beer and rock and rye, which the testimony tends to

prove is ardent and intoxicating liquor, in the house that he occupies in this city and county and state, at retail and by the glass and by the bottle, as well as in other ways. There is no pretense on his part that he had a license for that at all; in fact, he testified himself that he did make sales. He says he made them to what is called a 'beer club,' organized for the purpose of enabling the members of that club to procure beer for their own consumption. He got it for them on their order, and dealt it out to them in small quantities by the bottle and by the glass, and took pay for that, and also took pay, as he says, for the attention and delivery of the beer. He also states that the members of that club had arranged to defend him if he was called in account for it in the courts,—to bear the expense of litigation; and it was intimated, or found on examination, that some of you are members of a club of that description, and yet you have said you are impartial, and you would find a verdict, if the proof was that he had sold liquor, and the court charged that to sell it to a club, or members of a club, of that description, was a violation of the law. I never heard of a case of that description in my experience, where a number of men on the jury had been suffered to remain on the jury, if it is true that they belong to a club of that description. The arrangement was that they were to contribute towards defraying litigation—expenses of litigation—that was carried on, if any was carried on, by the state against the party that was furnishing liquor or anything else for the club. It is a new thing in my experience, and I don't know what to think about it."

Neal Brown and *L. A. Pradt*, (*Bardeen*, *Mylrea & Marchetti*, of counsel,) for plaintiff in error. *C. E. Estabrook*, Atty. Gen., for the State.

COLE, C. J. We shall consider the points relied on for a reversal of the judgment in the order in which they appear in the record.

The plaintiff in error, defendant below, was convicted before a justice of the peace, on a verified complaint, of the offense of selling malt and intoxicating liquors without first having obtained a license therefor, and appealed the cause to the circuit court of Langlade county. Before the trial in the circuit court, he made and filed an affidavit for a change of venue, on the ground of the prejudice of the circuit judge, and the motion for a change of venue was denied. This ruling is the first error assigned here. The right to a change of venue is claimed under section 4680, Rev. St., which provides that any defendant in an indictment found, or information filed, may apply for a change of venue on account of the prejudice of the judge of the court where such indictment is found, or information filed, in the manner provided by law for a change of venue in civil actions. The right to a change of venue is purely statutory, (*Baker* v. *State*, 56 Wis. 573, 14 N. W. Rep. 719,) and it is clear that this case is not within the letter of the statute. But it is said to be within its spirit, and that the words "indictment or information" are used in the section as descriptive of all cases of criminal prosecution of every kind, and include an appeal in a criminal case from a justice of the peace, as well as one on information filed in the circuit court. We do not feel justified in giving the language such a construction. The language is very plain, and it is evident from the whole chapter that the legislature were regulating criminal prosecutions in the circuit court by indictment or information. To say that the provision applied to an appeal from a justice in a criminal case would be amending the statute, and pure legislation. In the *Baker Case* it was decided that this section did not authorize a change of venue in a bastardy proceeding, though that had often been held to be *quasi* criminal in its nature. It was said, in that case, that section 4680 limits the right of removal to cases of an information or indictment in a purely criminal case. That ruling is decisive upon the point made here.

The counsel for the prosecution was permitted, against the defendant's objection, to examine a number of the jurors called as to their qualifications to

sit in the case. The examination was quite extended, and disclosed the fact that these persons had been or were members of a club at Antigo which, as we infer, was formed for the purpose of obtaining beer to drink, and with which club the defendant was connected in some relation, or had been active in forming. If the examination of these jurors disclosed anything, it tended to warrant the inference that the jurors did not stand indifferent in the case, but might have some bias or partiality in favor of the defendant. They, however, swore they were not sensible of any bias, and could render a verdict according to the evidence and law given them by the court, and they were permitted to sit in the case. The defendant then objected generally to the jurors, and to the manner of selecting them, and finally challenged the array. We think the objection to the jurors sworn, as well as the challenge to the array, was utterly untenable and without merit, and was properly overruled by the court.

The complaint charged that the defendant did, on the eleventh day of June, 1886, unlawfully sell, deal, and traffic in, and for the purpose of evading the law did give away, certain spirituous, malt, and intoxicating liquors, without first having obtained a license therefor. On the trial, it was objected that no offense was stated in the complaint. That the complaint states an offense under the statute is too plain for argument. It is not bad for duplicity; it is in the language of the statute, (section 4, *c.* 296, Laws 1885,) and the several acts stated conjunctively constitute but one offense, for which there can be but one conviction and punishment. *State* v. *Bielby*, 21 Wis. 205; *State* v. *Gummer*, 22 Wis. *442; *Storrs* v. *State*, 3 Mo. 7; *Com.* v. *Tuttle*, 12 Cush. 505.

A witness was sworn who testified to the purchase of beer from the defendant about the tenth day of June, 1886, and then evidence was given, against the defendant's objection, as to sales of beer or liquor by the defendant to other persons made before that time. It is said the prosecution made an election to proceed for a sale made on the tenth of June, and should have been confined to that specific charge. We do not understand that in a case of this kind it is necessary to prove a sale on the precise day laid in the complaint. Time does not enter into the nature of the offense, as in some higher grades of crime. In prosecutions for the violations of the excise laws, the state is often compelled to go to trial without being in possession of the proof as to the precise time and persons to whom liquors are sold. It would be a hardship to confine the prosecution to a sale made on the day charged, and exclude evidence of all other sales. In the *Gummer Case*, the last count charged sales to persons unknown, on divers days and times between the days stated and the making of the complaint. Evidence was given under that count, against the defendant's objection, of a sale made, and the ruling was approved by this court. Therefore we do not think it was error for the court below to refuse to confine the prosecution to specific acts of selling on some specific day. It did not matter how many such acts were proven; the conviction in this case would be *prima facie* a bar to any second prosecution for any prior sale. *State* v. *Smith*, 22 Vt. 74. It is said such a practice is unfair to the defendant, who cannot know what charge he will be called upon to disprove. But the same objection would lie in a case where the prosecution is not confined to proving the particular act on the day alleged. Proof of a sale at about the time laid in the complaint would equally take the defendant at a disadvantage. If the rule contended for by defendant's counsel, that proof could only be made of specific sales on the specific days laid, were conceded, it would be almost impossible to enforce the license laws of the state. We do not think such a strict rule is called for in the interests of justice, or for the protection of the accused. In this case the defendant was found guilty as charged in the complaint, and was sentenced to pay a fine of $100 and costs of the prosecution, and to stand committed to the county jail until such fine and costs were paid, or until he was discharged by due course of law.

We have said all we deem it necessary upon the point that the court allowed the prosecution to examine the jurors called as to their qualifications to sit in the case. The extent of such examination was a matter resting within the discretion of the court. It is true, most of these jurors admitted that they had bought liquors at the defendant's saloon, and were, or had been, members of the beer club. This might imply, at least, a probability of bias or partiality on their part in favor of the defendant, who did not object that they were unfriendly to him.

The objection taken to the remarks of the prosecuting attorney, while summing up the case to the jury, is not well founded. These remarks were quite rhetorical, but did not transcend the limits allowed counsel in such cases.

The instructions asked on the part of the defendant were not applicable to the evidence, and were properly refused. It is idle to claim, upon the testimony, that the defendant merely acted as agent for those to whom he delivered liquor. He sold liquor to these persons, and was paid for it. The evidence establishes that fact, if it proves anything. An agent does not usually demand pay of his principal for delivering to the latter his liquor which the agent distributes. Our remarks dispose of the material exceptions to the charge of the court. The jury were instructed that it was not necessary they should be satisfied that the sales of liquor, if made at all, were upon the precise day named in the complaint; that a sale made on any other day between the tenth of May and the eleventh of June would support the charge. This was in accord with the views which we have expressed. What the learned circuit judge said about members of the beer club being permitted to remain on the jury could have done the defendant no harm. It was calculated to provoke comment, that the state should suffer these persons to remain on the jury.

The learned counsel for the defendant has the candor to admit, practically, that his client was perhaps guilty of the offense charged against him. This admission is not improvidently made, in view of the evidence, which conclusively proves his guilt beyond all reasonable doubt. We think he had a fair trial and that the conviction should be affirmed. The judgment of the circuit court is affirmed.

HOPKINS v. TOWN OF RUSH RIVER.

(*Supreme Court of Wisconsin.* January 10, 1888.)

COSTS—ON APPEAL—UNNECESSARY ABSTRACT.

When on an application by plaintiff for a retaxation of costs of printing an abstract, it appears that it might have been reduced one-half, but was increased in part by unnecessary amendments of plaintiffs to the bill of exceptions, the motion will be granted as to a portion of the printing allowance, but without costs of motion.

Motion for retaxation of costs. For the opinion on appeal in this case, see 34 N. W. Rep. 909.

R. H. Start, for respondent. *R. M. Bashford*, for appellant.

LYON, J. The plaintiff moves for a retaxation of costs for the alleged reason that the sum allowed for printing the abstract of the case is excessive. The abstract contains 174 pages, and yet it is the common case of an action against a town to recover damages alleged to have been caused by a defective highway. There is nothing intricate about the case, either in its facts, or in the law governing it. The abstract would be greatly improved by condensing it to one-half its present limits, and it should not have exceeded that. We would reduce the sum allowed for it in that proportion but for the fact that the plaintiff proposed 198 amendments to the bill of exceptions, most of which were allowed. These amendments swelled the record, and in many, if not in most instances unnecessarily. Much of this surplus matter has found its

way into the printed case, and the fault is as much the plaintiff's as the defendant's.

Under these circumstances we adopt a medium line. We grant the motion without costs, and direct the clerk to deduct $30 from the allowance for printing abstract of case.

ROBARE *v.* KENDALL.

(*Supreme Court of Nebraska.* January 6, 1888.)

APPEAL—FROM JUSTICE—ORDER FOR ADDITIONAL SECURITY—TIME OF FILING.

In an action pending before a justice of the peace judgment was rendered in favor of plaintiff and against defendant. Defendant appealed to district court. At a succeeding term of the district court plaintiff moved the court for an order requiring a further undertaking on appeal. The motion was sustained, and defendant ordered to give a further undertaking within 25 days, and that, if not filed in said time, the appeal to be dismissed. The undertaking was not filed within the time prescribed by the order, but at the succeeding term of court defendant appealed and filed a showing, in effect, that the security upon the undertaking for appeal was sufficient, and asked further time in which to file additional undertaking, if one were required. Time was granted by the district court. *Held* no error, the first order requiring the additional security not being complied with, and the court not having lost its jurisdiction of the case.

(*Syllabus by the Court.*)

Error to district court, Valley county; TIFFANY, Judge.

Plaintiff in error, William Robare, recovered a judgment against A. M. Kendall before a justice of the peace on a promissory note. The defendant appealed to the district court, where his appeal was dismissed; but an order was afterwards entered reinstating it, and defendant was given leave to defend the action. The plaintiff brings error.

M. Randall and *E. W. Metcalfe*, for plaintiff in error. *A. M. Robbins*, for defendant in error.

REESE, C. J. This action was originally commenced before a justice of the peace of Valley county, judgment in that action being rendered in favor of plaintiff therein. Defendant appealed to the district court. At the May term, 1886, of the district court, the plaintiff filed a motion in which he moved the court to require defendant to give additional security on the undertaking for appeal. This motion was sustained, and the following order was made and entered upon the journal: "Now, on this twenty-first day of May, 1886, at the coming in of the court, the defendant, by his attorney, A. M. Robbins, filed an affidavit to show cause why he should not be required to give additional undertaking on appeal. After due consideration, the court ordered that the defendant give a further undertaking on appeal within twenty-five days, and that the defendant should file said good and sufficient undertaking, to be approved by the clerk of this court, and that if not filed in said time this appeal to be dismissed, at the cost of the appellant, amounting to $18.93."

It appears from the record that the additional security was not given within the 25 days, nor at any time until the subsequent term of the district court, held in December, 1886, when, upon motion of defendant, further time was given in which to file additional appeal-bond, the order as entered upon the journal being as follows: "Now, on this twentieth day of December, 1886, this cause came on for hearing, on motion by the defendant to be allowed to proceed to trial, and, on consideration of which, the same is sustained, and the said defendant ordered to give additional security on the appeal-bond within five days, the same to be approved by the clerk of this court."

Plaintiff complains of this last order, and brings the case into this court by proceedings in error. The allegations of his petition are—*First*, that the court erred in not denying the motion of defendant, and granting further time in which to file amended undertaking on appeal; *second*, the court erred in

sustaining the motion; and, *third*, the court erred in giving defendant five days in which to file said undertaking. The contention on his part is that the order of May 21st, not being complied with, the cause was dismissed, and the court had no jurisdiction or authority to make the subsequent order. The defendant in error filed his motion in this court to quash the proceedings in error, and strike the case from the docket, for the reason that a final judgment had not been rendered in the district court, as appears from the record.

The real question presented by the petition in error is whether the order of the twenty-first day of May was a final order, and had the effect of dismissing the case, its terms not being complied with. The question presented by the motion is identical with that by the petition in error. The motion will therefore not be considered and the case will be disposed of upon its merits. If the order of May 21st was final, and the failure of defendant to comply with its terms by the day fixed had the effect of dismissing the case, it is apparent that, at the subsequent term of court, no jurisdiction could be had in the premises, and the order complained of by plaintiff in error in this court would be void. But we do not think that order was final. The motion then pending before the court was to require additional security on the appeal-bond. This motion was sustained and the security required. The time within which the security could be given or the amended undertaking filed, was fixed at 25 days, the language of the order being, "that if not filed in said time, this appeal to be dismissed," etc. Had the 25 days expired during the session of the court, it would have been proper for the court, upon its attention being called to the fact that the amended undertaking had not been filed, to enter a final order of dismissal, and the case would then have been dismissed. Court was not in session at the expiration of the time, and no action was taken, so far as the record before us discloses, until the next term of court, in December following.

Section 1016, Civil Code, provides that in "any proceedings on appeal, when the surety on the undertaking shall be insufficient, or such undertaking is insufficient in form, it shall be legal for the court, on motion, to order a change or renewal of such undertaking, and direct the same to be certified to the justice of the peace from whose judgment the appeal was taken, or that it be recorded in said court." Under the provisions of this section, it was entirely competent for the district court to order a renewal of the undertaking, and that the same should be filed in that court. It was competent for the court, in making the order, to attach thereto the additional order dismissing the action in case the bond was not filed; and had the court seen proper, in the exercise of its discretion, to have adhered to the order of dismissal, and refused to allow the filing of an amended undertaking at the next term, it would, no doubt, have been proper so to do, in case its discretion was not abused.

In the order of May 21st the right of defendant to file an amended undertaking might have been cut off, and the cause dismissed at the December term; but the district court, doubtless in furtherance of justice, saw proper to permit the additional bond to be filed. In this we can see no error. There is no statutory provision covering cases of this kind; neither have there been any adjudications in this state upon this question, but, so far as we are advised, the practice throughout the state has been in accordance with the proceedings of the court below.

No error appearing, the order of the district court is affirmed.

(The other judges concur.)

STATE *ex rel.* CITY OF NORFOLK *v.* BABCOCK.

(*Supreme Court of Nebraska.* January 6, 1888.)

MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERS—POWER TO ISSUE BONDS.

Section 89, c. 14, Comp. St. 1887, confers upon cities of the second class, having more than 1,000 and less than 5,000 inhabitants, the right to make regulations to

secure the general health of the city, and to construct sewers, and to regulate their use. Under this authority, it was held that, when it became necessary for the city of N. to construct a sewer for the purpose of draining surplus water from its principal street, it had the power to provide the necessary money to pay for the same by the issuance of its bonds; such power being incident to and necessary for the carrying out of the authority expressly granted.

(*Syllabus by the Court.*)

Mandamus. This is a proceeding to determine the validity of certain bonds issued by the city of Norfolk for the purpose of constructing a sewer. The bonds were issued in due form, and presented to the state auditor, H. A. Babcock, for registration and certification. The auditor refused to register and certify them, on the ground that the city of Norfolk was a city of the second class, and unauthorized to issue such bonds under the statute. The city of Norfolk applies to the supreme court for a writ of *mandamus* to compel the auditor to register and certify the bonds.

F. P. Wiyton, for relator. *The Attorney General*, for respondent.

REESE, J. This action is submitted under the provisions of section 567, Civil Code; the necessary affidavit that the proceeding is in good faith, to determine the rights of the parties, being filed. The controversy is in relation to certain bonds issued by the city of Norfolk for the purpose of constructing a sewer. The bonds were issued in due form, and presented to the auditor for registration and certification. That officer declined to register and certify the bonds, "solely on the ground that cities of the second class, having less than five thousand inhabitants, are not authorized to issue bonds to aid in the construction of sewers as works of internal improvement." The cause is submitted upon an agreed statement of facts, which is as follows: "The relator is, and for more than a year last past has been, a municipal corporation, duly organized under the laws of Nebraska; a city of the second class, of over one thousand and less than five thousand inhabitants. On the first day of April, 1887, the assessed valuation of the relator was not less than $285,000. The relator has no bonded indebtedness prior to the bonds herein sought to be registered. The annexed transcript, marked 'Exhibit A,' which is incorporated into and made a part of this stipulation, is a true and accurate history and transcript of all things connected with and pertaining to the voting of $8,000 of bonds of said relator on the second day of September, 1887, for the purpose of constructing sewers in said city. The bonds referred to in said transcript have been duly issued by the relator, and submitted to defendant, who is auditor of public accounts, for registration; but defendant refused, and still refuses, to register said bonds, solely on the ground that cities of the second class, having less than five thousand inhabitants, are not authorized to issue bonds to aid in the construction of sewers, as works of internal improvements." The application is for a *mandamus* to compel the auditor to register and certify the bonds. That officer, not being satisfied as to his duty, declined to act, and submits the question to this court for its decision.

As the city of Norfolk is a city containing more than 1,000 and less than 5,000 inhabitants, its authority must be decided under the provisions of the the first division of chapter 14, Comp. St. 1887, and by the provisions of subdivision 26 of section 39 of that act. It is under that section that cities of the second class, in their corporate capacities, are authorized and empowered to enact ordinances "to construct and keep in repair culverts, drains, sewers, and cesspools, and to regulate the use thereof." The question here presented is, does the conferring of this power upon the municipality authorize it to issue bonds for the purpose of aiding in the construction of sewers?

Upon the argument, it was contended on the part of the respondent that subdivision 3 of section 69 of the same chapter, which provides that the expenses of constructing bridges, culverts, and sewers shall be defrayed out of the general fund of the city or village, not to exceed two mills of the levy for

general purposes, governs. We think this provision must be held to apply to villages of the character named in section 40 of the same chapter, and containing not less than 200 nor more than 1,500 (1,000?) inhabitants, and not to section 39, now under consideration; therefore the question of the power to issue bonds must be decided upon subdivision 26 above named. The proposition submitted to and voted upon by the inhabitants of the city of Norfolk was that of issuing the bonds of the city, in the sum of $8,000, for the purpose of aiding in the construction of a sewer along and beneath Norfolk avenue, by said city, and the necessary grading therefor, and running east on the north side of said Norfolk avenue, to the north fork of the Elkhorn river. It will, therefore, be seen that the purpose of the issuance of the bonds was to raise money to construct the sewer under this principal street and for the purpose of grading the street. By the subdivision of section 39, above referred to, the city is authorized to construct and keep in repair culverts, drains, sewers, and cesspools. Considerable attention was given in the argument of the case to the proposition that the sewer alluded to was intended as and for the purpose of draining the avenue referred to, and carrying off the surplus water accumulating thereon. This subdivision confers upon the municipality, in express terms, the right to construct the sewer, and we think it may safely be said that, even without statutory authority, the right to improve the street in such a way as to make it passable at all seasons of the year would be an inherent right vested in the municipality without express statutory authority therefor. But without discussing this proposition, we will simply inquire whether the express authority to construct a sewer will carry with it an implied authority to issue bonds to aid in doing so.

The authorities upon this subject are substantially uniform, some of which will be briefly noticed. In *City of Wyandotte* v. *Zeitz*, 21 Kan. 649, which was an action to recover upon certain bonds issued by the city denominated "Sidewalk Bonds," it was held that the city had the power to issue the bonds in payment for the building of sidewalks, notwithstanding the fact that the money to be obtained with which to pay the bonds had to be collected as personal tax from the abutting lot-owners. The act under which the city government had issued the bonds was to the effect that the city, acting under its provisions, was authorized and empowered to enact ordinances for the purpose of opening and improving streets, avenues, alleys, and making sidewalks within the city. The right of the city to pay its moneys for the construction of sidewalks was not questioned; but it was contended that since the charter provided that for making and repairing sidewalks the assessments should be made on lots abutting on the improvement, therefore the city could not issue bonds in the first instance for the construction of the sidewalk. But it was held that the corporation being authorized in general terms to build the sidewalk, without specification of the manner or means, it necessarily followed that it could contract with some person to furnish the material, and provide the labor, to be paid for upon the completion of the work; and that the city had the power to agree upon the mode, terms, and time of payment, and to give suitable acknowledgment of indebtedness by bond, note, or other contract. In *Desmond* v. *City of Jefferson*, 19 Fed. Rep. 483, it was held that, where the charter of the city empowered it to organize a fire department, and regulate the same, and adopt such other measures as should conduce to the welfare of the city, the city was authorized to purchase a fire-engine, and issue its negotiable bonds therefor. In *State* v. *City of Madison*, 7 Wis. 582, where the charter of the city, in express terms, conferred upon it the power to establish and regulate boards of health, provide hospital and cemetery grounds, and regulate the burial of the dead, it was held that the city was authorized to purchase the ground, and, if necessary, the common council could issue the bonds of the city to pay for them, the right to issue such bonds being implied from the authority to purchase the ground.

In *Mills* v. *Gleason*, 11 Wis. 493, it was held that, where the charter of a municipal corporation confers power to purchase fire apparatus, cemetery grounds, establish markets, and many other things for the consummation of which money would be a necessary means, it would also, in the absence of any positive restriction, confer power to borrow money as an incident to the execution of these general powers. In *Clarke* v. *School-Dist. No.* 7, 3 R. I. 199, it was held that the corporation might bind itself by an evidence of debt in a negotiable form for any debt contracted in the course of its legitimate business, in the exercise of the authority conferred by law. *Hubbard* v. *Saddler*, (N. Y.) 10 N. E. Rep. 426, was a case where the county authorities were authorized by law to lay out and construct streets and avenues, and provide for the estimate and award of damages, and for the payment of them, and all other charges and expenses necessary to be incurred. By a limited or general assessment, the supervisors had the power to issue bonds running from two to six years, to raise money to pay for the awards and damages made in anticipation of the collection of revenues by the special or general assessment made. The statute conferred the right to issue bonds for the purpose of building bridges, purchasing turnpike roads or toll-bridges, buying lumber for town hall, and constructing the same, including cemeteries, but not including the payment of damages to real estate by the laying out and construction of streets and avenues thereon. But it is held that, practically, the town was authorized to incur the debt to the land-owners; it was made responsible for its payment, and authorized to provide the necessary means therefor; and therefore the supervisors had the authority to issue bonds to raise the money. In *Kelley* v. *Mayor, etc.*, 4 Hill, 263, it was held that the municipal corporation might issue negotiable paper for a debt contracted in the course of its proper business, and no provision in its charter or elsewhere merely directing a certain form, in affirmative words, should be considered as taking away this power. And the same was held in *Moss* v. *Oakley*, 2 Hill, 265. See, also, upon this same subject, *State* v. *Town of Chillicothe*, 7 Ohio, 355.

In addition to the express powers conferred by the subdivision above quoted, the city had authority, under subdivision 6 of the same section, to make regulations to secure the general health of the city; and doubtless, for this purpose, the right to construct sewers is also given. If it becomes necessary for the health and convenience of the city to drain the principal streets by the use of under-ground drains or sewers, the power is given, in express terms, to do so. To say that this power existed, but that the means to make it effective had been withheld, would simply destroy the authority and nullify the legislative grant. We are fully aware of the necessity for great care in the exercise of the right to borrow money by municipal corporations, and that the power so to do should not be held to have been conferred except when expressly given, or when absolutely necessary to carry out and make effective the powers expressly conferred.

We think the present case falls clearly within the latter class, and that the bonds were legally issued. The writ will therefore be allowed.

(The other judges concur.)

END OF VOLUME 35.

INDEX.

NOTE. A star (*) indicates that the case referred to is annotated.

Abandonment.

Of wife, see *Husband and Wife*, 3, 4.

ABATEMENT AND REVIVAL.

Objections to jurisdiction, see *Appearance*.

Other suit pending.

1. To maintain the defense of the pendency of another suit for the same cause of action, it must be affirmatively proved that the suit is *still pending*.—Phelps v. Winona & St. P. Ry. Co., (Minn.) 278.

Death of party—Substitution.

2. After the appraisement of damages suffered by an abutting property owner by reason of a change of grade had been reported to and accepted by the city council, the owner died. *Held*, that his administratrix, and not his heirs, was the proper party to be substituted in his place in the further proceedings by appeal, etc., as it was then an interest in personal property which was in litigation.—Conklin v. City of Keokuk, (Iowa,) 444.

ABDUCTION.

What constitutes.

1. In order to constitute a "taking," within the meaning of Pen. Code Minn. § 240, subd. 1, it is not necessary that it should appear that force or violence was used. It may be accomplished by persuasion, enticement, or device. But it must not only appear that the female was taken away or induced to leave through the active influence or persuasion of the accused, but it must also appear that it was done for the illicit purpose forbidden by the statute.—State v. Jameson, (Minn.) 712.

Indictment.

2. In an indictment for abduction, under Pen. Code Minn. § 240, sudd. 1, it is not necessary to allege that the taking was without the consent of the parent or guardian, but it is proper to state from whose custody the female was taken.—Id.

Abstracts of Title.

Right to make, see *Records*, 1.

ACCORD AND SATISFACTION.

See, also, *Compromise; Payment; Release and Discharge.*

Consideration.

1. A debtor and creditor had an accounting, and the latter agreed to accept certain property of the former in full satisfaction of his debt; but the property was valued by them at eight dollars less than the amount of the debt, which difference was disregarded, and the agreement above entered into. *Held*, that the rule that acceptance of part payment of a debt is no consideration for the release of the whole debt, has no application to such a case where property is accepted in payment.—Hasted v. Dodge, (Iowa.) 462.

2. After the right to redeem certain property from tax sale had, as the parties supposed, expired, and the tax title become absolute, the parties made an arrangement in accordance with which the former owner quitclaimed a part of the land to the tax-sale purchaser, and the latter quitclaimed the remainder to the former. There was no fraud or mistake of facts. *Held* to be a compromise of their respective rights in the land, and that as such it will be upheld, although a subsequent judicial decision shows the rights of the parties to be different from what they supposed. —Hall v. Wheeler, (Minn.) 877.

Impeachment.

3. In an action on an insurance policy, plaintiff claimed that an alleged accord and satisfaction was effected by defendant's fraud. *Held*, that plaintiff cannot recover unless he shows repayment or tender of the money received before suit brought.—Pangborn v. Continental Ins. Co., (Mich.) 814.

4. Where plaintiff, in a settlement with defendant, overpaid him, on account of the fraudulent statements of defendant, he can recover back such a sum as will reduce his payment to the amount he would have

been required to pay on an accounting between the parties.—Wells v. McGeoch, (Wis.) 769.

5. Where a contract importing to settle all differences, "of whatever name or nature," is complete in itself, and was afterwards fully performed, and a suit in chancery at that time pending between the parties was discontinued, evidence cannot be introduced to show that it was only a partial settlement, and that the matters in controversy in the chancery suit were not included. — Freeman v. Freeman, (Mich.) 897.*

Accounting.

See *Equity*, 8.

ACTION.

See, also, *Abatement and Revival; Limitation of Actions; Parties; Pleading; Venue in Civil Cases; Writs.*

By and against
Assignee, see *Assignment*, 8.
Corporations, see *Corporations*, 4.
Infants, see *Infancy*, 8.
Municipal corporations, see *Municipal Corporations*, 25.
Partners, see *Partnership*, 17.
For price, see *Sale*, 12–15.
On bills and notes, see *Negotiable Instruments*, 3, 4.
Insurance policies, see *Insurance*, 11–13.
Bonds, see *Bonds*.
Contracts, see *Contracts*, 11–18.
Particular forms, see *Assault and Battery*, 1; *Assumpsit; Creditors' Bill; Death by Wrongful Act; Deceit; Divorce; Ejectment; Injunction; Libel and Slander; Malicious Prosecution; Negligence; Nuisance*, 3, 4; *Partition; Quieting Title; Replevin; Specific Performance; Trespass; Trover and Conversion.*

Joinder of causes.

1. A cause of action for money wrongfully withheld is properly joined with one for money wrongfully or fraudulently exacted and paid.—Kraemer v. Deustermann, (Minn.) 276.

2. A complaint alleged that defendant, in order to induce plaintiff to purchase certain shares of mining stock, had made certain representations concerning the mine; and also that defendant had to the same end, by an instrument in writing, warranted that no assessments had been made, or were soon to be made, against said stock. *Held*, that this was not a misjoinder of causes of action, and a demurrer to the complaint on that ground would not lie.—Humphrey v. Merriam, (Minn.) 865.

Adjournment.

See *Justices of the Peace*, 2.

Adverse Possession.

See *Ejectment*, 3–5; *Limitation of Actions*, 2, 8.

Alimony.

See *Divorce*, 3–6.

Animals.

Live-stock shipments, see *Carriers*, 3, 4.
Stock-killing cases, see *Railroad Companies*, 21–24.

APPEAL.

I. Appellate Jurisdiction.
II. Requisites.
III. Practice.
IV. Review.
V. Effect of Appeal.
VI. Decision.

See, also, *Certiorari; Criminal Law*, 32–36 *Exceptions, Bill of; New Trial.*
Costs, see *Costs*, 5–8.
From allowance of claim against estate, see *Executors and Administrators*, 7–10.
Notice, see *Municipal Corporation*, 21, 22.

I. Appellate Jurisdiction.

Appealable orders.

1. An order of the district court dismissing an application for the settlement of a bill of exceptions is not appealable.—Richardson v. Rogers, (Minn.) 270.

2. An order for final judgment for plaintiff, and denying defendant's motion for judgment, does not determine the action and is not appealable under Rev. St. Wis. § 3069.—Murray v. Scribner, (Wis.) 311.

3. An order dismissing an appeal from an order of the town supervisors laying out a highway, and from their award of damages, is appealable under Gen. St. Minn. 1878, c. 86, § 8, subsec. 5, as "an order which in effect determines an action and prevents a judgment from which an appeal might be taken."—Town of Haven v. Orton, (Minn.) 264.

From justices' courts.

4. A party who has appeared in an action before a justice of the peace, and entered into an agreement continuing the cause, may appeal from the judgment rendered against him before such justice. Cleghorn v. Waterman, 16 Neb. 230, 20 N. W. Rep. 686, 877; Crippen v. Church, 17 Neb. 306, 22 N. W. Rep. 567.—Smith v. Borden, (Neb.) 218.

II. Requisites.

In general.

5. Where defendant demurred to plaintiff's petition in equity as not stating facts

sufficient to constitute a cause of action, and the demurrer was sustained, neither a motion for a new trial, nor bill of exceptions, was necessary in order to obtain a review in the supreme court.—Hays v. Mercier, (Neb.) 894.

Time of taking.

6. For the purposes of an appeal a judgment is not perfected until the costs are duly taxed and inserted.—Richardson v. Rogers, (Minn.) 270.

Notice.

7. An appeal taken by one of several co-parties from a judgment taxing costs against all of them cannot be considered, unless notice has been served upon the other co-parties; for a modification of the judgment as to one co-party would affect the rights of all the others.—Moore v. Held, (Iowa,) 623.

8. Code Iowa, § 3174, provides that "a part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties." Sections 3178 and 3179, however, provide that an appeal is taken by serving notice on the adverse party or his agent, and that the appeal is perfected when such service is made, and the clerk's fees secured. Where an appeal was duly taken by two of several co-parties, but without service of notice on the other co-parties, *held*, that the court had jurisdiction to determine such questions as only affected the interests of appellants and the adverse party.—Id.

9. If notice of appeal from an order of the town supervisors laying out a highway has been actually served upon the chairman of the board, the mere fact that proof of such service has not been filed with the clerk of the district court is no ground for dismissing the appeal, there being nothing in the Minnesota "road law" requiring the filing of such proof, and if the notice of appeal describes the order and the highway so as to fully identify it, and apprise the supervisors beyond the possibility of mistake what is appealed from, it is sufficient, although it misstates the exact date of the order.—Town of Haven v. Orton, (Minn.) 264.

Bond.

10. A town is a "municipal corporation" within the meaning of Rev. St. Wis. § 3062, which provides that no undertaking need be given upon an appeal taken by a municipal corporation.—Miller v. Town of Jacobs, (Wis.) 824.

11. Rev. St. Wis. § 4032, provides that, on appeal from the county court, the party appealing, "other than an executor, guardian, administrator, or trustee," shall file a bond. A guardian, having a bond for $200, was ordered, on an accounting, to pay his ward $1,827.19, and appealed to the circuit court. *Held*, that the appeal required no bond to be filed by the guardian; following Stinson v. Leary, 34 N. W. Rep. 63.—Tompkins v. Page, (Wis.) 563.

12. If the condition of an appeal-bond substantially covers the provisions of the statute, and secures to the respondent all that the law designed for him, it is sufficient, although not in the exact words of the statute.—Riley v. Mitchell, (Minn.) 472.

13. In an appeal from the probate court to the district court, under Gen. St. c. 53, a defect in the appeal-bond in being executed by only one surety does not go to the jurisdiction of the appellate court over the subject-matter, but is a mere irregularity, which the respondent may waive, or which the district court may allow to be remedied by amending the bond or filing a new one.—Id.

III. PRACTICE.

Assignments of error.

14. Assignments of error not designating the particular errors objected to, as required by Code Iowa, § 3207, cannot be considered. — Wadsworth v. First Nat. Bank, (Iowa,) 504.

15. Under Code Iowa, § 2789, exceptions to the instructions of the trial court must state specifically the grounds upon which they are based.—Brantz v. Marcus, (Iowa,) 115.

16. On objection made to the admission of evidence, where no reason is assigned, the appellate court will not reverse the ruling of the court admitting it.—Merkle v. Township of Bennington, (Mich.) 846.

17. A separate exception, made in general terms, to each one of the findings of fact by the court, is sufficient to have the questions reviewed on appeal.—County of Milwaukee v. Schandein, (Wis.) 887.

Record.

18. The misconduct of counsel in argument to the jury should be brought up by bill of exceptions, and not by affidavits and counter-affidavits.—Rayburn v. Central Iowa Ry. Co., (Iowa,) 606.

19. Assignments of error were based upon the insufficiency of the evidence, and plaintiffs had 90 days in which to file a bill of exceptions. A bill filed within the time allowed did not certify the evidence taken at the trial, a copy of which was, however, certified by the judge and filed afterwards. *Held*, that the evidence did not constitute a part of the record.—Wadsworth v. First Nat. Bank, (Iowa,) 504.

20. The fact that an appellant's abstract incorrectly designates the judge making the certificate of the evidence, can have no effect in the determination of the appeal.—Wilson v. Russell, (Iowa,) 492.

Appeals from justices' courts.

21. On appeal from a justice to the district court, appellee at a succeeding term obtained an order that appellant give an additional undertaking within 25 days, or his appeal be dismissed. No undertaking was filed, but at the next term appellant made showing that his undertaking was sufficient, and asked for further time to file an additional one if required. *Held*, no error to grant this request, the first order not having been obeyed, and the court not having lost jurisdiction.—Robare v. Kendall, (Neb.) 940.

22. Under section 1008 of the Nebraska Code as it existed in 1885, a party appealing from the judgment of a justice of the peace had until the second day of the succeeding term of the district court in which to file the transcript, and the plaintiff had 20 days thereafter in which to file his petition. Therefore, where an appeal has been properly taken by a defendant, a motion made by him on the first day of such term to dismiss the cause for want of prosecution was premature, and should have been overruled.—Smith v. Borden, (Neb.) 218.

23. Defendant duly appealed January 4, 1884, to the circuit court from a judgment in a justice's court, and noticed the appeal for trial at the first term after the record was filed. The circuit judge, having formerly been of counsel, declined to try the case, and transferred it to another county. The record was taken from the office of the clerk by an attorney for plaintiff, but was never returned to that office, nor to the office of the clerk of the other county, and no steps were taken by plaintiff's attorneys to supply it until October, 1886, a few days before moving to dismiss the appeal under Rev. St. Wis. § 3766, providing that in appeals from justices' courts, "if neither party shall bring the appeal to a hearing in the appellate court before the end of the second term after the filing of the return of the justice therein, such court shall dismiss the appeal, unless it shall continue the same by special order for cause shown." *Held* to be within the exception, the appeal not being triable in the former county because of the disqualification of the judge, and because plaintiff had lost the record.—Cook v. McDonnell, (Wis.) 556.

IV. Review.

Objections not raised below.

24. Where no objections were made to the instructions in the motion for a new trial, they cannot be considered by the supreme court.—Omaha, N. & B. H. R. Co. v. O'Donnell, (Neb.) 285.

25. An assignment of error to be available on appeal must be founded on objections raised below.—D. M. Osborne & Co. v. Williams, (Minn.) 871.

26. The record should show that at some stage of the proceedings the very defect in the pleading complained of was presented to the court, either by motion for a more specific statement, or by motion in arrest of judgment.—Shuck v. Chicago, R. I. & P. R. Co., (Iowa,) 429.

27. An expert witness was asked to "state whether a blow upon the nose, which was sufficient to break the bones, would probably exite inflammatory action of any membrane of the nose." The question was objected to as irrelevant, immaterial, and leading. *Held*, that the appellate court could not say that the question was improperly allowed, on the ground that there was no evidence that any bones were broken, this objection not being suggested at the trial.—Quackenbush v. Chicago & N. W. Ry. Co., (Iowa,) 523.

28. Under Code Iowa, §§ 3167, 3168, an alleged mistake by the clerk or court below in computing a judgment cannot be considered until it has been presented and acted upon by the court below.—Rising v. Teabout, (Iowa,) 499.

29. Alleged errors in the clerk's taxation of costs will not be reviewed here, where no relief has been sought in the court below.—Stevens v. McMillan, (Minn.) 372.

30. Where plaintiff relies in the trial court upon an injury caused by a defective sidewalk, he cannot, on appeal, change his cause of action and claim damages for the injury as caused by a defective street.—Cooper v. City of Big Rapids, (Mich.) 173.

Discretion of trial court.

31. The allowing of an amendment to a pleading at the trial, is within the discretion of the court.—D. M. Osborne & Co. v. Williams, (Minn.) 871.

Presumptions.

32. Where the record does not contain the testimony in the case, and the instructions complained of are correct, as abstract propositions of law, it will be presumed they were sustained by the evidence.—State v. Broadwell, (Iowa,) 691.

33. When the misconduct of an attorney, in making statements to the jury, is alleged as error, the ruling of the trial judge, founded upon affidavits by each party, as to the statements, will not be disturbed. The record must clearly show misconduct by an attorney to justify a reversal of a decision on that ground.—Everett v. Central Iowa Ry. Co., (Iowa,) 609.

34. Where all of the material facts contained in affidavits on a motion for a new trial are contradicted by affidavits in resistance, the judgment of the trial court denying such motion will ordinarily be upheld.—Campbell v. Holland, (Neb.) 871.

35. Plaintiff applied to correct an entry in the record made by the clerk, and submitted an affidavit strongly supporting the motion. *Held* that, in the absence of any showing to the contrary, it will be presumed the court heard other testimony, and that the order overruling the motion was sustained by evidence.—State v. Drosky, (Iowa,) 586.

36. After the impaneling of a jury, and the statement of counsel, a juror was excused for cause. Thereupon the parties refused to call another juror to take his place, and the court discharged the jury, giving the parties full power to challenge the jury to be called, and thereupon the eleven remaining jurors were recalled, and one by stander. As nothing appeared from the record to disprove that the court first exhausted the regular panel, and then had a talesman summoned, it will be presumed the proceeding was regular and no error was committed.—State v. Laughlin, (Iowa,) 448.

Questions of fact.

37. Under Rev. St. Wis. § 3070, providing that the supreme court may review any intermediate order or determination of the trial court involving the merits, and necessarily affecting the judgment, appearing upon the record, whether the same were excepted to or not, the court may review the sufficiency of the evidence to sustain the verdict, even if no exception to or appeal from the order overruling the motion for new trial has been made.—Tourville v. Nemadji Boom Co., (Wis.) 330.

38. A decree against the clear weight of evidence will be set aside.—Larson v. Butts, (Neb.) 190.

39. In an equity appeal, where the testimony is contradictory and conflicting, the findings of the trial judge will not be disturbed.—Fender v. Powers, (Mich.) 80.

40. The appellate court will not reverse a finding of fact of the trial court unless the decided preponderance of the evidence is against it, or unless it be evident from the finding that it was based upon a mistaken view of the law.—County of Milwaukee v. Schandein, (Wis.) 337.

41. On an appeal on questions of fact alone, the appellate court will not disturb the findings of the trial court unless they are against the clear preponderance of testimony.—McDonald v. Estate of Kelly, (Wis.) 295.

42. Where the testimony is conflicting, and pretty evenly balanced, the finding of a trial jury thereon will not be disturbed, even if the testimony seems to preponderate in favor of the losing party.—Forbes v. Thomas, (Neb.) 411.

43. An appeal was taken without an exception of record, and on the sole ground that the verdict was contrary to the evidence. It appeared that the evidence was conflicting as to all the material facts upon which the verdict was founded. *Held*, the verdict would not be disturbed.—Tourville v. Nemadji Boom Co., (Wis.) 330.

Matters not apparent of record.

44. Where the record on error showed that but a very small portion of the evidence taken upon the trial was contained in the bill of exceptions, and the bill nowhere averred that all the testimony was set forth in the record upon any given point, *held*, that the rulings of the court upon questions of evidence would not be disturbed.—Bostwick v. Losey, (Mich.) 246.

45. When the abstract does not show that the admission of questionable evidence was excepted to, it will not be passed upon in the appellate court.—Gale v. Bohanan, (Iowa,) 599.

46. Where an appeal is presented upon a transcript, without abstract or argument, and no error is discovered in the record, the judgment will be affirmed.—State v. Stubbs, (Iowa,) 521.

47. Defendant asked leave to amend his answer. The court refused, stating that in the refusal he was governed by what counsel for defendant had said in his opening to the jury. *Held*, that the court cannot review the order refusing leave to amend unless what was said by the counsel be made a part of the settled case.—Harris v. Kerr, (Minn.) 379.

Harmless error.

48. To call for a reversal of a judgment, the error must appear to have been prejudicial to the party seeking to take advantage of it.—Pollard v. Turner, (Neb.) 192.

49. One who claims that an error was without prejudice must affirmatively show it to be so. Prejudice will be presumed until the contrary is shown.—McCormick Harvesting Machine Co. v. Jacobson, (Iowa,) 627.

50. An admission of an answer to an objectionable question, which is entirely favorable to the objecting party, is not prejudicial error.—Baker v. Chicago, B. & Q. R. Co., (Iowa,) 460.

51. Rulings upon a branch of a case composed of two causes, which branch is decided in favor of the party complaining of the alleged errors, are not grounds for reversal.—Rising v. Teabout, (Iowa,) 499.

52. When the record shows that improper evidence of value has been admitted, but the verdict was within the value as fixed by other and undisputed evidence, it will not be disturbed.—Meyenberg v. Eldred, (Minn.) 371.

53. Defendant introduced a card published by plaintiff. The court in his charge spoke of the card as "a mere piece of ego-

tism." On direction of the court one-half of the verdict was remitted by plaintiff. *Held*, that even if such an expression of opinion by the court was error, the remission was sufficiently large to remove all grievance of the defendant, as the card was introduced only in mitigation of punitive damages.—Massuere v. Dickens, (Wis.) 849.

54. Where a verdict is set aside and a new trial results in a verdict substantially the same, and on judgment rendered thereon defendant brings error, and plaintiff seeks also by petition in error to have judgment on the first verdict, the last verdict being sufficient in either case, the action of the court below will not be disturbed.—Omaha, N. & B. H. R. Co. v. O'Donnell, (Neb.) 235.

Objections waived.

55. Where the record shows that the trial court failed either to sustain or overrule certain objections to testimony, but it does not appear that exceptions were taken to this action of the court, its conduct will not be reviewed on appeal.—McGarvey v. Roods, (Iowa,) 488.

56. In a suit for damages for injuries from a fall, plaintiff alleged in his declaration that the neglect which caused the injury was with the knowledge and in the presence of defendant, while the testimony showed he was absent, and knew nothing about it. *Held* that, as there was no claim of a variance at the trial, nor in the assignment of errors, it cannot be raised on appeal.—Slater v. Chapman, (Mich.) 106.

V. EFFECT OF APPEAL.

Enforcement of order appealed from.

57. In an action for partition of land, a decree was entered ordering the partition, and requiring the widow to elect between her dower and homestead right, and the widow took an appeal and *supersedeas*. *Held*, that the appeal and *supersedeas* forbid the court to require the widow to make the election.—Thomas v. Thomas, (Iowa,) 698.

Amendment of order appealed from.

58. The court, on its own motion, set aside a special verdict, and ordered a retrial. From this order defendant appealed. Afterwards, during the same term, the court, on motion of plaintiff, amended the original order by adding a recital in correction thereof, and defendant took another appeal from such corrected order. *Held*, that while the court had power to amend the original order, after the appeal therefrom and the return to this court, the defendant had the right to have its first appeal determined as the order then was, without regard to the subsequent correction.— Kelly v. Chicago & N. W. Ry. Co., (Wis.) 588.

VI. DECISION.

Law of the case.

59. When this court has declared the law of a case, the law laid down in the decision of the cause remains the law, to be applied upon the same state of facts in all the subsequent proceedings in the cause.—Mynning v. Detroit, L. & N. R. Co., (Mich.) 811.

APPEARANCE.

Special appearance.

In an action by attachment the defendant answered, setting up facts showing fraud in the procurement of the service of the process, and objected to the jurisdiction of the court. *Held*, that an answer which simply sets up facts showing want of jurisdiction is not such an appearance as waives the objection, but merely a special appearance.—Chubbuck v. Cleveland, (Minn.) 862.

ARBITRATION AND AWARD.

Refusal to perform award.

In an action to recover expenses and money paid on a contract for the purchase of land, where the claim for expenses had been submitted to arbitrators, and defendant, on the ground that he had never agreed to pay these expenses, refused to pay the award, whereon plaintiff abandoned the contract, a charge which appears to intend that plaintiff could abandon the award as well as the contract, and could then recover nothing at all, is misleading and prejudicial to plaintiff.— Hart v. Firzlaff, (Mich.) 102.

Arrest.

Wrongful, see *Sheriffs and Constables*, 3.

ASSAULT AND BATTERY.

Civil action—Instructions.

1. The court instructed the jury that, in order to entitle the plaintiff to recover, they must find that he was "unlawfully, wantonly, and willfully assaulted." It was insisted that the word "wanton" means malicious, and that there was no evidence of malice. *Held*, that no such meaning should be given the word as used by the court, and the jury were only required under the instruction to determine whether the assault was willful and intentional, or justifiable or excusable. — Brantz v. Marcus, (Iowa,) 115.

Aggravated assault—Evidence.

2. The testimony of a physician as to the result which, according to medical

science, *might* follow blows and violence of a given character, when it is not alleged the result did follow, is not competent as tending to prove an assault with intent to inflict great bodily injury.—State v. Redfield, (Iowa,) 673.

ASSIGNMENT.

Actions by assignee, see *Parties*, 1.
Of debt and mortgage, see *Mortgages*, 14.
lease, see *Landlord and Tenant*, 4.
patent by parol, see *Patents for Inventions*.
tax-certificate, see *Taxation*, 14, 15.

What is assignable.

1. A right of action against a railroad company for killing stock may be assigned, and the assignee, by serving the notice required by Code Iowa, § 1289, for the purpose of recovering double damages, will be entitled to recover such damages upon the same showing as the original owner of the stock. REED, J., dissenting.—Everett v. Central Iowa Ry. Co., (Iowa,) 609.*

Evidence.

2. An assignee of a chose in action may testify whether or not he is the owner of the property, when material.— Cilley v. Van Patten, (Mich.) 831.

Action by assignee.

3. A party holding a non-negotiable note, having an indorsement by the payee to him, can maintain an action for the payment thereof.— Rising v. Teabout, (Iowa,) 499.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, *Bankruptcy; Insolvency.*

What constitutes.

1. Laws Wis. 1883, c. 249, § 1, forbids preferences in an assignment for the benefit of creditors, or in transfers made 60 days before such assignment. Rev. St. Wis. §§ 1694–1696, provide that all assignments for the benefit of creditors shall be void as against the creditors, unless a bond is given. Defendant assigned all his interest in an uncompleted contract to the garnishee, in consideration that the garnishee should pay the debts on the contract, and should, out of his profits, pay a certain debt of defendant, either in whole or part. *Held*, that the transfer to the garnishee was absolute and unconditional in consideration of the payment of the debt by the garnishee, and, as it was unaccompanied by any trust in favor of defendant or his creditors, the transaction was not an assignment for the benefit of creditors, within the meaning of the statute.—Ingram v. Osborn, (Wis.) 304.

2. A debtor turned over all his stock to a creditor in full satisfaction of his debt, which was greater than the value of the stock. *Held* that, as the transfer was unaccompanied by any trust in favor of the debtor or his creditors, it was not an assignment for the benefit of creditors, under the provisions of Laws Wis. 1888, c. 249, § 1; and Rev. St. Wis. §§ 1694–1696; following Ingram v. Osborn, *ante*, 304.—Noyes v. Schner, (Wis.) 810.

Inventory.

3. In an assignment for the benefit of creditors of all a debtor's property, both real and personal, "except such as are exempt from levy and execution under the laws of Wisconsin," an inventory of the property assigned, wherein the assignor states that he reserves the right to claim any of the lots assigned and inventoried as his homestead, and to select certain articles of personal property as being exempt from levy and sale on execution, is not such an insufficient inventory under the law as to render the assignment void, for it contains all the property assigned.—German Bank v. Peterson, (Wis.) 47.

4. An instruction, that when the inventory and list were filed in time and properly certified, the burden of proof of their incorrectness is on the party alleging it, and when it is shown that assets were omitted, then the burden is on the party seeking to sustain it to show that such omissions were made by mistake, is correct.—Batten v. Smith, (Wis.) 542.

Preferences.

5. In consideration of an extension of certain notes, defendants executed a mortgage in trust for creditors, whose claims were in the hands of the trustee for collection, retaining possession, and afterwards sold the property, but turned the proceeds over to discharge the claims. Plaintiff contended that this mortgage was in fact an assignment, with unlawful preferences. *Held* that, to make a preference of creditors unlawful, under Laws Wis. 1883, c. 349, it must be by assignment, or within 60 days prior to it, and not by common mortgage.—Chicago Coffin Co. v. Harris, (Wis.) 733.*

6. The provisions of Laws Wis. 1883, c. 349, § 2, that "every execution levy made under a judgment confessed against any such insolvent debtor within sixty days prior to an assignment for the benefit of creditors, or under a judgment entered on a judgment note by any such debtor within sixty days prior to any such assignment, and the lien of any such judgments upon real estate, shall be void and of no effect," do not apply to executions levied under judgments entered upon judgment notes

executed more than 60 days prior to such assignment. CASSODAY and TAYLOR, JJ., dissenting.—McCaul v. Thayer, (Wis.) 353.

7. An assignment, after preferring the claim of a clerk for labor, directed the residue of the proceeds of the property to be used "to pay * * * the debts, * * * due or to grow due, enumerated and designated as 'Class No. 2,' and all other indebtedness owing by said party of the first part to any person or persons whomsoever." In the schedule eight creditors were enumerated, and in the list which was verified and filed two creditors, to whom the assignor owed small amounts, were added. Plaintiff claimed the assignment was void on the ground that the eight creditors enumerated were preferred over the two. *He'd*, that the assignment did not make such preference.—Mack v. Meisen, (Wis.) 291.

Garnishment of assignee.

8. In garnishment by a judgment creditor against the assignee, only matters going to the validity of the assignment can be considered, and not alleged fraudulent transfers preceding it.—Batten v. Smith, (Wis.) 542.

9. In garnishment against an assignee, the court submitted certain questions to the jury, but they were not asked to find whether, upon the whole evidence, the assignment was void. *Held*, that as the issues in garnishment were not necessarily triable by jury, and the court had the right to determine matters not presented to them, it will be presumed that the court found the assignment valid when it dismissed the action.—Id.

Rights of assignor.

10. A debtor who has made an assignment for benefit of creditors may, after a creditor has filed a claim barred by the statute of limitations with the assignee, by a promise in writing, revive the debt.—Hellman v. Kiene, (Iowa,) 516.

ASSUMPSIT.

When lies.

1. Plaintiff deeded certain land to defendant, who agreed orally to convey to him a house and lot in part payment, but afterwards refused to do so, and sold to a third party. Plaintiff sued him before a justice, declaring orally on all the common counts. *Held* that, as defendant could not be compelled to convey the house and lot on an oral contract, his refusal to convey rescinded the contract, and raised an implied promise on his part to pay for the land he had received from plaintiff on the contract, and the value of it can be recovered under the *indebitatus* count for real property sold.—Nugent v. Teachout, (Mich.) 254.

Bill of particulars.

2. Plaintiff sold defendant certain land, and defendant agreed orally to convey a house and lot in payment, but after obtaining a deed to the land, refused to convey. Plaintiff sued him for the balance of the purchase money before a justice of the peace, declaring orally upon "all the common counts" in *assumpsit*, and filed a bill of particulars, setting out as an item the balance of the purchase price of land sold to defendant. *Held*, that the bill of particulars was explanatory, and an exemplification of the declaration, and notified defendant that the claim was for the unpaid balance of the land sold, and that plaintiff claimed the recovery of it on the declaration under "all the common counts." *Also held*, that the "*indebitatus* count" included a count for real property sold, and was used by plaintiff to recover the value of the estate sold.—Id.

3. Plaintiff declared in *assumpsit* on common counts, and subsequently filed a bill of particulars. At the trial evidence was objected to as irrelevant which tended to show a contract void, but which was not alleged so to be in the bill of particulars. *Held*, that such evidence should have been admitted. A bill of particulars is for the purpose of avoiding surprise at the trial, and defendants did not claim that this evidence would be a surprise to them.—Wright v. Dickinson, (Mich.) 164.

Pleading and proof.

4. In *assumpsit* on promissory notes, where defendant pleads the general issue, with notice that the notes were without consideration, and made under a contract against public policy, he cannot introduce evidence of fraud in procuring the contract.—McCabe v. Caner, (Mich.) 901.

Weight and sufficiency of evidence.

5. In an action, tried without a jury, to recover for goods delivered to one on the promise of another to pay for them, plaintiff and two other witnesses testified to the obtaining of the goods from plaintiff, and that defendant directed them to be charged to him, and the court found for plaintiff. *Held*, that the evidence supported the finding.—Montague v. Dougan, (Mich.) 840.

Practice—Determination of equities.

6. In an action of *assumpsit* for money had and received, where the question of the rescission of a contract and placing defendants *in statu quo* was involved, *held*, that the law court could measure the equities of the case, and ascertain all facts necessary to determine what amount should be paid to defendants.—Wright v. Dickinson, (Mich.) 164.

ATTACHMENT.

See, also, *Garnishment*.
Jurisdiction, see *Logs and Logging*, 4, 5.
Property subject to, see *Sale*, 18–21.

Personal service on defendant.

1. A defendant in attachment waives service of copies of the writ, affidavit, undertaking, and inventory, by absconding from the county and state.—Thomas v. Richards, (Wis.) 42.

2. By How. St. Mich. § 8005, in a proceeding against a debtor by attachment in a circuit court, if a copy of the attachment writ has not been served personally on the defendant, and he does not enter an appearance in the suit, the plaintiff may, on filing an affidavit of the publication of a certain notice, file the declaration and proceed to judgment as if personal service had been obtained. Plaintiff sued out an attachment writ, and it was returned without such service. Plaintiff then filed his declaration, and several days afterwards filed the required affidavit, and thereupon proceeded to judgment by default. *Held*, that the failure to comply with the statute was not a mere irregularity, but rendered the judgment void.—Steere v. Vanderberg, (Mich.) 110.

ATTORNEY GENERAL.

Management of actions by state.

The board of transportation of the state of Nebraska cannot control the attorney general in his management of an action to compel a railroad company to obey an order of the board.—State v. Fremont, E. & M. V. R. Co., (Neb.) 118.

BANKRUPTCY.

Discharge—Debt contracted by fraud.

A., being largely indebted to B., procured C. to execute to B. a note and mortgage for $2,650, by the statement that B. would furnish the $2,650 to C. as a loan; $1,200 to be applied to pay a prior mortgage, and $900 to pay a note held by A. against C. and another; the remainder to be paid in cash to C. A. concealed from C. his own indebtedness to B., and procured only $1,000, applying the $1,650 to his own debt to B. without the knowledge or consent of C. Long before these transactions he had transferred the $900 note as collateral. *Held*, that A.'s acts created a liability which a discharge in bankruptcy could not affect.—Forbes v. Thomas, (Neb.) 411.

BANKS AND BANKING.

Loans and discounts.

1. The act of 1881, (Laws Minn. 1881, c. 77,) prohibiting banks, organized under the laws of the state, from making loans or discounts on the security of the shares of its capital stock, is effectual to prevent a bank from having a lien on the shares of a stockholder for a debt thus created subsequent to that enactment, although a by-law adopted prior to that statute had provided for such a lien.—Nicollet Nat. Bank v. City Bank, (Minn.) 577.

2. Where the stock of a bank was made transferable only on the books of the bank, an assignment by the stockholder, for the purpose of collateral security, is effectual as against the bank, asserting a lien for a debt of the stockholder, (contrary to the Minnesota statute of 1881,) and its refusal, because of such asserted lien, to make the proper transfer on its books, renders it liable to the assignee in an action for damages as for the conversion of the stock.—Id.

3. An attachment of the shares by the bank, after notice of the assignment, is ineffectual to defeat the prior right of the assignee.—Id.

Collections—Negligence.

4. Where plaintiff alleged that defendant bank, after procuring the acceptance of a draft, negligently failed to collect it, or return it until the acceptors had become insolvent, it was not error to refuse to submit to the jury the question of defendant's negligence in not presenting or collecting the draft, and merely to submit the question of negligence in not returning it.—Fox v. Davenport Nat. Bank, (Iowa,) 688.

5. The draft was drawn and sent to defendant October 20th. It was accepted and made payable October 25th. It was not paid, and returned November 30th. The acceptors became insolvent December 1st. It did not appear that the acceptors were solvent at all times between October 20th and December 1st, or that plaintiff could have collected the draft had it been returned. The court charged that "there is no question but that, under the conceded facts and undisputed evidence, the defendant is presumptively liable." *Held*, that the question of liability was for the jury, and the instruction was erroneous.—Id.

BASTARDY.

Limitation of action.

The Iowa statute limiting actions for statutory penalties to two years has no application to proceedings to compel the

father of a bastard to provide maintenance for such child.—State v. Laughlin, (Iowa,) 448.

Bills and Notes.

See *Negotiable Instruments.*

BONDS.

See, also, *Principal and Surety.*

In replevin, see *Replevin*, 7.
Municipal, see *Municipal Corporations*, 22–24.
Of guardians, see *Guardian and Ward*, 1.
On appeal, see *Appeal*, 10–13.

Actions on—Burden of proof.

In an action upon the bond of a county treasurer, where the evidence shows a misappropriation of the funds in his care, and a shortage in his accounts, the burden of proof is upon the defendant to show that the funds have been subsequently replaced.—County of Milwaukee v. Schandein, (Wis.) 337.

BOUNDARIES.

Conflicting surveys.

1. Where two surveyors disagree as to the location of a boundary line, the verdict finding the line as located by one will not be disturbed, although from the evidence the location of the line by the other surveyor was the more likely to be correct.—Loveridge v. Omodt, (Minn.) 564.

Recognition.

2. A tract of land held in common by two persons was divided by them by an exchange of deeds, in which the description of the boundary line was confused and ambiguous. Plaintiffs in ejectment claimed up to a line fixed by a construction of the deeds by the supreme court on a former trial of the same cause. Defendants claimed under an alleged parol agreement between the original owners, by which they had designated a boundary line different from the one fixed by the construction of the deeds. *Held*, that the burden of proof to show the existence of such agreement, that the boundary line was located as they claimed, and that it had been accepted and acted upon and treated by the original owners as the true line, was upon defendants.—Jones v. Pashby, (Mich.) 152.

3. This agreement can be shown by acts of acquiescence during the time the respective portions were owned by the original owners, the making improvements by defendant's grantor on the land in dispute, and declarations made after the agreement by plaintiff's grantor while he was still the owner, against his title.—Id.

4. Where the boundary line fixed by the deeds is ambiguous and confused, a parol agreement fixing a line will operate as an estoppel if acquiesced in, notwithstanding the period of such acquiescence might fall short of the time fixed by the statute of limitations for gaining title by adverse possession.—Id.

BOUNTIES.

For planting trees.

Minn. Laws 1871, c. 80, entitled "An act to encourage the planting and growing of timber and shade trees," provided for a bounty to be paid for planting and growing trees. Minn. Laws 1878, c. 19, of the same title, made a similar provision, and was almost identical with the former law. *Held*, that the law of 1878 was intended to supersede the law of 1871, and repealed it by implication.—Smith v. County of Nobles, (Minn.) 883.

BRIDGES.

Liability for defects.

1. How. St. Mich. § 1442, which declares the liability of a township for damages to persons by reason of defective bridges, though repealed by act Mich. No. 264, 1887, was substantially re-enacted by that act, so that an action brought under said section before the passage of the latter act is not affected thereby.—Merkle v. Township of Bennington, (Mich.) 846.

2. Defendant in an action for personal injuries, resulting from defects in a bridge, requested the court to instruct the jury that unless they should find that, between the date when repairs were made thereon and the date of the accident, the bridge became defective, in the absence of testimony bringing knowledge thereof home to defendant, plaintiff could not recover, as the defect had not been of long enough standing to charge defendant with notice thereof. The charge was given, with this addition: "But this depends upon whether the repairs covered the place where this alleged accident occurred, by reason of defects in the bridge." *Held*, that the amendment was proper.—Id.

BURGLARY.

Consent of owner.

1. The proprietor of a building hearing of an intended burglary to be committed by breaking into such building, did not prevent it, but put a force in the building to capture the burglar. *Held*, that it should be left for the jury to say whether there was in fact such consent to the commission of the crime as to justify the acquittal of the accused.—State v. Sneff, (Neb.) 219.

First degree—Time of taking.

2. The evidence against a defendant, indicted for burglary, showed that the goods stolen were of a bulky character, were taken from a house in a somewhat isolated locality, and were found soon after the loss in defendant's possession. *Held*, that the difficulty of removing such goods unobserved, in the absence of other testimony, was entirely insufficient to sustain a conclusion that they were taken in the nighttime; and as the time of taking is the chief distinction, under Code Iowa, between burglary in the first and second degrees, a verdict of guilty in the first degree should be set aside.—State v. Frahn, (Iowa,) 451.

Possession of property taken.

3. Where it is shown that a larceny and burglary were committed by the same person at the same time, and the goods taken at the time of the burglary are found in the possession of a person soon after the occurrence, this is *prima facie* evidence that he is guilty of both offenses.—Id.*

CARRIERS.

State regulation of rates, see *Railroad Companies*, 1-8.

Of goods—Delivery.

1. Grain arrived over defendant's road consigned to plaintiffs November 25 and 26, and was inspected on those days, and weighed by the state weigh-master, and stored by defendant on November 26, in a public warehouse fit for such purposes, for and on behalf of plaintiffs, subject to a general instruction given by the railway companies to all the elevator companies not to issue any warehouse receipts until the paid freight-bills were presented. On the afternoon of November 27, (Saturday,) between 4 and 5 o'clock, the elevator company gave plaintiffs written notice that the wheat had been placed to their credit, accompanied with a report of the weight and grade. The defendant did not present its freight-bill to plaintiffs until November 29, (Monday.) The wheat was accidently destroyed by fire in the elevator on the night of November 27, without any fault of either party. Both parties knew of, and acquiesced in, the general custom of railroads at that point, which was, in the absence of special instructions, to deliver the grain to one of the public elevators for the consignee immediately upon inspection. *Held*, that defendant's liability as carrier had terminated before the destruction of the property.—Arthur v. St. Paul & D. Ry. Co., (Minn.) 718.

2. The instruction contained in the notice that warehouse receipts would not be issued to consignees until the paid freight-bills were presented, imposed no condition or restriction upon their issue not imposed by the public warehouse act, (Gen. Laws 1885 c. 144, § 6, and in no way affected the situation of the property with reference to the duty of the carrier.—Id.

Live-stock shipments.

3. In an action to recover the value of a horse which was killed by jumping from defendant's car on which it had been shipped under a contract which agreed that defendant should not be liable for loss "by jumping from the cars," the evidence showed that the plaintiff put the horse in the car, tied him by a halter and rope near a sliding window or door which plaintiff opened and left open. *Held*, that though it may have been negligence on the part of the defendant to set the car in motion with the window open, it was contributory negligence on the part of plaintiff to open it and leave it open just before, as he knew the car was to be moved, and he therefore could not recover.—Hutchinson v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 433.

4. In an action to recover the value of a horse which was killed by jumping from defendant's car, on which it had been shipped under a contract which provided that defendant should not be liable for loss "by jumping from the cars," but omitted the rate to be charged for the transportation, *held*, that whether a rate was expressly agreed on, or defendant was to receive what the service might be worth, or was to do the carrying gratuitously, it still might by agreement restrict its liability.—Id.

Of passengers—Negligence.

5. It is not the duty of a conductor of a railway train to assist a passenger to alight from a car.—Raben v. Central Iowa Ry. Co., (Iowa,) 645.

6. It is not the duty of a conductor of a railway train "to know" that a passenger has left the cars before he gives the signal to start. He is only required, after having the station announced, to stop the train and hold it such reasonable time as will permit the passengers to alight in safety—Id.*

7. While plaintiff, a passenger in one of defendant's trains, was sitting in a chair in the caboose attached to the train, other cars were backed against it with sufficient violence to throw plaintiff from his seat against the stove, injuring his nose. *Held*, that these facts sustained the verdict against defendant.—Quackenbush v. Chicago & N. W. Ry. Co., (Iowa,) 523.

8. Plaintiff's intestate, wrongfully, and without the knowledge of the defendant's employes, using a pass belonging to another person, was in a caboose attached to defendant's train. Other cars were backed

onto the train with such force as to throw deceased against a platform. In a suit for damages charging gross negligence on the part of defendant's servants, the court instructed the jury that, if the train-men knew, or had reason to know, that the caboose was occupied, and yet moved it recklessly or negligently, and in such a manner as that injury to persons who might be in the caboose might reasonably be expected as the direct consequence, and deceased was injured thereby, defendant was liable. *Held* correct. ADAMS, C. J., dissenting.—Way v. Chicago, R. I. & P. Ry. Co., (Iowa,) 525.*

9. Plaintiff in his petition alleged that the intestate, while a passenger on defendant's railway, was injured by the negligence of defendant's servants; but, it having been established that, although in one of defendant's cars, he was wrongfully traveling on another person's pass, he amended his petition by averring gross negligence of defendant's servants, leaving the other allegations to stand. *Held*, that the allegations that deceased was a passenger was redundant, if plaintiff relied upon the averment of gross negligence, and need not be proved.—Id.

10. Where a railroad company allowed a chair to remain in a caboose, it was not contributory negligence for plaintiff to sit in it, instead of on the stationary seats around the sides of the car.—Quackenbush v. Chicago & N. W. Ry. Co., (Iowa,) 523.

CERTIORARI.

To justices—Affidavit.

1. The affidavit for *certiorari* to a justice, because of an improper continuance, failed to allege that the affidavit for continuance required by How. St. Mich. § 6899, had not been filed; but the justice's return stated that the continuance was "upon showing made." *Held*, that the action of the justice must be deemed regular.—Hatch v Christmas, (Mich.) 883.

Decision—Modification of judgment.

2. Where, on common-law *certiorari* in an attachment, it appears that the proceedings of the inferior court are correct as to the personal judgment against the defendant, but erroneous as to the adjudication of a lien for the amount on the property, it being beyond the jurisdiction, that part of the judgment giving the lien should be quashed, as well as that awarding costs, and the remainder affirmed.—Shafer v. Hogue, (Wis.) 928.

Change of Venue.

See *Criminal Law*, 3, 4; *Venue in Civil Cases*, 2, 3.

CHATTEL MORTGAGES.

What constitutes.

1. Where a creditor takes a bill of sale from a debtor with the understanding that, upon the payment of certain indebtedness the goods shall be returned, the transaction is of the character of a mortgage, rather than a sale.—Buhl Iron-Works v. Teuton, (Mich.) 804.

2. The surrender by a creditor of certain notes due from a debtor, upon the execution of a bill of sale by the latter to the former, is not conclusive that the transaction was intended as a sale, and not a mortgage.—Id.

3. Parol evidence may be introduced to show that an instrument purporting to be a bill of sale was intended as security for an indebtedness.—Id.*

Validity—Before assignment.

4. A corporation gave a mortgage to secure a *bona fide* indebtedness, and immediately afterwards made a general assignment, without preferences, for the benefit of creditors. The mortgage was filed and recorded before the assignment. The evidence showed that the corporation intended to make an assignment when it executed the mortgage; also, that the mortgagee did not know that the corporation was embarrassed, or was intending to assign when she accepted the mortgage, and that she acted in good faith in the whole matter. *Held*, that the mortgage was valid, and that the mortgagee was entitled to have it paid out of the fund in the hands of the assignee.—Whipple v. Stebbins, (Mich.) 94.*

Lien—Description of property.

5. A chattel mortgage described the property covered as "the drug stock purchased by first party of second party at Belmont, Iowa, * * * to be located at Dows. * * *" *Held*, that under this description it was a question for the jury to determine whether the parties included in the "drug stock" show-cases, bottles, funnels, etc., pertaining to the drug store.—Kern v. Wilson, (Iowa,) 594.

6. A chattel mortgage describing the mortgagee as party of the second part, and expressed to cover "all stock and additions to the same that may be made from time to time by the second party," should not be construed as intending "first party" by the words "second party."—Id.

—— Growing crops.

7. A mortgage describing certain property covered as "crops growing and to be grown" on certain land, is sufficiently definite to cover the crops growing at the time of its execution, and as to them is valid, although the year when the crops are to be

grown is not specified; distinguishing Pennington v. Jones, 57 Iowa, 87, 10 N. W. Rep. 274.—Luce v. Moorehead, (Iowa,) 598.*

Renewal—Affidavit.

8. A chattel mortgage was filed with the town clerk, February 23, 1882. On January 18, 1884, an affidavit was filed in attempted renewal thereof. *Held* not a compliance with Rev. St. Wis. p. 655, § 2315, which requires such affidavit to be filed within thirty days next preceding two years from the filing of the mortgage, and that the mortgage was void as to *bona fide* purchasers.—Rice v. Kahn, (Wis.) 465.

9. An affidavit of renewal of a chattel mortgage stated the amount of the mortgagee's interest in the property. *Held* that, as against a purchaser who relied on the statement contained in the affidavit, the mortgagee was estopped to claim that more was due.—Id.

When payable.

10. If a mortgagee, availing himself of a stipulation in a chattel mortgage, takes possession of the property, or is about to do so, before the debt falls due, he thereby confers upon the mortgagor the right to pay the debt and keep his property.—Id.

Claim and Delivery.

See *Replevin.*

Colleges and Universities.

Exemption from taxation, see *Taxation*, 2.

COMPROMISE.

Consideration.

To constitute a good consideration for the compromise of a disputed claim, it is not necessary that the matter in dispute should be really doubtful in fact, provided there was in fact a dispute or doubt as to the rights of the parties honestly entertained. A party cannot create a dispute sufficient as a consideration for a compromise, by merely refusing to pay an undisputed claim.—De Mars v. Musser-Sauntry Land, L. & Manuf'g Co., (Minn.) 1.

Conflict of Laws.

Lex loci contractus, see *Limitation of Actions*, 6.

CONSTITUTIONAL LAW.

See, also, *Eminent Domain*, 1, 2

Title of act.

1. A statute entitled "An act to incorporate the city of Kalamazoo," is not unconstitutional because it provides for the organization of a recorder's court in such city. The establishment of municipal courts is one of the necessary things in the incorporation of cities, and does not infringe the constitutional provision against legislation on subjects not embraced in the title of the act.—People v. Gobles, (Mich.) 91.

2. The title to Michigan Act No. 10, Laws 1885, reads as follows: "An act to amend an act entitled 'An act to protect fish and preserve the fisheries of this state,' or act No. 350 of the Session Laws of 1865, approved March 21, 1865, and all acts amendatory thereto, and being found as amended in chapter 63, compiler's section 2195, How. Ann. St. Mich." *Held* not in violation of the constitution by reason of defect of title.—People v. Kirsch, (Mich.) 157.

Local and special laws.

3. Laws Wis. 1885, c. 442, providing for lowering the ordinary level of the water in certain lakes in Dane county, and for the drainage of wet and overflowed land in any part of said county, different from the system of drainage for the remainder of the state, as provided in Rev. St. 1878, c. 54, is not in conflict with Const. Wis. art. 4, § 23, which provides that the legislature shall establish but one system of town or county government, which shall be as nearly uniform as practicable.—Bryant v. Robbins, (Wis.) 545.

4. A special law of 1887, detaching the city of Ortonville from the township of Ortonville, *held* not unconstitutional, it not appearing that it had the effect of depriving the people of the opportunity of holding the general town election for that year.—State v. Gurley, (Minn.) 179.

Obligation of contracts.

5. A homestead purchased with pension money, and levied upon in satisfaction of a debt contracted prior to such purchase, is not exempt from execution, under Acts 20th Gen. Assem. Iowa, c. 23, providing for the exemption of pension money, or the property purchased therewith, and that such exemption shall apply to debts contracted prior to the purchase of such homestead. These provisions are in conflict with Const. U. S. art. 1, § 10, which declares that "no state shall pass any law impairing the obligation of contracts." BECK and ROTHROCK, JJ., dissenting.—Foster v. Byrne, (Iowa,) 518.

Due process of law.

6. Acts 20th Gen. Assem. Iowa, c. 188, providing for the laying of drains through property of private owners, for the benefit of land belonging to other individuals, is unconstitutional, as its purpose is to take property without "due process of law," and also because it provides for taking pri-

vate property for private use without the owner's consent. BECK, J., dissents.—Fleming v. Hull, (Iowa,) 673.

Taxation.

7. Act Minn. February 25, 1887, authorizes the village of Sauk Rapids to issue bonds in aid of the construction of a dam across the river at the place for the purpose of improving the water-power, and also provides that the village might secure the water-power for the use of the fire department, and that the press of the dam might be the foundation of a public wagon bridge. *Held*, that the act provided for public taxation for private purposes and as such was unconstitutional, and its unconstitutional character was not affected by the fact that public purposes were also incorporated in the act.—Coates v. Campbell, (Minn.) 366.

CONTINUANCE.

Is discretionary.

1. A motion for a continuance is addressed to the sound legal discretion of a court, and its decision thereon will not be reversed unless there has been an abuse of such discretion.—Singer Manuf'g Co. v. McAllister, (Neb.) 181.

Requisites of application.

2. Where an affidavit in support of a motion for a continuance on account of the absence of a document necessary to be used in the cause as evidence is filed, it should be made to appear affirmatively thereby, not only that the party seeking the continuance has been diligent in trying to procure such document, but that it is at least probable that the evidence can be had in case the adjournment should be granted.—Id.

Unnecessary—Costs.

8. Plaintiff was allowed to amend his petition, whereupon defendant asked for a continuance, which was granted; but the order for continuance also provided that defendant pay the costs thereof. It appeared that the amendment did not so change the issue as to necessitate the continuance. *Held* that, as defendant chose to accept the unnecessary continuance, accompanied by costs, the order should be affirmed. REED, J., dissenting.—Robinson v. Chicago, R. I. & P. Ry. Co., (Iowa,) 602.

In justice's court.

4. Suit was brought before a justice October 28th; the writ being returnable November 8th. On the return-day the cause was continued to January 28th. *Held*, that the continuance dates from the return-day, and under How. St. Mich. § 6899, providing that a justice may continue a case for three months, it was not beyond the lawful time.—Hatch v. Christmas, (Mich.) 833.

CONTRACTS.

See, also, *Assignment; Assumpsit; Bonds; Carriers; Chattel Mortgages; Covenants; Deed; Frauds, Statute of; Fraudulent Conveyances; Guaranty; Infancy*, 1, 2; *Insurance; Landlord and Tenant; Mortgages; Negotiable Instruments; Partnership; Principal and Agent; Principal and Surety; Sale; Specific Performance; Subscription; Usury; Vendor and Vendee.*

Corporate contracts, see *Counties*, 2; *Municipal Corporations*, 7, 8.

Damages for breach, see *Damages*, 1–7.

Post-nuptial contracts, see *Husband and Wife*, 2.

Rescission in equity, see *Equity*, 3–5.

What constitutes.

1. In a suit for rent upon a verbal lease, the court charged that if the jury should find that defendant said to P., "Very well, I will take it for a year," and that P. replied, "Very well," that "made a contract between them; in law their minds met, and made a good and binding contract." *Held*, that such charge was proper and correct.—Pendill v. Neuberger, (Mich.) 249.

2. Defendant, having been solicited to purchase some trees of plaintiff, a nurseryman near Minneapolis, wrote the plaintiff's agent, April 29, 1885, inquiring if the trees could be delivered at his farm in Lisbon, Dakota, "as soon as possible." Defendant passed through Minneapolis May 8th, and while there wrote plaintiff's agent on that date to the effect that if he had not shipped the trees to Lisbon, to do so at once. These two letters were handed plaintiff Saturday, May 9th, and the trees were shipped the following Monday. Two days later plaintiff found a telegram in his post-office box, dated May 11th, and purporting to be from the defendant at Lisbon, and ordering him not to send the trees. *Held*, that the two letters taken together constituted a contract for the purchase of the trees, and that defendant was liable thereon, plaintiff having used due diligence in filling the order.—Hawkinson v. Harmon, (Wis.) 28.

Mutuality.

8. Where a contract limiting liability was made out in duplicate, and the carrier's agent laid the papers before the shipper and requested him to sign them, stating at the time that they were in duplicate, evidence that plaintiff signed them without reading them is insufficient to avoid, as to him, the force of the contract.—Hutchinson v. Chicago, St. P. M. & O. Ry. Co., (Minn.) 438.

4. Plaintiff offered in evidence a writing alleged to be the contract between the parties, but not signed by defendant. The court instructed that "the unsigned contract offered in evidence * * * cannot be regarded as the contract of the defendant upon which the plaintiff can recover as upon a written contract signed by him. * * * It at the most can only be considered as a part of the transaction at the time of the negotiation and agreement between the parties. If said paper was read over to the defendant accurately and fully, and fairly understood * * * by him, and he assented and agreed to the terms therein stated, * * * he is bound by said terms, and his liability will be determined accordingly." The objection being to the first sentence, *held*, that in an instruction consisting of several sentences, all bearing on the same question, all must be read together, and in this, taken as a whole, the court committed no prejudicial error.—D. M. Osborn & Co. v. Simnerson, (Iowa,) 615.

Public Policy—Validity between parties.

5. Rev. St. Ill. 1881, c. 38, § 130, provides for a penalty against any one cornering the market in certain commodities, or attempting to do so, and that all contracts for that purpose shall be void. Plaintiff and defendant had entered into a speculation to corner the wheat market, which was successful. After the close of the deal, plaintiff's share of the profit was left with defendant, who, by plaintiff's request, afterwards invested it in a lard deal. *Held*, that defendant must account to plaintiff for the money, although the wheat deal was illegal.—Wells v. McGeoch, (Wis.) 769.

6. Plaintiff and defendant attempted to corner the market for lard in Chicago, which was illegal, under Rev. St. Ill. c. 38, § 130. In settling their losses, defendant fraudulently overstated the amount of money furnished by him, and understated that furnished by plaintiff, who, relying on this statement, made a large overpayment in settlement. *Held*, that he was entitled to recover it from defendant.—Id.

Interpretation.

7. In an action to recover for expenses, and money paid on a joint contract for the purchase of land, where plaintiff has testified that his payments were conditional on defendant's reimbursing his expenses, a charge purporting to state plaintiff's theory of the contract but omitting all mention of the condition, is error.—Hart v. Firzlaff, (Mich.) 102.

8. A grant of the "right, privilege, and permission to enter and cut, during the logging seasons of 1883–84 and 1884–85, all the pine timber fit for saw-logs growing upon" certain land, *held* to be a contract for the sale only of so much timber as the grantees should cut during these two logging seasons.—King v. Merriman, (Minn.) 570.

9. A contract purported to sell "all the brick now situated and being in a certain kiln, * * * to the amount of 530,000." Five hundred thousand were delivered and paid for. The provisions in the contract for payment tended to show that the parties did not contemplate a sale of more than 500,000, and this construction was confirmed by a written undertaking signed by defendant "to load 420,000 brick or the balance of 500,000 not shipped," etc. *Held*, that only 500,000 passed under the contract.—Brown v. Starret, (Mich.) 163.

10. A written contract read as follows: "We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at same price that Mr. Ream has his for, and the binder is to do good work, and give satisfaction; and, if not, the said Ellis is to pay for use of same." *Held*, that the agreement that the binder was to do good work, and give satisfaction, embraced independent conditions; and, unless the binder gave satisfaction to Mr. Ellis, as well as did good work, he was not obliged to keep and pay for the machine.—Plano Manuf'g Co. v. Ellis, (Mich.) 841.

Actions upon.

11. A void contract need not be rescinded before bringing action to recover money paid under it.—Wright v. Dickinson, (Mich.) 164.

12. Upon a contract for the payment of a certain sum in goods, the goods being deliverable upon demand, an action for a recovery in money cannot be maintained without an allegation and proof of a demand, or refusal to deliver the goods.—Parr v. Johnson, (Minn.) 176.

13. In such an action, in which no demand is averred, the defendant, alleging in defense fraud in the making of the contract, and demanding a rescission, does not thereby lose the right to avail himself of the fact that upon the plaintiff's case there is no right of recovery.—Id.

Conversion.

See *Trover and Conversion.*

CORPORATIONS.

See, also, *Banks and Banking; Insurance; Municipal Corporations; Railroad Companies; Religious Societies.*

Incorporation and powers.

1. A corporation *de facto*, at least where there is a law under which a corporation may be formed for such purposes, is ca-

pable of taking and holding property as grantee, and conveyances to it will be valid as to all the world, except the state, in direct proceedings to inquire into its right to exercise corporate franchises. In an action brought by it to recover such property, no private person will be allowed to attack collaterally the regularity of its organization.—East Norway Lake N. E. Lutheran Church v. Froislie, (Minn.) 260.*

Assignment of stock.

2. Although the shares of stock in defendant bank were made transferable only on the books of the bank, an assignment of the same, without such transfer, invested the assignee with an equitable title, which would be protected as against all parties not showing a superior right.—Nicollet Nat. Bank v. City Bank, (Minn.) 577.*

Officers and agents—Notice.

3. A corporation acquired personal property from one who had notice of want of title in his vendor, and who had managed its affairs from its organization. *Held*, that it took the property charged with the same notice.—Walker v. Grand Rapids Flouring Mill Co., (Wis.) 332.

Actions against—Pleading.

4. A complaint need not state the names of officers or agents of the defendant who did the act constituting plaintiff's cause of action, but such acts may be pleaded generally as done by defendant.—Todd v. Minneapolis & St. L. Ry. Co., (Minn.) 5.

COSTS.

In trespass, see *Trespass*, 5.

Offer of judgment.

1. An offer for judgment in favor of the plaintiff in an action for a specified sum, and "accrued costs," is a substantial compliance with the provisions of Gen. St. 1878, c. 66, § 259, which provides that "defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, to the effect therein specified, *with costs*," etc.—Petrosky v. Flanagan, (Minn.) 665.

2. Upon the acceptance of such offer as provided by the statute, the plaintiff's right to enter judgment carries with it the costs lawfully taxable to carry the offer into effect.—Id.

Security for costs.

3. Plaintiff, being a non-resident, sued defendants, and the court overruled a motion to compel him to give a bond for costs. *Held*, that as by the judgment of the court below defendants were to pay the costs, and it has been affirmed on appeal, defendants were not prejudiced by the ruling.—Walker v. Russell, (Iowa,) 443.

Taxation.

4. Sixty-one days after findings were filed, plaintiff served notice of taxation of costs. Upon the hearing before the clerk, defendant objected to the taxation of costs, because plaintiff neglected to have them taxed within 60 days after the findings were filed, as required by Laws Wis. 1882, c. 202. *Held*, that plaintiff waived its right to costs by neglecting to have them taxed within the time prescribed by law.—For River Flour & Paper Co. v. Kelly, (Wis.) 542.

On appeal.

5. Under How. St. Mich. § 6515, where the judge refuses to make an order requiring the official stenographer to make and file a copy of the testimony and proceedings in the case, and yet refuses to settle a bill of exceptions without such transcript, the party appealing, who is obliged to obtain and pay for it, is entitled, in case he prevails in the higher court, to have the amount so paid taxed as a legitimate expenditure in the case; following Bradford v. Vinton, 27 N. W. Rep. 2.—French v. Fitch, (Mich.) 707.

6. When, on an application by plaintiff for a retaxation of costs of printing an abstract, it appears that it might have been reduced one-half, but was increased in part by unnecessary amendments of plaintiff to the bill of exceptions, the motion will be granted as to a portion of the printing allowance, but without costs of motion.—Hopkins v. Town of Rush River, (Wis.) 989.

7. Where defendant's counsel assign a great number of errors, but abandon all but a few in their argument, plaintiff is justified in procuring, and should not be required to pay the costs of, additional abstracts covering all the points of error assigned by defendant's counsel.—Rayburn v. Central Iowa Ry. Co., (Iowa,) 606.

8. The court will not grant damages in view of the groundlessness or frivolousness of an appeal, except in a case where the appeal is not only groundless, but taken with the evident purpose of mere delay or in bad faith.—Tourville v. Nemadji Boom Co., (Wis.) 330.

COUNTIES.

See, also, *Bridges; Highways; Poor and Poor Laws; Schools and School-Districts; Towns.*

Liabilities, see, also, *Bounties.*

Officers—Duty to give bond.

1. P. & L. Laws Wis. 1871, c. 400, § 8, which provides that the county treasurer

of Milwaukee county shall give a bond for the faithful performance of all duties required of him by the county board of supervisors with regard to the handling of the court-house funds, was obligatory not only upon the treasurer negotiating the court-house bonds, but also upon his successor, to whom the said special fund may be transferred.—County of Milwaukee v. Schandein, (Wis.) 337.

Contracts—Deed by county clerk.

2. The recital in a deed executed by the county clerk, as such, conveying the interest of the county in lands bought in by it at a tax sale, that the deed was made in pursuance of a resolution of the county board, as required by Rev. St. Wis. § 653, is not *per se* evidence of the existence of such a resolution; and, in ejectment by the remote grantee of such lands, the mere production of the deed containing such a recital, without proof of the resolution itself, establishes no title, and the plaintiff should be nonsuited.—Ward v. Necedah Lumber Co., (Wis.) 929.

Liabilities—Expenses of extradition proceedings.

3. How. St. Mich. § 9620, authorizes the governor to appoint agents to demand from the authorities of other states fugitives from Michigan, and provides for the payment of their accounts by the state treasurer, but there is no provision for the payment of such accounts by a county. Where an agent to serve a requisition was appointed by the governor upon the express condition that the state should not be liable for his expenses, *held*, that this stipulation could not cast upon the county in which a fugitive so brought back was tried, any liability for the expenses incurred by the agent.—Follansbee v. County of St. Clair, (Mich.) 257.

Courts.

Appellate jurisdiction, see *Appeal*, 1, 4.
Chancery jurisdiction, see *Equity*, 1–5.
Jurisdiction, amount in controversy, see *Justices of the Peace*, 1.

COVENANTS.

Running with the land.

1. Plaintiff's grantor sold defendant's grantor a right of way for a railroad. The deed recited "the water on the south-east side of the road to be made to run on the same side of the road instead of through the cattle-guards." The defendant built a culvert carrying the water through the cattle-guards. *Held*, that this provision was a covenant running with the land, and not a condition attached to the estate.—Peden v. Chicago, R. I. & P. Ry. Co., (Iowa,) 424.

Action for breach.

2. Defendant purchased a right of way of plaintiff's grantor, and covenanted not to carry the water on the side of the track through the cattle-guards, but, before plaintiff's purchase, built a wooden culvert, carrying the water through the cattle-guards. After his purchase, a stone culvert was put in place of the former one. The jury were instructed that, if the first culvert was permanent, plaintiff's grantor had a right to sue, at his first injury, for all future damages, any time within five years; that if plaintiff purchased within the five years he could sue for any damages sustained afterwards, but if the first culvert was permanent he could not recover, as the five years had expired. *Held*, that these instructions were erroneous and conflicting; that if the first culvert was permanent the damages were original, and arose in favor of plaintiff's grantor at once, and the conveyance did not operate to assign the right of action.—Id.

—— Damages.

3. On the breach of the covenant of warranty the grantee may recover the full consideration paid, and interest from date of payment; and where payments have been made under an antecedent contract in pursuance of which the deed was executed, he is not concluded as to the amount of damages by the execution of the deed, or the recital of the consideration therein; but the actual consideration paid may be recovered, including previous payments of principal or interest under the contract.—Devine v. Lewis, (Minn.) 711.

CREDITORS' BILL.

Priority of judgments.

Plaintiff and defendant were judgment creditors of the same party, and sought to enforce their judgments against a piece of land which had been fraudulently conveyed away by the judgment debtor. *Held*, that plaintiff having taken the first steps to uncover the property fraudulently conveyed, his rights were superior to those of defendant, though the latter was the senior judgment creditor.—Boyle v. Maroney, (Iowa,) 145.

CRIMINAL LAW.

See, also, *Extradition; Indictment and Information; Jury; Witness.*

Particular crimes, see *Abduction; Assault and Battery*, 2; *Burglary; False Pretenses; Homicide; Intoxicating Liquors; Larceny; Nuisance*, 1, 2; *Obstructing Justice; Rape; Receiving Stolen Goods; Seduction.*

Former jeopardy.

1. A *nolle prosequi* to an information will not operate as an acquittal where no jury has been impaneled in the case.—People v. Kuhn, (Mich.) 88.*

Venue.

2. Under Rev. St. Neb. 1866, c. 19, all unorganized counties were attached to the nearest county directly east for election, judicial, and revenue purposes. *Held*, that one accused of murder could not be indicted and tried in the county south of the one in which the crime was alleged to have been committed.—Ex parte Carr, (Neb.) 409.

3. One convicted before a justice of the peace of selling intoxicating liquors without a licence is not entitled, on appeal to the circuit court, to a change of venue under Rev. St. Wis. § 4680, granting that right "to any defendant in an indictment found or information filed."—Boldt v. State, (Wis.) 935.

4. The exercise of its discretion by the trial court, in refusing to grant a change of venue, will not be interfered with, where the petition is supported by affidavits and testimony of inhabitants of the county to the effect that petitioner cannot have a fair trial there, while the petition is opposed by affidavits and testimony to the opposite effect, and there is no reason to attach greater weight to the testimony of either side.—State v. Beck, (Iowa,) 684.

Continuance.

5. An information filed on the eleventh day of October charged the accused with forging and uttering a promissory note. He was placed upon trial on the nineteenth day of the same month. Prior thereto he filed a motion for a continuance, which was supported by his affidavit, which alleged that he could prove by four non-resident witnesses that the notes were placed in his hands for the purpose of sale by one B., and that, as requested, he sold the notes simply as an accommodation, and returned all the money to the person for whom the sale was made. The residence of two of the witnesses out of the state was given, so that their depositions might be taken. The proposed evidence being material, and sufficient time for procuring their deposition not having elapsed, it was held that the district court erred in overruling the motion for a continuance.—Newman v. State, (Neb.) 194.

Conduct of trial.

6. To allow an attorney, who has acted in behalf of a defendant charged with embezzlement, at the preliminary examination, at which examination defendant was discharged, to afterwards act and appear of record in behalf of the state upon the trial of the same defendant, indicted for the same crime, is error.—State v. Halstead, (Iowa,) 457.

7. It is not ground for a new trial that the attorney for the state, in his address to the jury on a trial for selling liquors without a license, was permitted to make very exaggerated statements as to the strength of the evidence on the part of the state, and other remarks of a similar rhetorical character.—Boldt v. State, (Wis.) 935.

8. The exclusion of witnesses from the court-room during a trial is discretionary with the court. And if, on the trial of a criminal case, defendant moves to exclude a prosecuting witness, who is a detective, and who caused the arrest of defendant, and the court permits the witness to remain and suggest to the prosecuting attorney facts relating to the testimony which the witness had learned while investigating the case, there is no abuse of the discretion.—People v. Burns, (Mich.) 154.

9. While it is the right of a trial judge to interrogate witnesses when essential to the administration of justice, the common-law rule conferring arbitrary power upon trial judges has been so far modified by the Nebraska Crim. Code, as to warrant a new trial in case of its abuse.—Fager v. State, (Neb.) 195.

10. The jury impaneled for the trial of a complaint for selling intoxicating liquors without a license was made up, in part, of men who were members of a beer club which the accused was active in forming. It was understood among the members that the club would see to it that, if the accused was prosecuted, he should lose nothing, and come to no harm. These jurymen had sworn on the *voir dire* that they were without bias, etc., and the judge in his charge referred to the inconsistency, and remarked that it was singular that the prosecution had not challenged them. *Held*, that the conduct of the trial judge was not ground for a new trial.—Boldt v State, (Wis.) 935.

Evidence.

11. Where defendant was arrested in bed at a house of ill fame with a pistol under his pillow, evidence of what occurred at the time of the arrest, and that defendant resisted, is admissible.—People v. Burns, (Mich.) 154.

12. Where it appeared that defendant was given the fullest chance to cross-examine the prosecuting witness, it is not error to refuse the admission of questions covering ground already covered by the testimony, nor to refuse the admission of questions clearly improper.—State v. Ward, (Iowa,) 617.

13. Thirty-four questions were propounded to a witness on cross-examination, as to her testimony in a former trial.

which she refused to answer. The court refused to strike out her testimony, but instructed the jury that her demeanor on the stand should be considered. *Held*, it was not error, as her former contradictory testimony could have been proven, or the court asked to compel her to testify.—State v. Archer, (Iowa,) 241.

14. A witness called by the state, whose name was not indorsed on the indictment, and of whose testimony no notice was given, was, upon objection of defendant, excused, when defendant's counsel withdrew the objection, "but waived no rights," and thereupon the witness was recalled and examined without objection. *Held*, that such examination was not error, after the withdrawal of objections.—State v. Ward, (Iowa,) 617.

—— **Best and secondary.**

15. Where the record of the indictment against a party accused of committing a crime has been omitted, or lost, or destroyed, the court will receive secondary evidence as to the essential facts stated in the indictment which conferred jurisdiction on the trial court.—Ex parte Carr, (Neb.) 409.*

16. Upon the trial of a defendant indicted for embezzlement, he offered in evidence certain deposit slips used in making bank deposits, in the name of the company from which he was charged with embezzling, to show that the funds were properly accounted for. These slips were in his own handwriting, and were the *memoranda* from which the bank made its entries in its books. *Held*, that their exclusion on the ground that the bank-books were the primary evidence of the fact to be shown, and because they were in defendant's own writing, was error.—State v. Halstead, (Iowa,) 457.

17. Letter-press copies of letters sent by defendant to his employers, and containing statements of his accounts with them, are not competent evidence to prove an embezzlement by defendant, when it is not shown that the original letters cannot be procured.—Id.

—— **Identity.**

18. It was proved that, on the morning after the commission of the crime, the man assaulted gave a description of one of his assailants. Defendant offered evidence that one W. answered the description. *Held* properly excluded.—State v. Beck, (Iowa,) 684.

19. The man assaulted admitted on cross-examination that soon after the crime was committed he was shown a photograph of one W., and that he then expressed the opinion that W. was one of his assailants. Defendants offered evidence, which was excluded, that W. was in the neighborhood about the time the crime was committed. *Held* no error.—Id.

20. On the trial of an information for the offense of breaking and entering a store on the night of November 2, 1884, if other evidence showed that defendant, together with another who had been convicted of the same crime, occupied a rented room both before and after the commission of the crime, and were seen together about 7 o'clock on the evening of November 2, 1884, evidence that defendant was seen in company with the same person on October 25, 1884, is admissible.—People v. Burns, (Mich.) 154.

—— **Character.**

21. A question put to a witness for defendant, who was testifying as to the latter's reputation, in these words: "Are you acquainted with his reputation as a peaceable, law-abiding citizen?"—was excluded as incompetent and immaterial. *Held*, that the ruling might well be sustained, on the ground that the question was not explicit by reason of the omission to include defendant's reputation in the community where he dwelt at and before the commission of the offense.—State v. Ward, (Iowa,) 617.

22. Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time the accused committed, or attempted to commit, a crime similar to that with which he stands charged.—Cowan v. State, (Neb.) 405.

23. On trial of an indictment for murder, the state introduced testimony showing that defendant and his wife had made statements contradictory to their evidence. The defendant offered to prove their general reputation for truth. *Held*, that the offer was properly refused.—State v. Archer, (Iowa,) 241.

—— **Confessions.**

24. After defendant's arrest, and before trial, an article in a newspaper was shown to him which purported to give, among other things, a summary of his statements before the coroner. Defendant read the whole article, and admitted that it was correct. On the trial, after proof of these facts, the prosecuting attorney cut out that portion of the article which related solely to defendant's statements, and offered such portion in evidence. *Held*, that it was properly admitted, without putting in the whole article.—People v. Coughlin, (Mich.) 72.

—— **Accomplices.**

25. A person to whom one, intending to commit burglary, confides such intention, and procures such person to promise to act as accomplice, is a competent witness to prove the declarations and acts of the party committing the offense; the credibility of

such witness being a question for the jury. —State v. Sneff, (Neb.) 219.

Evidence — Weight and sufficiency.

26. Defendant and C. were jointly indicted, but were tried separately, and C. was convicted. On appeal the judgment was reversed, because the evidence was insufficient to identify C., who was set at liberty. On trial of defendant some additional witnesses gave testimony tending to prove admissions by defendant that he was concerned in the commission of the offense. The jury found him guilty. *Held*, that the additional testimony warranted the jury in convicting him, even though C. was discharged.—State v. Beck, (Iowa,) 684.

Instructions.

27. In its charge to the jury the court need not state the reason for the rule that guilt must be proved beyond a reasonable doubt, if it state the rule correctly. MITCHELL, J., dissenting. — State v. Johnson, (Minn.) 373.

28. The court, in defining a reasonable doubt, said: "It is a doubt for having which the jury can give a reason based upon the testimony." *Held* erroneous, and calculated to mislead.—Cowan v. State, (Neb.) 405.*

29. In an indictment for murder, *i. e.*, a request to charge that if a single fact, proved to the satisfaction of the jury, was inconsistent with defendant's guilt, he should be acquitted, was rightly refused.—State v. Johnson, (Minn.) 373.

30. It is not error for the court to refuse to instruct the jury that certain evidence has a certain tendency.—People v. Coughlin, (Mich.) 72.

Sentence.

31. A city recorder (having the same jurisdiction in criminal cases as a justice of the peace) before whom a person is tried and convicted of a misdemeanor, triable by a justice, and punishable by "imprisonment in the county jail * * * not more than ninety days," cannot sentence such person to imprisonment in the state house of correction, notwithstanding the act creating such house of correction, which was earlier in time than that creating the specific offense charged, provides that "all courts having criminal jurisdiction may sentence" to imprisonment in it "all male persons duly convicted before them of a misdemeanor, when the imprisonment shall not be less than ninety days." How. St. Mich. § 9755.—People v. Gobles, (Mich.) 91.

Appeal.

32. Where there is no appearance by appellant, and the transcript filed shows no error, judgment will be affirmed.—State v. Dow, (Iowa,) 587.

33. On appeal the record contained the indictment, instructions, verdict, judgment, and motion for new trial, which was overruled. *Held*, there being no evidence or bill of exceptions and the instructions abstractly considered being correct, the judgment would be affirmed. — State v. Myers, (Iowa,) 114.

34. Under Code Iowa, § 4522, which provides that in criminal cases "no appeal can be taken until after judgment," the abstract on appeal must show that a judgment has been rendered.—State v. Briggs, (Iowa,) 521.

35. Where it is claimed that improper testimony was admitted, it must appear by the bill of exceptions that objection was made and overruled, and an exception taken at the time.—Fager v. State, (Neb.) 195.

—— Case certified.

36. Where a criminal proceeding for abandonment of wife is tried to the court, and the facts as found show the accused to be liable for the penalty denounced by the statute, such finding is equivalent to the verdict of a jury, and the case may be certified to the supreme court, under Rev. St. Wis. § 4721, permitting such report on conviction.—State v. Witham, (Wis.) 934.

DAMAGES.

For breach of covenant in deed, see *Covenants*, 8.
death, see *Death by Wrongful Act*, 2.
defamation, see *Libel and Slander*, 6–8.
frivolous appeal, see *Costs*, 8.
public improvements, see *Municipal Corporations*, 14–21.
trespass, see *Master and Servant*, 2; *Trespass*, 6–8.
In condemnation proceedings, see *Eminent Domain*, 5, 6.
replevin, see *Replevin*, 4.

For breach of contract.

1. Plaintiff deeded to defendant a piece of land upon which was a $700 mortgage which defendant was to assume, and a $50 mortgage, which plaintiff was to pay. Plaintiff sued for balance due him. *Held*, that he was entitled to recover the difference between the price of the land and the $700 mortgage, principal and interest, less whatever defendant had paid on the $50 mortgage. — Nugent v. Teachout, (Mich.) 254.

2. Action was brought to recover damages from defendants who had procured plaintiff to execute a note and mortgage to a third party, upon the fraudulent representation that he would procure a loan from such party to pay off a prior mortgage, which promise defendant did not fulfill; both mortgages were subsequently

foreclosed, but not until after the land had been conveyed by plaintiff to another. *Held*, that plaintiff could not recover damages for cost of title or interest in the land, but only the amount of the note and interest.—Forbes v. Thomas, (Neb.) 411.

For personal injuries.

3. A plaintiff, injured on the nose in a railroad accident, never had catarrh before, but he had it soon afterwards; there was medical testimony that such an injury might produce catarrh under certain exceptional circumstances. *Held*, that the court properly refused to charge that there was no sufficient evidence that the catarrh was caused by the injury.—Quackenbush v. Chicago & N. W Ry. Co., (Iowa,) 528.

4. In an action for damages for personal injuries, the plaintiff alleged in his complaint that by reason of his injuries he had not been able to attend to the duties of his profession—stating what his profession was—from which he was before able to secure a "comfortable living." *Held*, that under these allegations it was competent to show what his earnings were per month in his profession.—Collins v. Dodge, (Minn.) 868.

Injuries to property.

5. A riparian owner, who is deprived of the use of pasturage by floods caused by the negligence of defendant, may recover the value of the pasturage without showing that his cattle were not as well fed elsewhere, or that he was put to expense in procuring other food.—Witheral v. Muskegon Booming Co., (Mich.) 758.

6. Plaintiff claimed compensation for his hay being swept away by floods caused by defendant's negligence, and gave evidence of the amount of hay cut upon the land the year before. *Held*, that it was properly admissible to show the capacity of the land for producing hay.—Id.

Pleading.

7. Plaintiffs owned a saw-mill, and contracted to saw 4,000,000 feet of logs to be furnished by defendant. In an action for defendant's breach of contract in not furnishing the logs as agreed, plaintiffs filed a bill of particulars, claiming for "loss of profits on sawing four million feet of logs," etc., and "loss of profits on account of defendant's failure to perform his contract." They did not offer to show that they had incurred actual damage, by reason of expenses in preparing to perform the contract, or stoppage of the mill for want of work, nor claim nominal damages. *Held*, that under their bill of particulars plaintiffs could not recover.—Petrie v. Lane, (Mich.) 70.

8. The complaint alleged special damages in a certain sum, coupled with an allegation of plaintiff's estimate of his total damages, besides the demand, which by statute is essential to the complaint. *Held*, that the allegations were sufficient to warrant general damages.—Collins v. Dodge, (Minn.) 868.

DEATH BY WRONGFUL ACT.

Pleading—Variance.

1. In an action by an administratrix for her intestate's death, the declaration alleged that the planks in the bridge, where the accident occurred, were loose, and the stringers uneven, the planks liable to slip off, turn over, and tip up, and thereby trip horses; and that the horses did become entangled in the loose planks, and thereby tripped. The jury found, and the proof showed, that one of the horses driven by the deceased had stepped into a hole in the bridge, whereby the team became frightened, resulting in the injury alleged. *Held* no variance.—Merkle v. Township of Bennington, (Mich.) 846.

Measure of Damages.

2. Evidence of what the deceased was worth at the time of his death is admissible for the purpose of showing the reasonable expectation of pecuniary benefit to his family from the continuance of his life. Any one who has knowledge of his pecuniary afairs, as an attorney, who managed the settlement of his estate, may testify. The fact that his knowledge was derived in part from proceedings had in the probate court in the settlement of his estate does not render his testimony secondary evidence.—Phelps v. Winona & St. P. Ry. Co., (Minn.) 273.

DECEIT.

Evidence.

1. In an action to recover damages for fraudulently procuring plaintiff to execute a note and real estate mortgage, whereby title to the land was lost, but not until plaintiff had sold to another, evidence of plaintiff's efforts to procure money to pay off the mortgage, and of his inability to do so on account of the incumbrances, was admitted. *Held*, that the element of damages resulting from loss of title having been eliminated under the instructions of the court, the admission of the evidence was error without prejudice.—Forbes v. Thomas, (Neb.) 411.

2. In an action for fraud in selling stock of a corporation, the court admitted evidence of the value of the corporation's real estate three years after the sale of the stock, and then charged the jury that "the price which the property brought at public sale in the spring of 1886, when the com-

pany had suspended, is not the true criterion as to the value at that time, [meaning the time when the plaintiff purchased his stock.] The fact may be considered in connection with the evidence, but allowance should be made for the changed condition." *Held*, that the charge was objectionable, and did not cure the error in admitting the evidence.—French v. Fitch, (Mich.) 258.

3. Defendant sold plaintiff 28 shares of stock in a company, representing to him that the capital stock was all paid up. It appeared that when the company was formed only 60 per cent. was paid in on the stock, and that afterwards, before plaintiff purchased his shares, profits which the company had made, amounting to 40 per cent. on the capital stock, were allowed to remain in the business as undivided profits, which thus made shares worth their full face value. Defendant admitted that he made the representation, and claimed that it was true. *Held*, sufficient evidence to warrant a submission of the question of fraud to the jury.—Kryger v. Andrews, (Mich.) 245.

Dedication.

See *Highways*, 1.

DEED.

By county clerk, see *Counties*, 2.
Construction and effect, see *Riparian Rights*.
Tax-deeds, see *Taxation*, 26–32.

Description.

1. When, in the description in a deed, reference is made to a plat, it may be used to identify the lands referred to, though it does not conform to the statute, and is not duly certified.—Sanborn v. Mueller, (Minn.) 666.

Delivery—What constitutes.

2. Defendant and her mother went together to a justice of the peace, where the mother signed and acknowledged a deed conveying certain property to defendant. The mother then left the deed in the custody of the justice, with instructions to keep it until she had died, and then file it for record. The justice told her she could have the deed whenever she wanted it, but she replied: "I don't want it. You must keep it until I die." She also told defendant that she had deeded the land to her. *Held*, that the evidence showed a present delivery, and not an attempt to make a testamentary disposition of the property.—Hinson v. Bailey, (Iowa,) 626.

—— Effect.

3. Land had been sold at a sheriff's sale under a power in a trust deed to one H., and was afterwards conveyed by mesne process to various grantees, among whom were defendant and one B. In order to remedy supposed defects the original mortgagor executed a curative deed to H. and delivered it to B., who had it recorded for all the owners without the knowledge of H. until some time afterwards, when he executed a curative deed to his immediate grantee. *Held*, that the curative deed from the mortgagor took effect the date of its delivery to B., and a quitclaim deed by the mortgagor to a person having knowledge of the facts, executed between the time of the delivery of the deed to B. and its acceptance by H., was of no effect.—Holcombe v. Richards, (Minn.) 714; Yoerg v. Holcombe, Id. 718.

Construction and effect.

4. The owner of certain land and water privileges conveyed a two-thirds interest in the latter to A., and after mortgaging his remaining interest with certain land, conveyed his equity of redemption in such interest to A. The purchaser on foreclosure of the mortgage conveyed to plaintiff land adjacent to the privileges, to the middle of the stream, with all the hereditaments and appurtenances; and thereafter quitclaimed the one-third interest in the privileges to A. *Held*, that the deed to plaintiff conveyed no interest in the water privileges.—Winchell v. Clark, (Mich.) 907.

5. Where a grantor and his wife, who had been in possession without color of title of certain village lots, (in connection with others in the same block held under a tax title which appeared of record,) under circumstances tending to show adverse possession thereof, the lots being situated in, and a part of, block 10, (according to the plat of a certain addition,) executed a deed to a purchaser containing the following description, viz.: "All of blocks 10 and 11," (in the same addition,) "intending to convey *only* those lots in said blocks 10 and 11 which have been quitclaimed to the parties of the first part, or either of them, by conveyance of tax titles," *held*, that there passed by the deed only such lots as were acquired under the conveyance of tax titles.—Witt v. St. Paul & N. P. Ry. Co., (Minn.) 862.

6. A deed conveyed certain lands, "excepting and reserving therefrom sixty-eight feet of land off from the east end of said described premises." The vendor retained possession of a lot 68 feet wide along the whole east side of the lands, and put the purchaser in possession of the remainder. They built a fence and dug a well on the line thus fixed. The vendor built a house and barn on the portion held by him, and, after many years, conveyed it as 68 feet wide. *Held*, from the acts of the parties and the surrounding circumstances,

that the exception was meant to reserve 68 feet in width along the east end of the lot, and not 68 square feet, which would be a strip but six inches wide.—Montfort v. Stevens, (Mich.) 827.

Default.

Setting aside, see *Judgment*, 1-3.
What constitutes, see *Mandamus*, 1.

Delivery.

What constitutes, see *Deed*, 2; *Sale*, 3-6.

DEPOSITION.

Of adverse party.

1. A deposition taken under Rev. St. Wis. 1878, § 4096, which, as amended, read, "* * * the examination of a party * * * otherwise than as a witness at the trial, may be taken by deposition, at the instance of the adverse party in any action or proceeding at any time after the commencement thereof, and before judgment," may be produced, and used as evidence on trial, even if deponent be present in court.—Meier v. Paulus, (Wis.) 301.

Disqualification of notary.

2. The fact that a notary before whom a deposition was taken has his office in a room occupied by the attorneys who represented the parties taking the deposition, is not of itself sufficient to warrant the exclusion of the deposition when offered to be read upon the trial.—Singer Manuf'g Co. v. McAllister, (Neb.) 181.

Of party called as witness.

3. The deposition of defendant taken at plaintiff's instance was excluded at the trial, on the ground that defendant was present in court, whereupon plaintiff called him as a witness. *Held*, that plaintiff did not thereby waive the error in excluding the deposition.—Meier v. Paulus, (Wis.) 301.

DESCENT AND DISTRIBUTION.

See, also, *Dower; Executors and Administrators; Partition; Wills.*

Election of widow between homestead and dower, see *Appeal*, 57.

Children omitted from the will.

Rev. St. Wis. § 2287, provides that "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate. * * *" *Held*, that the evidence must be very clear that the omission was the result of mistake or accident, and that the right of a child omitted to share in the estate can rest upon no other basis.—Moon v. Estate of Evans, (Wis.) 20.

Dismissal.

After judgment, see *Judgment*, 9.

District and Prosecuting Attorneys.

Fees of special prosecutor, see *Intoxicating Liquors*, 13.

DIVORCE.

Proof of marriage.

1. Where complainant fails to allege any marriage, but relies upon cohabitation to establish the marriage relation, and the record shows that for the greater part of the period of cohabitation complainant was incompetent to contract, and does not show that there was any contract of marriage since the disability was removed, a judgment for plaintiff is erroneous.—Rose v. Rose, (Mich.) 802.*

Sufficiency of evidence.

2. The action of the trial court, in dismissing an action for divorce on the ground of adultery and cruel and inhuman treatment, will be sustained on appeal, where the evidence does not show that the plaintiff established her claim by a clear preponderance of evidence.—Slater v. Slater, (Iowa,) 439.

Alimony.

3. A division of property made on separation is no bar to a subsequent claim by the wife for suit money, in a subsequent suit by her for divorce.—Campbell v. Campbell, (Iowa,) 522.

4. On application for suit money for the wife as complainant, the amount of allowance for her necessities is discretionary.—Id.*

5. Suit money may be allowed to a wife suing though she fail to prove her right to the divorce.—Id.

6. Where after decree for divorce and alimony for the wife, she petitions under Rev. St. Wis. § 2369, to revise the allowance of alimony on account of a change in defendant's circumstances, the court may require the payment of her attorney's fees and support pending the proceeding, but cannot require a bond therefor, section 2367 only providing for a bond in the actual divorce suit.—Blake v. Blake, (Wis.) 551.

DOWER.

Election.

1. In Iowa a widow cannot take both her dower and homestead, but must elect which she will take.—Thomas v. Thomas, (Iowa,) 693.

2. A widow cannot be compelled to elect whether she will take her dower or homestead, until the indebtedness of the estate is determined.—Id.

3. Continued occupancy of the homestead, in the absence of an election to take dower, will be deemed an election to take under the homestead right.—Id.

4. The owner of certain lands, among them a homestead, died, leaving several lineal descendants and a widow. Action for partition was begun during the life of the widow, who had never had her share of the estate set apart to her, but who had leased the homestead to another for life. Before the decree of distribution, the widow devised her share of the husband's estate, and died. *Held*, that she was entitled to no share in the distribution, as the devise did not amount to a setting apart of an interest to her in the estate; following Darrah v. Cunningham, 33 N. W. Rep. 445.—Mobley v. Mobley, (Iowa,) 691.

Assignment.

5. A widow's dower is not subject to her husband's debts, and it is to be set apart without reference thereto.—Thomas v. Thomas, (Iowa,) 693.

6. Courts of law and equity have concurrent jurisdiction in the assignment of dower, and therefore the proceedings for that purpose authorized by Code Iowa, §§ 2444-2451, are not exclusive.—Id.

DRAINAGE.

Power to construct drains.

1. The power to construct drains is no part of the usual powers of town and county governments, but is a special authority given for a particular purpose, and may be conferred by legislation on any person.—Bryant v. Robbins, (Wis.) 545.

Proceedings to establish.

2. In a proceeding to establish a drain or ditch, under chapter 89, Comp. St., the jurisdictional facts are—*First*, a petition signed by one or more owners of land to be affected by the proposed ditch; *second*, a bond provided by statute; *third*, that the proposed improvement is a necessity, and will be conducive to the health, convenience, and welfare of the public; and, *fourth*, the statutory notice.—County of Dakota v. Cheeney, (Neb.) 211.

3. The failure of the county board to find that the signers of the petition are owners of lands to be affected is not jurisdictional.—Id.

4. A party objecting to the construction of a proposed ditch should act with reasonable promptness in urging his objections, and should not wait until the completion of the improvement before alleging an entire want of authority to make the same.—Id.

Record of establishment.

5. Under Code Iowa, § 1220, providing for establishing and cutting ditches when the board of trustees of a town deem it necessary for the public health, and providing that "all the findings and doings of the trustees shall be reduced to writing, and entered on record by the clerk," a ditch is not legally established without a written record showing the action of the trustees, and that the ditch was necessary for the public health. BECK, J., dissenting.—Hull v. Baird, (Iowa,) 613.

6. One of the trustees testified that "his judgment" was that the record made by the trustees did not contain these recitals, and no other evidence on that question appeared. *Held*, to warrant the conclusion that the record was not properly made, and therefore the proceedings were invalid.—Id.

DRUGGISTS.

Sale of liquors by, see *Intoxicating Liquors*, 2, 3.

Forfeiture of license—Illegal sale of liquor.

Acts 18th Gen. Assem. Iowa, c. 75, § 9, provides that pharmacists shall not sell liquors for a beverage, and that, in addition to a fine for repeated violations of the act, his name should be stricken from the register. Acts 21st Gen. Assem. c. 83, § 2, repealing section 8 of said chapter 75, provides that the offender's name shall be stricken from the register by the commissioners of pharmacy on receipt of the transcript of conviction, to be transmitted from the court in which he is convicted. *Held* that, the sections being repugnant, the last enacted must govern, and the commissioners could not strike off a name on *ex parte* testimony, without any transcript of conviction.—Straight v. Crawford, (Iowa,) 920.

DURESS.

What constitutes.

A complaint in an action to recover money alleged that the same had been paid under fraud, threats, and duress, but failed to specify the acts and circumstances relied upon, save that the defendant had threatened to turn plaintiff out of possession of a tract of land to which the defendant had

the legal title. *Held* insufficient, it not appearing that the money had been paid upon a wrongful claim or unjust demand, or under actual or threatened personal restraint or harm, or interference with plaintiff's property, and that he could escape or prevent the injury only by making such payment.—Kraemer v. Deustermann, (Minn.) 276.

EJECTMENT.

When action lies.

1. Ejectment is the only adequate and proper remedy against one in possession of certain lots as a landing for a swinging bridge, and claiming the permanent right of possession in hostility to the owner's title.—Lawe v. City of Kaukauna, (Wis.) 561.

2. An action of ejectment was brought to recover land on the ground that defendant had violated the conditions of the purchase,—that intoxicating liquors should not be sold on the premises. There was no written contract except a receipt given for a portion of the purchase price, which stated that the deed with restrictions relating to intoxicating liquors would be given on completion of payment on or before 90 days from date. This balance was not paid nor the deed delivered. *Held*, that the suit was premature, inasmuch as the deed had not yet been given, and there was no such restriction or condition that could affect the bargain, or the conduct of the defendants before the giving of the deed.—Jump River Lumber Co. v. Moore, (Wis.) 360.

Defenses—Adverse possession.

3. The time when adverse possession began is a question for the jury.—Miller v. Beck, (Mich.) 899.

4. On the issue of adverse possession by defendant a charge as to the period of open and notorious occupation necessary to give title, but omitting to explain that such possession must be distinct and hostile, or to define more clearly the word "adverse," is not erroneous.—Id.

—— Possession under deed.

5. Possession under a deed from one in possession, when such deed was delivered, will allow the defendant in ejectment to contest the case by attacking the plaintiff's title.—Rogers v. White, (Mich.) 799.

Parties.

6. Plaintiffs brought suit in ejectment against defendant, who claimed the lands under a tax deed to his grantor. Defendant was not in the actual possession of the lands, and the evidence to show that the grantor was in possession was vague and unsatisfactory. Rev. St. Wis. §§ 3075, 3076, provides: "If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named in the complaint; if they are not so occupied, the action must be brought against some person exercising some acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the action." *Held*, that defendant was properly sued alone.—Burchard v. Roberts, (Wis.) 286.

Pleading.

7. The general issue will admit evidence of adverse possession.—Miller v. Beck, (Mich.) 899.

8. In ejectment, to recover certain lots used by defendant city as a highway and landing for a swing-bridge, defendant alleged dedication and adverse user. Plaintiff replied that, for many years when the dedication and adverse user were alleged to have taken place, he was not the owner. *Held*, that this raised an issue as to ownership, under which it was proper to charge the jury that no one, but the owner or his duly-authorized agent could dedicate the property to public use.—Lawe v. City of Kaukauna, (Wis.) 561.

Evidence.

9. On the issues of dedication of the premises by plaintiff and adverse user by the public, testimony of other witnesses, and of plaintiff himself, that he had objected to the public use of the premises, is admissible.—Id.

10. In ejectment, where plaintiff claims title under tax deeds, and defendant under a government patent, it is admissible for defendant to introduce in evidence the deeds connecting him with the patentee.—Rogers v. White, (Mich.) 799.

Instructions.

11. In ejectment, to recover lots used by the city as a landing place for a swinging bridge and a highway to and from the bridge, it appeared that some years before there had been two old bridges below the present site, and that the lots had been used then as a highway to the bridges. *Held*, that instructions relating to the acts of dedication by plaintiff, which did not restrict the time of the acts to the present swinging bridge, were not prejudicial to defendant.—Lawe v. City of Kaukauna, (Wis.) 561.

ELECTIONS AND VOTERS.

Ballots.

1. A "sticker" or "paster" containing the name of a candidate, and attached to the face of a ballot, is not a "cut or device to distinguish one ballot from another," within the prohibition of Gen. St. Minn. 1878, c. 1, § 82.—Quinn, In re, v. Markoe, (Minn.) 263.

Officers.

2. The acts of election officers *de facto*, being in under color of election or appointment, are valid as to third parties and the public; and it is no ground for the rejection of the vote of an election precinct that some of the judges of election did not possess the qualifications required by law. —Id.

EMINENT DOMAIN.

Constitutional power—provision for compensation.

1. After the completion of certain improvements to the Fox river, under the act of 1848, the United States became the owner, by purchase, of the title to such improvements, under the provisions of the act of congress of March 3, 1875, and assumed the payment of compensation to any land-owners entitled thereto by reason of such improvements. The latter act also gave the right to such owners to institute proceedings for ascertaining their rights. *Held* that, while the act of 1848 was defective in not making adequate provision for the compensation of land-owners, such defects have now ceased to be of importance, by reason of the action of the United States in assuming responsibility for the claims.—Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., (Wis.) 529.

—— Public use.

2. Section 16 of the Wisconsin act of August 8, 1848, for the improvement of navigation of the Fox and Wisconsin rivers, reserving to the state the absolute right to such water-power created by the erection of any dam or other improvement, upon lands owned by the state or others, as might be valuable for hydraulic or commercial purposes, *held*, not such a taking of private property for private purposes as would render the provision invalid; the creation of the water-power being merely incidental to the public improvement contemplated by the act.—Id.

Right to damages.

3. Const. Neb. art. 1, § 21, providing that the property of no person shall be taken or damaged for public use without compensation, does not restrict such damages to those which could be foreseen at the time their cause was constructed.—Omaha & R. V. R. Co. v. Standen, (Neb.) 183, Same v. Brown, (Neb.) 188.

4. Work on a dam across the Fox river, erected under authority of an act of the legislature, was begun subsequent to March 3, 1855. One end of the same rested on a lot, the owner of which never gave authority for such use, nor were condemnation proceedings ever instituted to ascertain the damages to the same. By act of congress, approved March 3, 1875, the United States became the owner of the dam, assuming the payment of damages in cases in which "compensation is now, or shall become, legally owing." *Held* that, as on March 3, 1875, there had not been 20 years' adverse user of the lot, compensation for damages was owing to the owner thereof, and that the same is still a valid claim against the United States.—Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., (Wis.) 529.

Measure of Damages.

5. The opinions or estimates of witnesses, as to the amount of damage done to the lands not taken, by taking part for railroad purposes, are not conclusive on the jury.—Johnson v. Chicago, B. & N. R. Co., (Minn.) 438.

6. Where, from the evidence, it is apparent to the jury that maintaining and operating a railroad near buildings increases the risk, the jury may, though no witness has testified directly that it will, consider such risk, in estimating the damage to the land on which the buildings stand.—Id.

Estate acquired.

7. Where, in condemnation proceedings by a railway company, a village lot is appropriated under the description thereof as designated by a survey and plat of the same, the company takes presumptively to the center of the street. And, subject to the public easement and the control of the proper public authorities, the company acquires the same interest in that portion of the lot so taken lying in the street as to the remainder thereof, and may apply it to the same uses.—Witt v. St. Paul & N. P. Ry. Co., (Minn.) 862.

EQUITY.

See, also, *Creditors' Bill; Fraudulent Conveyances; Injunction; Mortgages; Quieting Title; Specific Performance; Trusts.*

Jurisdiction, church schism, see *Religious Societies*, 2–4.

Jurisdiction — Protection of legal rights.

1. A court of equity has jurisdiction to regulate the respective rights of parties in and to a water-power, and where no question appears as to the unsettled or unascertained rights of the several parties, the jurisdiction will be exercised.—Patten Paper Co. v. Kaukauna Water-Power Co., (Wis.) 787.

2. A complaint for equitable relief, which shows that a river in its natural condition would flow in certain channels, and that defendant has turned the water which naturally ran to plaintiff's dam away from it, and threatens to continue so to do, to the

destruction of plaintiff's rights, states a cause of action.—Id.

—— Rescission of contracts.

3. Representations which mislead and deceive a party, whereby he makes a contract for the sale of land, are ground for the exercise of equity in rescinding the contract so induced, whether the party making the representations willfully deceived or otherwise —Mohler v. Carder, (Iowa,)647.*

4. The evidence showed that the defendants deceived and misled plaintiff, by representations as to the quality and value of certain land, into making a trade of property owned by defendants for such land. *Held*, upon plaintiff's offer to reconvey, that equity would rescind the contract so made.—Id.

5. In an action to set aside a contract, on the ground of undue influence, whereby plaintiff agreed to furnish defendant money, the profits from its use to be divided between them, it appeared that at the time plaintiff executed it he was of sound mind and memory, and fairly educated; that the promises of defendant were a lawful consideration; that plaintiff had before been employed by defendant, and afterwards while in another city received news of the death of his mother; also a letter from defendant requesting him to come to see him immediately, defendant, on plaintiff's request, forwarding him the necessary means; that on his arrival plaintiff received from defendant a letter informing him of the amount of money his mother had left him, which he showed to defendant. Plaintiff remained for about three months in defendant's house, and, after executing the contract in question, left for London accompanied by defendant, who acted as his attorney in the settlement of his mother's estate. *Held* not to show fraud or undue influence.—Holmes v. Hill, (Neb.) 206.

Pleading—Multifariousness.

6. Allegations against one defendant, when several are joined, which, if proved, would not show a cause of action against that defendant, do not make a complaint demurrable as joining several distinct causes of action.—Patten Paper Co. v. Kaukauna Water-Power Co., (Wis.) 787.

Parties.

7. Where the object of an action is to determine the respective rights of parties to water in a stream, and facts are shown which entitle the plaintiff to have this determined, all parties interested in the waters of the stream are proper parties.—Id.

Practice—Findings.

8. In an action for an accounting, during the term at which the decision was rendered and findings filed, plaintiff asked the court to make additional findings on questions omitted therefrom. *Held*, that a refusal was error; and, upon exceptions that the findings failed to include certain specified material questions of fact litigated at the trial, they will be reviewed.—Wells v. McGeoch, (Wis.) 769.

ESTOPPEL.

By judgment, *Res Adjudicata*, see *Judgment*, 8–10.

pleading, see *Set-Off and Counter-Claim*, 1, 2.

In pais, conduct, see *Insolvency*, 3.

——, oral agreement, see *Boundaries*, 4.

In pais—What amounts to.

1. Defendants purchased a lot situate on a race-way, and erected a factory, with a view to operate the same with power drawn from the race. On proceedings to restrain such diversion, it appeared that plaintiff company and its grantors were engaged in selling and leasing hydraulic rights, and, though they knew of the erection of the mill, had not informed defendants of the want of title in them to the power. *Held*, that plaintiff's silence did not estop it from an assertion of its rights, as it might well have expected that defendants would buy or lease from it the amount of power they needed.—Fox River Flour & Paper Co. v. Kelly, (Wis.) 744.

2. Certain personal property belonging to plaintiff, and by him consigned to himself in the care of another, was by the latter sold to a third person, and conveyed by him to defendant, who retained it. Defendant had notice of the ownership, and never paid anything for the property. Plaintiff never sold or contracted to sell it to any one, and demanded of defendant its return, which was refused. *Held*, that plaintiff was not estopped to recover for its conversion by reason of having so intrusted it to another.—Walker v. Grand Rapids Flouring Mill Co., (Wis.) 332.

3. A county, after contesting the validity of bonds issued by it, failed to appeal from a judgment in favor of their validity, but issued refunding bonds by an agreed compromise. Upon refusal of the secretary of state to register these refunding bonds, on account of their alleged illegality, the county compelled their registration by writ of *mandamus*. After their registration, the county exchanged them for the original bonds. *Held*, in an action to recover interest on the refunding bonds, that the county was estopped to deny their validity in the hands of a *bona fide* holder for value. State v. Wilkinson, 31 N. W. Rep. 376, followed.—State v. County of Dakota, (Neb.) 225.

4. In an action of partition brought by one of the heirs of an intestate against the others, where it appears that the plaintiff has acquiesced in and received the benefits of an amicable division made 20 years before, he will be estopped to claim a redistribution of the property.—Mitchell v. Mitchell, (Mich.) 844.

EVIDENCE.

See, also, *Deposition; Witness.*

In general, see *Criminal Law*, 11-26; *Homicide*, 9-15; *Libel and Slander*, 10-12; *Payment*, 1-8; *Rape*, 1-8; *Seduction*, 1-5; *Trover and Conversion*, 3-6.

Competency and relevancy, see *Assignment* 2; *Fraudulent Conveyances*, 8-10; *Garnishment*, 3; *Municipal Corporations*, 18-20; *Parent and Child*, 2; *Sale*, 5, 14, 15; *Weights and Measures; Wills*, 4.

Declarations and admissions, see *Boundaries*, 3; *Partnership*, 3; *Sale*, 7.

Opinion, expert, see *Assault and Battery*, 2.

Parol to vary writing, see *Accord and Satisfaction*, 5; *Negotiable Instruments*, 5, 6; *Sale*, 8; *Taxation*, 13; *Vendor and Vendee*, 1; *Wills*, 6.

Presumption, see *Gift*, 1.

Weight and sufficiency, see *Appeal*, 37-43; *False Pretenses*, 2; *Trusts*, 4.

Best and secondary.

1. Where the files of the court are lost, parol evidence is admissible to prove their loss and contents.—Cilley v. Van Patten, (Mich.) 831.*

2. In an action to recover possession of real estate claimed under a contract of sale, *held*, that a copy of the contract could not be offered in evidence without first proving the loss or destruction of the original, or that it was not within the jurisdiction of the court.—Woods v. Burke, (Mich.) 798.

Declarations and admissions.

3. In an action on a note given for a machine, where defendant alleges that he afterwards paid for the machine by giving plaintiff a note of other parties, defendant's statements that he had traded the latter note for the machine, are inadmissible.—McCormick Harvesting Machine Co. v. Jacobson, (Iowa,) 627.

Opinion.

4. In an action for personal injuries, resulting from defects in a bridge, the testimony of a witness that "it was a very poor, shackly bridge," is admissible.—Merkle v. Township of Bennington, (Mich.) 846.

5. Where, in an action for personal injuries, resulting from a defective bridge, the testimony of a witness that, from his personal knowledge, the bridge was in good repair, is improperly stricken out, but is followed by testimony showing, in detail, the facts upon which his opinion is based it is error without prejudice.—Id.

6. Plaintiff offered to show by lay witnesses that she had been in good health prior to the injury for which suit was brought. *Held*, that this testimony as to whether she appeared to be in good or bad health does not call for such an opinion as requires especial skill to determine, and it should have been admitted. — Smalley v. City of Appleton, (Wis.) 729.

Documents.

7. An extract from a medical book is admissible in evidence, if it has some bearing upon the question at issue, and its indefiniteness of statement goes to its weight in evidence, and not to its admissibility.—Quackenbush v Chicago & N. W. Ry. Co., (Iowa,) 523.

8. Books of account are receivable in evidence only when they contain charges by one party against the other, and then only under the circumstances and verified in the manner provided by Civil Code, Neb. § 846. Van Every v. Fitzgerald, 21 Neb. 36, 31 N. W Rep. 264.—Pollard v. Turner, (Neb.) 192.

9. In an action to recover for goods delivered to one on another's promise to pay for them, plaintiff offered in evidence, to show to whom the credit was given, his ledger, journal, and another book called a "blotter," and testified that the journal was kept "in regular order," that, as a rule, all sales made by him were, by him or his employes, entered on the blotter at the time of sale, and on the same day transcribed to the journal. *Held*, that the books were admissible.—Montague v. Dougan (Mich.) 840.

10. Defendants cross-examined the plaintiff as to erasures in his account-books, and a leaf which appeared to have been torn out; he answered that the erasures had been made by himself, to correct errors, and the leaf torn out, by himself, because it had been accidentally soiled; defendants afterwards offered said books in evidence, which offer was refused. *Held* no error.—Campbell v. Holland, (Neb.) 871.

Parol to vary writing.

11 Evidence of the "surrounding circumstances" under which a written contract was executed is not admissible to prove the unexpressed intention of the parties, or their prior verbal negotiations. Its use is limited to throw light on the real meaning of that which is written in case of ambiguity arising upon the face of the instrument.—King v. Merriman, (Minn.) 570.

12. A transaction being such that the parties may or may not have understood it alike as an agreement, the testimony of the parties may be received directly as to their understanding. The subsequent acts of a

party may also be shown by the adverse party as showing his understanding of the agreement. — Ganser v. Fireman's Fund Ins. Co., (Minn.) 584.

13. Parol evidence is admissible to show that an assignment of a judgment, absolute in form, was intended merely as collateral security. — Callender v. Drabelle, (Iowa,) 240.

14. Plaintiffs sued to recover the agreed compensation for procuring a purchaser for certain land of defendant. The written contract stated the amount for which the land was to be sold, and that plaintiffs were authorized to execute a contract for the sale thereof, but did not state the terms of sale. *Held*, that parol evidence was admissible to show a verbal agreement as to such terms.—Magill v. Stoddard, (Wis.) 846.

15. In an action to set aside a certificate of redemption executed by a sheriff, its recitals may be impeached by parol evidence, showing that no redemption was in fact made, and no money paid to the sheriff.—Cooper v. Finke, (Minn.) 469.

16. In an action to set aside a deed on the ground that it was obtained by fraud, parol evidence of the fraud is admissible to impeach the deed.—Id.

Evidence in another suit.

17. The deposition of a partner in a suit to wind up the partnership tending to show that the firm was dissolved at a certain date, is inadmissible in a suit by firm creditors to set aside mortgages on firm property on the ground that they were not signed by one who was then a partner — Southern White Lead Co. v. Haas, (Iowa,) 494.

Rebuttal.

18. The plaintiff was cross-examined as to where he derived the money used in the purchase of property in litigation, and, having answered that a portion of it had been received in payment of a loan made to his father, and attempt having been made to discredit his statement, he was permitted to testify, in rebuttal, as to where he obtained the funds out of which said loan was made. *Held* no error. — Campbell v. Holland, (Neb.) 871.

Competency.

19. The former declarations of a witness offered by the adverse party were properly excluded, they not being contrary to his testimony. — Ganser v. Fireman's Fund Ins. Co., (Minn.) 584.

20. The general reputation of a party to an action cannot be established by the proof of specific acts.—Dorsey v. Clapp, (Neb.) 889.

Materiality.

21. In an action for damages for failure to deliver a note as agreed, defendant's evidence as to his *bona fide* intent is immaterial, where he has neither tendered nor surrendered the note. — Forbes v. Thomas, (Neb.) 411.

22. In an action against a city for injuries caused by a defective sidewalk, defendant was allowed to show that plaintiff had said, in effect, that, with the money she expected to get from the city, she intended to furnish her house, get a horse and carriage, etc. *Held*, that this testimony was irrelevant and immaterial, and presumably prejudicial to plaintiff, and should not have been referred to in the charge to the jury.—Smalley v. City of Appleton, (Wis.) 729.

EXCEPTIONS, BILL OF.

Appeal from order dismissing application to settle, see *Appeal*, 1.

Settlement and signing.

1. A bill of exceptions in Iowa must be signed by the trial judge, or in particular cases by the by-standers; and where the transcript from the lower court purports to contain all of the evidence and the exceptions taken at the trial, but is made and certified to by the court reporter alone, it is not such a record of the proceedings as will justify a review thereof by the appellate court. — Independent School-Dist. of Fairfield v. Farmer, (Iowa,) 450.

Sufficiency.

2. On an appeal, the record showed that there had been two trials of the cause; that, at the first, the evidence was taken down by the short hand reporter, and certified by the judge, and properly filed; that, at the second trial, a transcript of the short-hand notes was used by consent of the parties as evidence, and a short-hand record was kept of other proceedings. This last short-hand report, including the transcript of the former report, was certified by the trial judge as being "all of the evidence that was offered or introduced on the trial of said case, and all of the objections and rulings made and exceptions taken; and the said official report in short-hand is hereby made a part of the record in the above-entitled cause." This certificate was filed within the proper time. *Held*, that the bill of exceptions was sufficient. — Hurlburt, Hess & Co. v. Fyock (Iowa,) 482.

EXECUTION.

See, also, *Attachment; Garnishment.*

Death of judgment debtor.

The right to issue an execution against the property of a judgment debtor terminates with the death of the latter, and in the absence of any order or proceeding re-

establishing the right of a judgment creditor as to such property, an execution sale of the property, and sheriff's deed thereto, after the death of the judgment debtor, are ineffective for the enforcement of the creditor's judgment.— Boyle v. Maroney, (Iowa,) 145.

EXECUTORS AND ADMINISTRATORS.

See, also, *Descent and Distribution; Wills.*

Powers, see *Mortgages*, 21.

Substitution in action of decedent, see *Abatement and Revival*, 2.

Appointment.

1. The personal representatives of a testator had a right of action against a municipal corporation for his death, resulting from defects in a bridge. The executor appointed by the will refused to commence suit, but closed his administration and procured his discharge. *Held* that, under How. St. Mich. § 5843, providing that if an executor dies, or is removed, or his authority shall be extinguished, administration, with the will annexed, may be granted of the estate not already administered, letters of administration were properly granted to the widow, to permit her to prosecute the action.—Merkle v. Township of Bennington, (Mich.) 846.

Realization of assets.

2. Rev. St. Wis. §§ 3825, 3826, provide for an examination of one alleged to have property in his hands belonging to an estate. *Held*, that these sections only provide for the examination of the party charged; and no rule of court can extend the statute, and make the proceeding one to recover the property described from the respondent. — Saddington's Estate v. Hewitt, (Wis.) 552.

3. Rev. St. Wis. §§ 3825, 3826, provide that upon complaint to the county court, by any one interested in an estate, that any person has embezzled or concealed or has in his possession property belonging to the estate, he may be examined by the court. A petition to the court alleged that defendant had disposed of property belonging to an estate. *Held*, that the allegations were sufficient to justify the court in proceeding under those sections.—Id.

4. In a proceeding under Rev. St. Wis. § 3825, the court was unable to determine whether the money from the note in the hands of the respondent came to him as the individual property of one W., or from him as the administrator of an estate. *Held* that, after such a finding, it was error for the court to restrain respondent in the use of the money.—Id.

5. The evidence before the county court was not returned, but the finding of the court was that it was unable to decide whether it was the property of the estate or not. *Held* that, upon such findings, the proceeding should have been dismissed.—Id.

Allowance of demands—Claim not proved.

6. The wife and heirs of the deceased conveyed mortgaged land belonging to the deceased, by a quitclaim deed, to the mortgagee. The administrator claimed the right of possession of the land, and to rent it for the benefit of the common creditors. The mortgagee petitioned the county court to order the administrator to pay over the rents collected, not necessary to pay expenses of administration, to the mortgagee, and to deliver possession of the land to him, and sell it subject to the mortgage. *Held*, that the mortgagee having never proved his claim upon the estate the county court had no jurisdiction to admit him to a participation in the assets. — Crow v. Day, (Wis.) 45.

—— Appeals.

7. The payee of a note given for the benefit of another is a "creditor," within the meaning of the statute (Gen. St. Minn. 1878, c. 53, § 24,) allowing appeals from the disallowance of claims against estates in the probate court.—Lake v. Albert, (Minn.) 177.

8. The trial and determination of a claim against an estate on appeal from the probate court, without pleadings, is an irregularity merely, and does not go to the district court's jurisdiction.—Id.

9. Under Gen. St. Minn. 1878, c. 53, authorizing any executor, administrator, or creditor of an estate to appeal from the allowance or disallowance in the probate court of claims against the estate, a *notice* of appeal served and filed is effectual as an "application" for an appeal.—Id.

10. On appeal from a disallowance of a claim, the circuit court should not enter a judgment against the administrator, but only an allowance or disallowance of the claim, to be certified to the probate court. —Tyler v. Fleming, (Mich.) 902.

Expenses of last sickness.

11. A decedent who had prior to her death always lived with her husband, left an estate of between $2,000 and $3,000. *Held*, that the expenses of her last sickness and funeral were a charge upon the husband, and not upon the estate.—Galloway v. Estate of McPherson, (Mich.) 114.

Exemptions.

From taxation, see *Taxation*, 2.

Homestead bought with pension-money, see *Constitutional Law*, 5.

EXTRADITION.

Interstate, expenses, see *Counties*, 3.

Who is fugitive from justice.

1. To be a fugitive from justice in the sense of the act of congress regulating the subject of extradition. (Rev. St. U. S. § 5278,) it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against its laws, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another state. Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. Rep. 291.—State v. Richter, (Minn.) 9.

2. The important fact is not his purpose in leaving, but that he has left, and hence is beyond the reach of the process of the state in which the crime was committed.—Id.

3. The fact that he is not within the state to answer the charge when required, renders him, in legal intendment, a fugitive from justice, regardless of his purpose in leaving.—Id.

FACTORS AND BROKERS.

Real-estate agents—Authority.

1. Defendants, real-estate brokers, wrote to plaintiff's attorney in fact: "Do you have charge of the lands * * * belonging to the estate of Hon. S? If so, are they for sale? * * * If the title is all right, we can possibly find a customer for the list this year. Let us hear from you as to prices, etc." The answer was: "I herewith inclose you a price-list of our lands. * * * My mother is the widow of Hon. S., and is the sole devisee. * * * I am executor of my father, and attorney in fact of my mother. The titles are all strictly clear and good." Attached to this letter was: "Western land for sale, Winnebago county, Iowa," with a list of land, terms, and prices, and "Apply to D. S. * * *" *Held*, that this correspondence, on its face, does not contain authority to sell the lands, binding on plaintiff, if the sale was made on the terms given.—Stewart v. Pickering, (Iowa,) 690.

2. The fact that in a particular instance a person was authorized by the owner of property to negotiate a sale of it to one person on certain terms, the actual transfer to be made by the owner personally, is not sufficient to prove authority in such person to sell and transfer the same property at a prior time and on different terms to another and different person.—Graves v. Horton, (Minn.) 568.

3. Plaintiff was a real-estate broker, and applied to defendant to purchase a certain lot, obtained his terms, agreed to take the lot, and paid him $100. The evidence showed that this was done in contemplation of the purchase of the lot by a customer of plaintiff, one C., with whom he had previously conferred. Soon afterwards the parties were brought together, and it was mutually understood that the negotiations for the purchase were made for C., who agreed to take the lot and pay the price indicated; that afterwards plaintiff prepared a deed running to C., and at his instance it was executed by defendant to be delivered to C., and left with plaintiff. C. subsequently refused to take the deed and complete the purchase. It appeared that plaintiff had never asked for a deed for himself, or offered to pay the purchase money; that after C. refused the deed plaintiff sued him for his fees and expenses, including the $100 paid defendant, which he alleged was advanced and expended by him for C. as his agent in the premises, and recovered judgment therefor. *Held*, that the jury were justified in finding that plaintiff was the agent of C. in the negotiations, and that defendant was warranted in treating the latter as principal.—McKinney v. Harvie, (Minn.) 668.

—— Commissions.

4. Plaintiffs, real-estate agents, agreed, for a certain per cent. on the price, to procure a purchaser for defendant's land. The evidence showed that plaintiffs procured a purchaser for the land on the terms agreed upon, and that defendant then refused to sell, but wanted a higher price. *Held*, that the evidence warranted a verdict for plaintiffs for the agreed compensation.—Magill v. Stoddard, (Wis.) 346.

FALSE PRETENSES.

Information.

1. Where, in an information against a party for obtaining money by false pretenses, it is alleged that "by reason of the false pretenses" the accused obtained the money, the words of the statute being "by false pretense," *held*, the allegation was sufficient.—Cowan v. State, (Neb.) 405.

Evidence.

2. In a prosecution against a party for obtaining money under false pretenses from a bank, the note given by him for the money, and mortgage to secure the same, when introduced in evidence, are sufficient to prove the *de facto* existence of the bank. People v. Hughes, 29 Cal. 260; Bank v. Harding, 1 Neb. 461.—Id.

Fires.

See *Negligence*, 1, 2; *Railroad Companies*, 25–27.

FISHERIES.

Laws regulating.

1. The Grand river, Michigan, at a point three miles up stream from the mouth, is not a "harbor" in the sense in which that word is used in the statutes of the state of Michigan regulating fisheries.—People v. Kirsch, (Mich.) 157.

2. The power granted to the common council of Spring Lake, Michigan, is special, and it has not authority to make the general laws of the state inoperative, nor to establish harbor lines in Grand river. —Id.

3. Act No. 10, Laws Mich. 1885, regulating and protecting fisheries, is not repealed by implication by act No. 61 of the same year.—Id.

FIXTURES.

Between owner and vendee of the land.

1. When the owner of a machine adapted for use in a flouring-mill consigns it to himself in the care of another, to have it tested in a flouring-mill belonging to a third person, and the machine is set up by that other in the mill on legs, and attached to the floor with screws, and to the main shafting of the mill with belts and pulleys, the machine does not thereby become a fixture as between the owner and a purchaser of the realty.—Walker v. Grand Rapids Flouring-Mill Co., (Wis.) 333.*

Between landlord and tenant—Right to remove.

2. A tenant at will, who has purchased and occupies a building put on the land by his assignor, cannot, having fallen into arrears of rent, and being ejected after due notice to quit, bring action for the landlord's subsequent conversion of the building, which he has thus had full opportunity to remove.—Erickson v. Jones, (Minn.) 267.

Fraud.

See, also, *Deceit; Duress; Fraudulent Conveyances.*

As ground for rescission of contracts, see *Equity*, 3–5; *Sale*, 9–11.

Criminal liability, see *False Pretenses.*

Debt contracted by, effect of discharge in bankruptcy, see *Bankruptcy.*

In sale of goods, waiver by purchaser, see *Sale*, 16.

service of process, see *Writs*, 2.

Of agent on principal, see *Principal and Agent*, 9.

FRAUDS, STATUTE OF.

Debts of other persons.

1. A promise by a defendant in an action to his co-defendant, who appealed from the judgment, that he would pay one-half of the costs of the appeal, is not a promise to pay the debt of another, as the promisor was interested in the result of the appeal, and might be benefited by a reversal of the judgment.—Wilson v. Smith, (Iowa,) 506.*

2. A retail trader died indebted to plaintiffs for goods purchased. His widow continued the business, and orally promised plaintiffs to pay her husband's indebtedness if they would sell goods to her on credit. The credit was given. *Held* that, under How. St. Mich. § 6185, providing that "every special promise to answer for the debt, default, or misdoings of another person" must be in writing, and signed, etc., the widow was not liable for the husband's debt; her promise to pay being purely collateral, and no equitable consideration moving to her.—Ruppe v. Peterson, (Mich.) 82.*

Sale of goods.

3. A contract for the sale of trees of the value of $94.50 is within the Wisconsin statute of frauds, and is void where no earnest-money is paid, and no partial delivery made, unless "a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith;" but an order by letter is a sufficient "memorandum," and under Rev. St. § 2327, such "subscription" may be made by an agent of the buyer.—Hawkinson v. Harmon, (Wis.) 28.*

Representations of character.

4. How. St. Mich. § 6188, provides that "no action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing," etc. *Held*, not to apply to an action for damages for fraud and deceit practiced by defendant in making sale to him of shares of the capital stock and a mortgage bond of a corporation.—French v. Fitch, (Mich.) 258.

FRAUDULENT CONVEYANCES.

See, also, *Creditors' Bill.*

Preference, see *Assignment for Benefit of Creditors*, 5–7; *Insolvency*, 2.

What constitutes.

1. A mortgage upon property exempt by law, executed by insolvent debtors, is not

in fraud of creditors.—Chicago Coffin Co. v. Harris, (Wis.) 783.

2. The sale of all non-exempt property of a debtor, his failure to pay his debts, and knowledge of these facts by the purchaser, do not constitute, but only indicate, fraud. —Kuhn v. Gustafson, (Iowa,) 660.

6. The insolvency of a mortgagor, although a circumstance which may be taken, together with other material facts, to show a fraudulent design in disposing of property, is not of itself sufficient to establish it.—Rothell v. Grimes, (Neb.) 892.

Preference of creditors.

4. In Iowa, a debtor in failing circumstances may mortgage the whole of his property, for the security of a portion of his creditors, even though the effect of the transaction is to defeat the collection of his unsecured debts.—Southern White Lead Co. v. Haas, (Iowa,) 494.

5. A creditor may obtain from a failing debtor payment of his claim, provided he acts in good faith, and receives no more than sufficient to satisfy the debt.—Rothell v. Grimes, (Neb.) 892.*

6. Where one has borrowed money of another to start business, and finding it unprofitable turns over his stock to the latter in payment of the debt, this is no fraud as to his creditors.—Noyes v. Schnee, (Wis.) 810.

Transactions between relatives.

7. About the time a debtor became embarrassed, he transferred to his mother, for $1,200, certain promissory notes to that amount. He also conveyed to her, without consideration, his homestead, worth $650. His mother soon after bought a piece of land for $1,500, and had it conveyed to the debtor's wife. No part of the $1,200 received by the debtor from his mother was used in buying the land, nor was any of it returned by him to his mother, but it was used by him for his own purposes. *Held*, that no such fraud was shown as to entitle the creditors to have the land applied to the payment of judgments against the debtor, even though the mother's object in taking the deed in the name of the debtor's wife was to put the property beyond the reach of his creditors.—Pringey v. Warrall, (Iowa,) 682.

Evidence.

8. Testimony as to the insolvency of a defendant is evidence bearing upon the question of good faith in a conveyance made by him.—Henny Buggy Co. v. Patt, (Iowa,) 587.

9. On an issue of fact as to whether an assignment of property was made to hinder, delay, or defraud creditors, it is competent, where the assignor or assignee is a witness, to inquire of him whether, in making the assignment, he intended to delay or defraud his creditors.—Campbell v. Holland, (Neb.) 871.

10. The evidence showed that a party who had disposed of his goods had been convicted of a crime two days before the sale. For the purpose of further showing fraudulent intent in disposing of the goods, the United States statutes prescribing the fine for such crime were offered, to show an inducement for the fraudulent transfer. *Held*, that the rejection of these was not prejudicial error.—Kuhn v. Gustafson, (Iowa,) 660.

GARNISHMENT.

Of assignee for benefit of creditors, see *Assignment for Benefit of Creditors*, 8, 9.

Property assigned.

1. A principal defendant in garnishment had contracted with a railroad company to build a dock, and, being insolvent, induced the garnishee to obtain the bond required and advance the money needed to start the work. It required more money than was anticipated, and, to secure the garnishee, defendant sold and assigned to him all his rights under the contract, together with all tools and machinery, defendant to receive $200 per month for his services, and the garnishee agreeing that, if his profits amounted to a certain sum, he would pay a debt due by defendant to a bank; the garnishee further assumed the debts of the concern. *Held*, that the transfer from defendant was complete and absolute, and the agreement to pay one of his creditors, if the profits permitted, did not operate as a fraud on the other creditors, and was obligatory on the garnishee and enforceable by the bank as soon as the profits accrued; and the profits could not be garnished by other creditors.—Ingram v. Osborn, (Wis.) 804.

Procedure.

2. Where a garnishee answers, denying indebtedness, and the plaintiff tries the issue, it is not necessary for the complaint to allege the recovery of a judgment against the defendant, where the record in the case discloses that fact.—Henny Buggy Co. v. Patt, (Iowa,) 587.

3. Where the facts showed that a firm consisted in fact of but one person, it is not error to introduce evidence of a chattel mortgage from the firm to a garnishee, to prove the latter's indebtedness to such person, against whom plaintiff had a judgment.—Id.

4. Objections to a judgment rendered against a defendant, which do not go to the jurisdiction of the court, and concern the defendant alone, cannot be successfully

raised by a garnishee for defendant's indebtedness.—Id.

GIFT.

Presumption from possession.

1. On the issue of fact between plaintiff and defendant, as to the ownership of certain notes, the defendant claimed that the money for which they were taken was given him by plaintiff's intestate. Plaintiff showed, to rebut the presumption arising from defendant's possession, only certain statements of deceased that she intended to divide her property equally, etc. *Held*, that such statements, if admissible, were not sufficient to disprove defendant's claim.—Wescott v. Wescott, (Iowa,) 649.

Subsequent incumbrances.

2. A parol gift of land, followed by immediate and continued possession, vests a good title as against all subsequent grants or incumbrances of the donor, unless recognized by the donee while the title stood in the donor's name.—Potter v. Smith, (Mich.) 916.*

GUARANTY.

Scope.

1. In *assumpsit* it appeared that defendant carried on his business through contractors whom he largely paid by the store goods of plaintiff; that he gave him a written guaranty to pay for supplies which he should furnish to his contractor K.; that defendant told him to pay the men of K., and he would repay him; that statements of the account were furnished defendant, who made partial payments, and never objected to any of them until after K.'s job was closed; that K. earned enough money on the job to pay the account; that by the agreement defendant was only to pay to the extent of moneys K. was to receive from the job; that he had paid that amount or more; that he had written to plaintiff several weeks before K.'s job closed "to call your attention to what I have told you, and also written in former letters, that I would not assume an unlimited account of K., but only so far and fast as he earns it;" and that plaintiff never received the letter. *Held*, that the evidence sufficiently showed that plaintiff had authority to pay the orders, and that he kept within the limit, even though the jury found specially that he did not have *unlimited* authority.—Brennan v. Busch, (Mich.) 795.

Laches of plaintiff.

2. Where the whole amount of the guarantied debt was due August 25th, and the defendant's store and stock of goods was destroyed October 1st, up to which time the debt might have been made from them, and a term of court was held in September in which no suit was brought, *held*, that plaintiffs had failed in diligence, and could not recover on the guaranty.—Durand v. Bowen, (Iowa,) 644.

GUARDIAN AND WARD.

Accounting, bond on appeal, see *Appeal*, 11.

Recovery on bond.

1. In an action on a guardian's bond in the penal sum of $4,000, by one of three wards, two of whom had recovered $8,546.04 on the same bond in a former action, *held*, that plaintiff was not entitled to judgment in excess of one-third of the penalty of the bond.—Edmonds v. Edmonds, (Iowa,) 505.

Power of guardians.

2. Under the Michigan statutes authorizing a guardian to demand, sue for, and receive all debts due his ward, a guardian may maintain an action to foreclose a mortgage given to his predecessor.—Norton v. Ohrns, (Mich.) 175.

Sale of real estate.

3. In proceedings in the probate court for a guardian's sale of real estate, the petition for license to sell omitted to set out the circumstances of the estate; the guardian did not subscribe the oath before sale; no bond before sale was given; and it was doubtful whether a report of sale had been made. *Held*, that these were not such irregularities as to invalidate the title acquired by a *bona fide* purchaser at such sale.—Fender v. Powers, (Mich.) 80.

HIGHWAYS.

See, also, *Bridges*.

Establishment, appeal, see *Appeal*, 7–9.

—— order dismissing appeal, see *Appeal*, 3.

Dedication.

1. The evidence showed that from the time defendant's road was built there had been a public highway running at right angles to defendant's tracks; that, soon after the road was built, the public put some plank at the crossing, so as to enable travel to pass; that this was taken up by defendant, which put down new plank-crossings, which it thereafter maintained at its own expense; that these crossings were on a line with each other, and together with the highway on each side made one continuous line for travel; that the road (including these crossings) was extensively traveled by the public without objection from defendant, and that this was the only crossing in the neighborhood. *Held*, that the question of dedication by defendant com-

pany of a highway across its tracks was, under the evidence, one of fact for the jury.—Skjeggerud v. Minneapolis & St. L. Ry. Co., (Minn.) 572.

Establishment.

2. The failure of the supervisors to award damages to the land-owner or take from him a written agreement as to their amount, or a written release therof, as provided by Rev. St. Wis. § 1270, invalidates the proceedings and renders them impracticable by any person interested.—McKee v. Hull, (Wis.) 49.

3. A statement to the supervisors by a party that he would allow the road to be run on his land, and that he did not, and would not, claim any damages therefor, was not such a waiver as would bind him, was not a valid release under the statute, and did not raise an estoppel *in pais*.—Id.

Discontinuance.

4. How. St. Mich. § 1300, provides that the commissioner may adjourn proceedings to discontinue a highway no longer than 20 days. *Held*, that such proceedings had on June 6th, pursuant to a 20-days adjournment from May 18th, are irregular and void.—Price v. Stagray, (Mich.) 815.

5. How. St. Mich. § 1298, provides that proceedings to discontinue a highway must be after 10 days' notice. *Held*, that such proceedings, at a hearing on June 6th, pursuant to a notice given June 1st, are irregular and void.—Id.

Taxes and assessments.

6. The commissioners of highways levied a tax of one mill on the dollar for highway purposes. By the Michigan statute the commissioners are required to assess upon the valuation appearing on the assessment roll of the preceding year. The valuation of certain lands was $50, and the assessed tax on these lands should have been 5 cents in addition to the tax of 50 cents for highway labor, whereas the lands were taxed $1. *Held*, that the excess made the tax void.—Seymour v. Peters, (Mich.) 62.

Liability for defects.

7. A state road ran north and south on the line between two townships. Plaintiff was injured in an accident caused by the unsafe condition of the road, and occurring on that portion of the road which had been assigned, by the action of proper officials, to the care and repair of the defendant township. The Michigan act of 1836 placed all state roads under the control, care, and supervision of the several townships "through which the same shall pass." How. St. § 1445, makes it the duty of townships to keep in good repair the roads in their jurisdiction; and section 1442 gives a right of action to persons injured by neglect to keep roads in safe and good condition. *Held* that, under these statutes, the defendant was liable.—Sharp v. Township of Evergreen, (Mich.) 67.

8. Plaintiff was driving on a township road on Sunday, for a lawful purpose, and was injured by an accident resulting from the township's neglect to keep the road in good and safe repair. *Held*, that the township was liable.—Id.*

Obstruction—Action for damages.

9. In an action for damages resulting from the negligence of defendant in obstructing a highway-crossing with snow thrown from the railroad track, causing the death of plaintiff's intestate, evidence of the difficulties experienced by other travelers in attempting to pass the crossing prior to the accident, and while the highway was in substantially the same condition, was admissible.—Phelps v. Winona & St. P Ry. Co., (Minn.) 278.

10. In determining whether plaintiff exercised ordinary care in attempting to travel a highway known to him to be partially obstructed, evidence that there was no other road by which he could reach his destination is competent.—Skjeggerud v. Minneapolis & St. L. Ry. Co., (Minn.) 572.

Title to the fee.

11. The presumption of law is that the owner of the land abutting on a street is the owner of the fee in the street.—Rich v. City of Minneapolis, (Minn.) 2.

HOMESTEAD.

Conveyance, see *Specific Performance*, 1.
Entries, see *Public Lands*, 1, 2.
Widow's election between homestead and dower, see *Appeal*, 57; *Dower*, 1–4.

Proceeds of sale.

1. Defendant having sold his homestead, took notes in part payment, and borrowed money upon them as security, and bought a homestead, intending to use his interest in the notes to pay his debts, and improve the same. *Held*, under Rev. St. Wis. § 2983, providing that the proceeds of the sale of the homestead, held with the intent to procure another, shall be exempt for two years, that his interest in the notes was exempt.—Bailey v. Steve, (Wis.) 735.

Conveyance.

2. Plaintiff, the owner of a homestead under a patent from the United States, conveyed the same by warranty deed to his wife, who gave him a mortgage, reciting that it was given to secure part of the purchase money. Both parties acted in the honest belief that such conveyance would render the homestead more secure to the wife and children. After some years, finding that they were mistaken, the wife reconveyed to plaintiff, who there-

upon discharged the mortgage. There was no money consideration in any of the transactions. The land had been continuously and openly occupied by plaintiff and his family as a homestead during the entire period. *Held*, that the conveyance did not operate to extinguish the exemption, under Rev. St. U. S. § 2296, providing that no lands acquired under the provisions of the homestead act "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."—Bouscher v. Smith, (Iowa,) 681.

HOMICIDE.

Murder.

1. In trial for murder it appeared that defendant and others with deceased were seen quarrelling in the street; that soon afterwards deceased fell with a gash in his neck, from which he died; that the next morning, blood was found on defendant's hands and clothes. *Held*, that the evidence was sufficient to go to the jury.—State v. Johnson, (Minn.) 878.

Self-defense.

2. In a prosecution for murder, the defense was that the killing was done in self-defense. At the time of the homicide the defendant was in his "root-house," or outdoor cellar, and resisting an invasion of it. The court gave the same instructions as would have been applicable if this "root-house" had been defendant's dwelling-house. *Held* no error.—People v. Coughlin, (Mich.) 72.

3. An instruction that "the burden of proof was upon the prosecution to satisfy the jury, beyond a reasonable doubt, that the killing was not in self-defense, and that no reasonable belief existed in defendant's mind at the time that he was in great bodily danger, as the facts and circumstances then appeared to him," *held* correct.—Id.

4. An instruction: "If you should find, beyond a reasonable doubt, that defendant shot and killed P. through mere cowardice, or from intentionally pointing his gun at him, and carelessly shooting to frighten him away, and under circumstances which, as they appeared to him at the time of the shooting, were not sufficient to induce in him a reasonable belief that he was in danger of bodily harm, the law will not justify the killing on the ground of self-defense," *held* correct.—Id.

Indictment.

5. An indictment for murder in the first degree, which alleges that the killing was done without authority of law and with malice aforethought, is good under Gen. St. Minn. 1878, c. 108, providing for the form of such an indictment.—State v. Johnson, (Minn.) 873.

6. Intent or purpose to kill is essential to constitute the crime of murder in the first or second degree, as defined by Crim. Code Neb. §§ 3, 4, and this intent must be specifically and directly averred as part of the description of the offense in every indictment for either of those crimes.—Shaffer v. State, (Neb.) 884.

7. An averment that the accused "feloniously, purposely, and of deliberate and premeditated malice," did make an assault on the deceased, and that he then and there "feloniously, purposely, and of his deliberate and premeditated malice did shoot" the deceased with a gun loaded, etc., inflicting a mortal wound of which the deceased then and there died, does not satisfy the requirements of the law; for though the accused may have purposely and of deliberate and premeditated malice assaulted the deceased, and shot him, it does not follow that the shooting was with the design and purpose to produce death.—Id.

8. Where the purpose to kill is not averred by way of description of the offense, the omission cannot be aided by the ordinary formal conclusion of the indictment which avers that "so" the jurors do find and say that the accused "did in manner and form aforesaid, feloniously, purposely, and of his deliberate and fraudulent malice, kill and murder" the deceased. Such allegation, being nothing more than a legal conclusion arising from the facts previously stated, cannot cure any defects in the premises on which it assumes to be predicated.—Id.

Evidence.

9. The proceedings before the coroner are not admissible as evidence for the defendant, when the object is merely to corroborate the defendant's testimony upon the trial.—People v. Coughlin, (Mich.) 72.

10. A declaration made within a few moments of the firing of the pistol shot which caused the injuries of which deceased died, tending to identify the defendant as the perpetrator of the crime, and made when there was danger of the occupants of the house being burned, and in reference thereto, a fire having been started in one of the rooms, is part of the *res gestæ*.—State v. Schmidt, (Iowa,) 590.

—— Dying declarations.

11. A declaration made by deceased a few days before her death was received in evidence. Some days before making it, deceased had said she knew she must die, and had made other statements showing she did not expect to live. *Held*, properly admitted.—Id.

12. The sense of impending death neces-

sary to constitute a dying declaration may be proven either by the express words of the declarant, or inferred from the circumstances of the case.—Id.

18. The length of time elapsing between the making of a declaration and the declarant's death does not affect the admissibility of the declaration in evidence, though, in the absence of better evidence, it may serve to show the presence or absence of a sense of impending death.—Id.

14. A dying declaration in writing was received in evidence, as was also a parol declaration made by the same party further identifying the perpetrator of the crime. *Held*, that part of the evidence being written and part parol was no objection to it. —Id.

15. Dying declarations are entitled to the same consideration as statements made upon oath.—Id.

Instructions.

16. In a trial for murder the witnesses, of whom defendant was one, concurred in the statement that he killed the deceased. The court in its charge said the killing was conceded. *Held*, that it was not error.—State v. Archer, (Iowa,) 241.

17. Under an indictment for murder defendant assigned as error that the court refused to define, in the charge to the jury, manslaughter in the second degree. There was nothing in the record to show that it was requested. *Held*, that the assignment was not available on appeal. — State v. Johnson, (Minn.) 373.

HORSE AND STREET RAILWAYS.

Exclusive franchise.

The opinion in this case, (33 N. W. Rep. 619,) that, under Code Iowa, 464, empowering cities to authorize or forbid the laying of a street-railway track, the city may make a contract for street-railway service, and, if a better or more immediate service can be obtained thereby, may secure the company, against an impairment of its profits or interference with its extension for a limited time, does not mean that a city, under such a contract, cannot avail itself of an improved street railway operated by other than animal power, if necessary for its welfare.—Des Moines St. Ry. Co. v. Des Moines Broad Gauge St. Ry. Co., (Iowa,) 602.

HUSBAND AND WIFE.

See, also, *Divorce; Dower; Homestead.*

Property rights, see *Trusts*, 8.

Property rights.

1. In an action for damages for conversion of certain crops and stock, the evidence showed that plaintiff and her husband had occupied her farm about four years, and that she let the farm to her husband, who carried it on and sold and appropriated the products thereof, and used and disposed of the crops and stock raised and kept thereon, during that time, as his own, without interference from her; also that she admitted that her husband owned the property. *Held* sufficient to warrant a finding that the products of the farm were the property of the husband.—Stennett v. Bradley, (Wis.) 467.

Post-nuptial contracts.

2. In an action brought by a wife against her husband upon a contract made between them by which the husband agreed, in substance, to drop all matters of dispute, live as a husband ought to live, and pay to the wife $200 per year, if the wife would remain at his home, drop all matters of dispute, keep his house, and live with him, the petition stated that previous to the making of the contract the husband had been wasting his money on other women, and the contract was made to settle differences arising thereby. *Held*, that the contract was without consideration, and a demurrer to the petition should be sustained. ADAMS, C. J., and SEEVERS, J. dissent.—Miller v. Miller, (Iowa,) 464.

Abandonment.

3. An abandonment of his wife by a married man occurring before Laws Wis. 1885, c. 422, took effect, (viz., April 18, 1885,) but willfully continued down to the time of trial, subjects him to the penalty denounced by that act for refusal to support.—State v. Witham, (Wis.) 934.

4. The words "being of sufficient ability," as used in section 2 of said act relating to refusal to support, refer as well to the husband's capacity to earn wages or salary as to property actually owned by him.—Id.

INDICTMENT AND INFORMATION.

Conviction for lesser offense, see *Rape*, 4. Particular crimes, see *Abduction*, 2; *False Pretenses*, 1; *Homicide*, 5–8.

Finding and filing.

1. Code Iowa, § 4290, providing that the dismissal of a charge against a person by a grand jury "does not prevent the same from being again submitted to a grand jury as often as the court may direct, but, without such direction, it cannot again be submitted," does not forbid the grand jury from finding an indictment upon their own motion on a charge that has once been dismissed, but which has not been resubmitted by the court.—State v. Collis, (Iowa,) 635.

2. Defendant was convicted of a crime and sentenced to imprisonment. An information for another offense was then pending against him, but this, on his incarceration, was *nolle pros'd*. He escaped from prison, and fled to Canada. Another information on the second offense was then made, and on this, after his extradition, he was tried without examination before a magistrate. *Held*, that defendant was a "fugitive from justice" within the meaning of a statute (How. St. Mich. § 9555) providing that informations may be filed, without preliminary examination, against fugitives from justice.—People v. Kuhn, (Mich.) 88.

3. Where the charge as set forth in an information, and upon which the defendant is convicted, is substantially the same as that on the preliminary examination, the information will not be quashed for want of a preliminary examination.—Cowan v. State, (Neb.) 405.

Form.

4. Putting the date when and the place where found, at the end of an indictment, after the words "against the peace and dignity of the state" does not vitiate it; such date and place are no part of the indictment.—State v. Johnson, (Minn.) 878.

5. An indictment against two or more persons may charge the act to have been done by them collectively.—Id.

6. An indictment charged the keeping of a nuisance in a building. It further charged the keeping of a nuisance in a building on a certain lot. Each charge was full and complete in itself. There was a blank in the indictment separating the two charges, but no numbers were used to designate it as two counts. *Held*, that the indictment contained two counts, and the court below did not err in so construing it.—State v. Dow, (Iowa,) 651.

Allegation of place.

7. An information which fails to allege that the crime was committed within the jurisdiction of the court, is fatally defective.—McCoy v. State, (Neb.) 202.

INFANCY.

See, also, *Guardian and Ward; Parent and Child.*

Contracts.

1. Whether an infant was emancipated by his father at the time he made a note, is immaterial as regards his liability thereon.—Tyler v. Fleming, (Mich.) 902.

Ratification of contract.

2. Whether the contract of a minor was ratified by his silence for two years after his majority is a question for the jury, and an instruction that the failure to disaffirm was a ratification, is error.—Id.

Actions by.

3. In an action for services rendered prosecuted by an infant through his next friend, the answer denying the alleged infancy, the plaintiff need not prove that he is an infant; his right of action not depending upon that fact.—Meyenberg v. Eldred, (Minn.) 871.

INJUNCTION.

Protection of water-rights, see *Waters and Water-Courses*, 6.

Entry of judgment nunc pro tunc.

1. Where a judgment has been docketed without first being entered upon the judgment book, the refusal of the court to grant a temporary injunction to restrain the clerk from entering the judgment *nunc pro tunc* was within the sound legal discretion of the court.—Rockwood v. Davenport, (Minn.) 877.

Pleading.

2. A complaint does not show a case for an injunction to prevent a cloud upon title, if it appears only by inference, and not by averment, that acts are threatened or contemplated which will impose a cloud.—Maloney v. Finnegan, (Minn.) 723.

INSOLVENCY.

See, also, *Assignment for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances.*

Construction of assignment.

1. An assignment by a firm, under the Minnesota insolvent laws, which is ambiguous as to whether the partnership property only, or the separate property of the partners as well, is conveyed, will be rather construed in the latter sense, since in the former it would be invalid. And a reservation of exemptions therein adds force to this construction, since a firm has no exemptions.—Security Bank v. Beede, (Minn.) 435.

Preferences.

2. A provision in an insolvent law providing that a preferential conveyance made in fraud of the provisions of the statute shall be void, is to be construed as meaning simply that it is voidable only in favor of proceedings under and in aid of the law. A creditor who is not a party to the insolvency proceedings, but is claiming the property by virtue of an attachment or judgment against the insolvent debtor, can claim no benefit from this provision.—Smith v. Breinerd, (Minn.) 871.

Rights of creditors.

8. Where the insolvent law provides that a secured creditor may release and deliver up to the assignee the property held as security, and be admitted as a creditor for the whole of his debt, the proof of the whole claim without a release would not of itself discharge or release the security. Only the assignee could avail himself of the right which this provision of the act was intended to secure for the benefit of the estate. A mortgagee who has proved his debt against the estate of the mortgagor without discharging his mortgage, is not thereby estopped to claim under it against a subsequent attaching creditor who has not proved his debt.—Id.

INSURANCE.

The contract.

1. The evidence tended to show that it was understood between plaintiff and defendant's agent that when the former's policy of insurance should expire, a new policy should be issued, and with the exception of a different apportionment of the insurance money, the terms of insurance should remain as before; that after the policy had expired a new agent went to plaintiff to learn how he wanted the new policy made; that plaintiff then named the same terms contemplated in the conversation with the former agent; that the new agent assented to this; that a few days after this the former agent, who was still acting for the company, again went to plaintiff, at the request of the new agent, to ascertain how he wanted the insurance placed; that the terms were again stated and arranged in accordance with what had been before agreed upon; that a policy was then made out, but not delivered until the next day. In the mean time the property covered by the policy was destroyed by fire. *Held*, that the evidence justified the finding that a parol contract of insurance had been effected.—Ganser v. Fireman's Fund Ins. Co., (Minn.) 584.

2. Plaintiff gave its note, undated, to defendant insurance company, payable in installments at such times as defendant might order, with a blank application signed by plaintiff, which was accepted by the agent of the defendant, with the agreement that it would effect a contract of insurance, and that, when plaintiff would give defendant the apportionment of the risk, the policy should issue, and the note and application be filled up to correspond. *Held*, that such an arrangement did not make a contract of insurance.—Mattoon Manuf'g Co. v. Oshkosh Mut. Fire Ins. Co., (Wis.) 12.

Assignment of policy.

3. Action was brought by an insurance company to determine, as between the two defendants, the title to money due on a policy. Complainant alleged that one claimed under an assignment from the assured, which fact was also alleged in the answer of such claimant, and was nowhere denied by the pleadings of the other. Claimant testified that an assignment was made, and the policy delivered to her, and offered in evidence a copy of the original assignment which she testified she had been unable to find. *Held*, sufficient evidence of the assignment.—Mutual Benefit Life Ins. Co. v. Wayne Sav. Bank, (Mich.) 853.

4. Action was brought by a life insurance company to determine the title to money due on two policies upon the life of the husband of the beneficiary. The other claimant, a bank, asserted title by virtue of an assignment of the policies. It appeared that the wife was peculiarly ignorant of business matters; that for a number of years her husband had been doing business with the bank in his wife's name, and was in the habit of borrowing large sums of money on their joint notes. He would procure her signature to blanks, and as occasion required, fill them out. She did not know what papers she signed, nor what use was made of them. Her signature was thus obtained to the assignments of the policies, which were given to the bank as security for a large debt, evidenced by these notes, and of the existence of which the wife was ignorant. She never knew of her husband's dealings with the bank, nor that he was in any way indebted to it. She never had any property of her own, and she never received any benefit from these notes or assignments. *Held*, that the assignments were invalid.—Id.

Surrender of policy.

5. Plaintiff procured from defendant a policy on the life of her father. Her father was never examined by a physician. Plaintiff paid the premiums. An inspector sent out by the company to examine and take up improper policies, called upon plaintiff, learned her father had not been examined, and took the policy to send to the company, promising the company would return the policy or the premiums. Plaintiff afterwards demanded the policy or the premiums of the local agent, but received neither. Defendant claimed to have returned the policy to plaintiff's husband through the local agent. He denied having received it. There was no claim of fraud on the part of plaintiff. *Held*, that an instruction directing a verdict for defendant was erroneous. The case should have been left to the jury.—Frain v. Metropolitan Life Ins. Co., (Mich.) 108.

Application.

6. At the time of his application plaintiff had possession of the realty on which the

insured property was situated under a land contract upon which he had paid part of the purchase price, the remainder being paid after the issuance of the policy, but before its delivery to him; that this land contract was shown to the insurance agent when his application was made, and no questions were asked or representations made as to plaintiff's title or interest in the land or building, and that the improvements on the land were of greater value than the insurance. *Held*, that plaintiff was the real owner in equity, and held, within the meaning of a condition in the policy, "the entire, unconditional, and sole ownership of the property."—Johannes v. Standard Fire Office of London, (Wis.) 298.

Conditions of policy.

7. Laws Iowa 1880, c. 210, § 2, (McClain's Code, p. 299,) relating to forfeitures of policies, provides that where a fire insurance company shall take a note for a premium, written notice of its maturity shall be given to the insured, and that "such notice may be served by registered letter, addressed to the insured." *Held*, that service is complete when the registered letter is mailed.—McKenna v. State Ins. Co., (Iowa,) 519.

Agents.

8. One claiming to be the agent of a life insurance company forwarded an application to it, signed by him as agent, and the company thereafter received from the insured dues and assessments on the policy issued on the application. *Held*, in a suit on the policy, that, having enjoyed the benefits of his acts, it could not deny that he was its agent.—McArthur v. Home Life Ass'n, (Iowa,) 430.

9. An agent of a life insurance company falsely stated the age of the applicant, forged a medical certificate, and on the return of the policy materially changed it before delivering it to the insured, without the knowledge of either the company or the insured. *Held*, that in filling up the application, of which the medical certificate was a part, and in delivering the policy, the agent was acting within the scope of his authority; and that he perpetrated a fraud without the knowledge of defendant will not relieve it from liability on the policy.—Id.*

10. The attempted waiver by a local agent of the condition against incumbrances, is a nullity.—Hankins v. Rockford Ins. Co., (Wis.) 84.*

Actions on policies.

11. Under Acts 18th, Gen. Assem. Iowa, c. 211, § 2, providing that insurance companies shall attach to their policies, or indorse thereon, a true copy of any application or representation of the assured which may affect the validity of the policy, or shall be barred from pleading or proving such matter, a demurrer will lie to a plea of misrepresentations in the application, when the act has not been complied with.—Cook v. Federal Life Ass'n, (Iowa,) 500.

12. There being no averment by defendant that the contract provided that fraud in the proof of loss should avoid the contract, and it not appearing that the plaintiff consented to litigate that question, the defendant was not in a position to avail itself of that defense.—Ganser v. Fireman's Fund Ins. Co., (Minn.) 584.

13. Any fact necessary to an understanding of other material and relevant facts in a case is admissible in evidence; *e. g.*, an expired contract of insurance, in connection with a subsequent parol agreement for the reinsurance of the same property, made with reference to the former contract.—Id.

INTEREST.

See, also, *Usury*.

On past-due negotiable paper.

The holder of past-due negotiable paper is not entitled to interest upon arrears of interest from the maturity of the obligation.—Buchtel v. Mason, (Mich.) 172.

INTOXICATING LIQUORS.

Illegal sales by druggists, forfeiture of license, see *Druggists*.

Licenses and taxes.

1. Defendant manufactured beer, and sold the same at wholesale and retail. She had paid the manufacturer's tax, and this, by How. St. Mich. § 1281, exempted her from paying a wholesale tax. She paid no retail tax. The amount of tax for "selling at wholesale," "selling at retail," or "selling at wholesale and retail," is the same. *Held*, that defendant was not authorized to sell at retail.—People v. Greiser, (Mich.) 87.

Druggists.

2. Acts Gen. Assem. Iowa, 1886, c. 83, relating to sales of intoxicating liquors by pharmacists for medicine, is complete in itself, and contains all the law in relation to such sales, and the manner of obtaining permits to sell, and by implication repeals the provisions of Code Iowa, c. 6, so far as relates to pharmacists.—State v. Courtney, (Iowa,) 685.

3. Since the passage of Acts Gen. Assem. 1886, c. 83, relating to sales of intoxicating liquors by pharmacists for medicinal purposes, a pharmacist is not required to give bond to obtain a permit so to sell, and such permit is not limited to one year.—Id.

Illegal sales.

4. When a physician sells liquor to persons who apply therefor by their own sug-

gestion, and not because of his prescription as their medical adviser, the fact that he is a practicing physician is no defense to a prosecution for illegally selling intoxicating liquors.—State v Cloughly, (Iowa,) 659.

5. Proof that persons drank liquor in a pharmacy raises the presumption that such liquor had been unlawfully given or sold to them by the proprietor thereof, as directly provided by Acts 21st Gen. Assem. Iowa, c. 88.—Id.

6. Evidence showing that a customer called for beer, was given liquor that looked like beer, and other evidence tending to prove the sale of intoxicating liquor, is sufficient to justify the finding of a jury that such liquor was sold. The burden rests upon defendant, after such proof, to disprove the intoxicating character of the liquor.—Id.

7. After proof of the sale of intoxicating liquor in a store in Iowa, the burden rests upon defendant to show such sales were lawful.—Id.

8. The accused, in a prosecution for selling liquor without a license, set up the defense that he was acting merely as the agent of the persons who got the liquor of him. It was proven conclusively, however, that such persons paid him for what they got, and at the time they got it. *Held*, that instructions for the defense on the liability of such an agent were properly refused.—Boldt v. State, (Wis.) 935.

Recovery of price.

9. Plaintiff, a corporation engaged in the wholesale drug business, sued to recover a balance for drugs sold and delivered. Defendant set up a counter-claim for money paid for intoxicating liquors unlawfully sold by plaintiff to defendant. The evidence showed that plaintiff dealt with defendant in the belief that he had a permit to sell liquors for lawful purposes; also that plaintiff had no permit, but that H., one of its stockholders, held permits to sell liquor for lawful purposes; that part of H.'s liquors were kept in the building occupied by plaintiff, but that plaintiff had no interest in that part of the business; that defendant ordered his liquors from plaintiff, but that the orders were turned over to H., who rendered the bills to defendant, and that, though defendant was directed by H. to remit to plaintiff, there was no evidence that plaintiff had any interest in the transaction; that plaintiff procured no liquors for any one but its drug customers, and in such cases settled with H., and looked to the customers for reimbursement; that plaintiff sent defendant certain statements of account, in which some of the claims for liquors were included, but that plaintiff was the mere assignee of H. *Held*, that a judgment in favor of defendant on his counter-claim should be reversed.—Hurlburt, Hess & Co. v. Fyock, (Iowa,) 482.

Criminal prosecutions.

10. A complaint charging that the defendant did on June 11, 1886, unlawfully sell, deal, and traffic in, and for the purpose of evading the law did give away, certain spirituous, malt, and intoxicating liquors, without first having obtained a license therefor, charges an offense under the statute; and is not bad for duplicity, the very language of the statute, (Laws Wis. 1885, c. 296, § 4,) being used, and the several acts, stated conjunctively, constituting but one offense, for which there can be but one conviction and punishment. — Boldt v. State, (Wis.) 935.

11. A prosecution under Code Iowa, § 1542, which provides that "no person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquors with intent to sell the same within the state," etc., is not barred by a conviction under an indictment under section 1543, providing that "whoever shall erect or establish or continue or use any building, erection, or place for, [keeping intoxicating liquors, with intent to sell the same,] shall be deemed guilty of a nuisance," etc., both the information and indictment covering about the same period of time.—State v. Graham, (Iowa,) 628.*

12. Under a complaint charging sales of intoxicating liquors without a license on June 11, 1886, the prosecution may show sales about June 10, 1886, to one person, and sales to others between May 10, 1886, and June 11, 1886.—Boldt v. State, (Wis.) 935.

13. An attorney selected by a peace officer to prosecute a person charged with keeping liquors for unlawful sale, under Code Iowa, c. 6, tit. 11, is entitled to the fee provided by statute for such services to be paid by the county, under Code Iowa, § 3829.—Work v. Wapello Co., (Iowa,) 452.

14. A fine imposed on a conviction for selling liquors under Code Iowa, § 1523, and other statutes, is not subject to that provision of Acts 21st Gen. Assem. c. 88, amending Acts 18th Gen. Assem. c. 75, § 8, to the effect that 25 per cent. of all fines recovered under "this act" shall be paid into the state treasury for the use of the commissioners of pharmacy in enforcing "this act," said act relating solely to the practice of pharmacy.—State v. Noel, (Iowa,) 922.

15. Under Code Iowa, § 1558, declaring fines, costs, and judgments against any person for unlawful sales of liquor a lien on all property used or occupied for such purposes with the owner's knowledge, no lien attaches until the fines and costs are assessed, or the judgments rendered; and an injunction to restrain the sale of property

alleged to have been so used and occupied, pending proceedings for unlawful sales, was properly dissolved on motion.—Bonesteel v. Downs, (Iowa,) 924.

JUDGE.

Judge de facto.

1. The title of a person to the office of judge of the recorder's court of a city cannot be tried in a collateral proceeding arising by way of *certiorari* to his judgment as such recorder, it not being alleged that any other person is the duly elected and qualified recorder.—People v. Gobies, (Mich.) 91.

JUDGMENT.

In replevin, see *Replevin*, 4.
Lien, see *Creditor's Bill*.
Objections to, see *Garnishment*, 4.
Operation and effect, bar to subsequent action, see *Nuisance*, 4.

By default.

1. A showing that the day before trial the judge had gone away, and the passenger train next day being late, had returned on a freight train, and defendant's attorney, knowing that the train was late, and that the judge was not at his usual hotel, failed to appear, does not manifest an abuse of discretion in the court in refusing to set aside the default then entered.—Reiher v. Webb, (Iowa,) 631.

2. That defendant had a lame back on the day of trial is no sufficient ground for setting aside a default.—Id.

3. Defendant was sued for services rendered, and pleaded meritorious defenses and a counter-claim. The court struck his answer from the files, and ordered judgment for refusal to appear and be examined by deposition; the order on appeal was affirmed, and judgment entered on *remittitur*. The court then set aside default on terms. Defendant asked to be allowed to comply with the order to appear as witness, which was denied. On appeal the judgment and orders were affirmed, (30 N. W Rep. 520,) and rehearing refused, (31 N. W Rep. 762.) Defendant asked for the setting aside of default and trial, on terms, alleging that all his appeals had been made in good faith on advice of counsel, and that he had a meritorious defense. *Held*, that this was a matter of legal discretion with the court, but it should be exercised to secure substantial justice; and where the defendant in default was excused, as in this case, and had a meritorious defense, he should have a trial on terms working no injustice to the plaintiff.—Whereatt v. Ellis, (Wis.) 814.

Rendition and entry.

4. As respects the lien or validity of a judgment informally entered and docketed without the taxation and insertion of costs therein, the omission is to be treated as an irregularity merely.—Richardson v. Rogers, (Minn.) 270.

5. When it appeared that judgment was entered up while a motion for a new trial was on file, which motion was overruled, and all the proceedings occurred at the same term of court, *held*, that the fact that judgment was entered before the determination of the motion was no ground for reversing the decision on the motion.—Hasted v. Dodge, (Iowa,) 462.

6. Gen. St. Minn. 1878, c. 66, § 273, provides that judgment shall be entered upon the judgment-book. Id. § 275, provides that immediately after entry of the judgment, a judgment-roll shall be made up, which shall contain a copy of the judgment, and for the filing of the judgment-roll. *Held* that, in order to entitle a judgment to be docketed, it must first be duly entered in the judgment-book, and a judgment-roll be filed.—Rockwood v. Davenport, (Minn.) 877.

7. When a judgment has been docketed without first being entered in the judgment-book, the clerk has no authority to make such entry *nunc pro tunc*.—Id.

Operation and effect.

8. An order discharging a person as garnishee of a judgment debtor is no bar to an action against the same person to set aside as fraudulent a conveyance to him by the judgment debtor, and to subject the property to a judgment against the grantor.—Boyle v. Maroney, (Iowa,) 145.

9. Where an action has been tried, and a verdict for the plaintiff set aside by the court, and a new trial granted, the plaintiff has a right to dismiss or discontinue his action, the same as if no trial had ever been had. It would be a dismissal "before trial," and no bar to another suit for the same cause of action. Nor would the plaintiff be estopped from setting up in the second suit, as the basis of his right to recover, other or different facts from those set up in the first action.—Phelps v. Winona & St. P. Ry. Co., (Minn.) 278.

10. Defendant gave two notes for a machine, conditioned that the machine must be perfected, or the notes were void. In an action on the second note, the answer stated that defendant had been sued upon the first note, to which he set up failure of the condition; alleged its breach, and a breach of warranty given with the machine; that the jury found specially the facts as averred; and found the difference between the value of the machine as warranted, and as it was, to be the amount of

the note at that time in suit. The answer in the present suit also alleged failure of condition. *Held*, that the answer did not show a previous adjudication of the matter relied upon in defense, or a judgment sufficient to compensate defendant for the failure of the condition; and that the second note was subject to the defense set out. —Bayliss v. Deford, (Iowa,) 596.

Release.

11. A judgment debtor, by agreement with his creditor, gave a mortgage on his property to certain bankers for enough to pay the judgment, the money thus obtained to be paid to the creditor, by his request, directly by the bankers. *Held*, that on the execution and delivery by the debtor of the mortgage to the bankers, he was entitled to a release of the judgment.—Walker v Crosby, (Minn.) 475.

Revival.

12. A judgment lienor, whose lien had terminated by limitation before the rendering of judgment in favor of plaintiff against the same judgment debtor, and, at the time of plaintiff's judgment, taken no steps to preserve or revive his lien. *Held*, that such lien could not be revived as against plaintiff.—Boyle v. Maroney, (Iowa,) 145.

Setting aside.

13. Where defendant failed to make proper service of his answer, and judgment was taken by plaintiff by default, it is within the sound discretion of the court to refuse to set aside the judgment on the ground that it was taken through surprise, inadvertence, or excusable neglect.—Van Aernam v. Winslow, (Minn.) 381.

JUDICIAL SALES.

See, also, *Execution; Guardian and Ward*, 3; *Mortgages*, 20.

Decree.

A decree for the sale of land to satisfy a lien should allow the lienor to purchase and direct the proceeds to be applied, first to the debt and costs, and the residue, if any, to be paid to the debtor; and it is error to order the payment of the money into court, to be divided between the parties as their interests may appear.—Johnson v. Fowler, (Mich.) 764.

JURY.

Summoning and impaneling, see *Appeal*, 86.

Competency of jurors.

1. The fact that one called as a juror in a litigation in which the city is a party is a tax-payer in the city, is no ground for challenge by the city.—Conklin v. City of Keokuk, (Iowa,) 444.

2. On the trial in the circuit court on appeal from a conviction before a justice for selling intoxicating liquors without a license, the examination of a number of the jurors as to qualification showed that they had been or were members of a club which seemed to have been formed for the purpose of obtaining liquor, and which the accused had been active in organizing, or with which he was connected in some way. These jurors having sworn that they were sensible of no bias, etc., they were accepted. The accused then objected generally to the jurors, to the manner of selecting them, and finally challenged the array. *Held*, that the objection and the challenge were both without merit; the inference to be drawn from the facts, if any, being that of prejudice in favor of the accused.—Boldt v State, (Wis.) 985.

Summoning and impaneling.

3. The defendant in a prosecution for murder challenged the array because two townships of the county (including the vicinage of the crime) were not represented on the panel. The order in this case directed a jury to be drawn from the body of the county, as authorized by How. St. Mich. § 7578. It was not shown that the officers who drew the jury had arbitrarily left out the townships from which jurors were not drawn, nor that the lists of such townships had not already been exhausted. *Held*, that the challenge was properly overruled.—People v. Coughlin, (Mich.) 72.

4. In the absence of evidence to the contrary, it will be presumed that the officers charged with the drawing and summoning of jurors have faithfully and correctly performed their duty in the premises.—Id.

5. How. St. Mich. § 7578, authorizes an order of court for the summoning of a jury for the general purposes of the term, when the regular panel has not been summoned 14 days before the term, or when a sufficient number of the regular panel do not appear. Under this section, summoning of 35 jurors, instead of 24, is not cause of challenge to the array.—Id.

Challenges.

6. Where a juror did not appear to be very conversant with the English language, *held*, that the judge might of his own motion excuse him as disqualified, although the plaintiff objecting had exhausted all his peremptory challenges. — O'Neil v. Lake Superior Iron Co., (Mich.) 162.

JUSTICES OF THE PEACE.

Appeal from, see *Appeal*, 4, 21.

Jurisdiction — Amount in controversy.

1. In an action of *assumpsit*, before a justice, the amount claimed in the *ad damnum*

determines the jurisdiction, and plaintiff may remit part of the amount proven, or abandon and omit proof of part of the amount claimed.—Olley v. Van Patten, (Mich.) 831.

Practice—Adjournment.

2. Rev. St. Wis. § 3631, provides that in justices' courts, no adjournment, after the first, shall be allowed unless the party applying shall show by oath that he cannot safely proceed to trial. In an action in justice's court, where there had already been two adjournments for cause shown, the case was again adjourned, on motion of plaintiff, and cause shown, against the objections of defendant, after the jury was sworn. On the adjourned day plaintiff appeared; but defendant, though in court, refused to appear. On motion of plaintiff, but without any affidavit or cause shown, the case was again adjourned. On the day to which the case was adjourned, the defendant did not appear, and judgment was rendered against him. *Held*, that the adjournment was unauthorized by law, and the judgment rendered by the justice should have been reversed.—State v. Gust, (Wis.) 559.

LANDLORD AND TENANT.

Recovery of possession, removal of fixtures, see *Fixtures*, 2.

Leases.

1. In a suit for rent upon a verbal lease, the court charged the jury that in determining the question "when this lease was to commence," they had "a right to take into account and consider the time when the defendant went into possession, the time from which he paid the rent, and all other circumstances thereon which throw any light upon the question of when the lease was to commence." *Held*, that such charge was correct and proper.—Pendill v. Neuberger, (Mich.) 249.

2. In a suit for rent on a verbal lease defendant asked the court to charge the jury "that the payment of rent for the month of February, which was paid on the twenty-eighth of February, is not, of itself, any evidence as to the time when the contract, alleged to have been entered into on or about the twenty-eighth of February, was to commence." The court refused to so charge, and instructed the jury that they had a right to infer from the payment of two months' rent monthly, that such payments were made under the alleged agreement of February 28th. *Held*, that such charge was proper and correct.—Id.

3. Defendants leased a farm for one year, the lease to be renewed "if both parties are suited, for eight years, reserving the right to sell," and occupied the farm for six years, when the plaintiffs bought it. *Held*, that the sale terminated the lease.—Wallace v. Bahlhorn, (Mich.) 834.

—— Assignment.

4. Under a deed conveying the grantor's interest in royalties under a mining lease, without the right to recover for rents past due, such rents cannot be recovered by the grantee on suit for rents subsequently accrued.—Pendill v. Eells, (Mich.) 754.

Eviction—Abatement of rent.

5. In an action to recover unpaid royalties under a mining lease, the evidence showed that the lessors had put locks on the engine-house, and employed a man to see that it was not opened, excluding defendants, to whom the lease had been assigned under a mortgage from the lessees, from working the mine, and though defendants had put on additional locks, plaintiffs had free access to and full possession of the premises. *Held*, that the court should have instructed the jury to return a verdict for defendants.—Id.

6. The lessor of a mill covenanted to repair the flume of the water-power, and make other repairs on the mill. In consequence of his failure to do this the mill became useless, and the lessees abandoned it. The lessor sued for the rent for the balance of the term. *Held*, that the defendants were not bound to repair the mill and deduct the costs thereof from the rent, and that they were justified in abandoning it.—Bostwick v. Losey, (Mich.) 846.

7. The lessor of a mill covenanted to repair the flume of the water-power, and make other repairs. In consequence of his failure to do this the lessees were unable to use the water-power, and finally abandoned the mill. *Held*, that the lessees could recover damages for the failure of the lessor to repair the flume, the measure of such damages being the value of the use of the water-power.—Id.

Lien for rent.

8. A lease for a planing-mill stipulated that the lessor should have a lien for rent and unpaid taxes upon all *improvements* put upon the premises, and that machinery put up by the lessees should be treated as chattel property. The lessees having mortgaged machinery affixed by them to the premises, the mortgagee replevied the property from the lessor, who had taken possession under claim of a lien for rent. *Held* that, under the lease, machinery was not included in the term "improvements," and the lessor could have no lien thereon except by having reduced it to his claim when the mortgage was executed.—Booth v. Oliver, (Mich.) 798.

LARCENY.

See, also, *Burglary; Receiving Stolen Goods.*

Verdict.

The verdict by which the defendant was found guilty of larceny, "in manner and form as charged in the first count or paragraph of the information," without ascertaining the value of the property alleged to have been stolen, is insufficient, under the provisions of section 488 of the Nebraska Criminal Code, to sustain a sentence of imprisonment in the penitentiary.—McCoy v. State, (Neb.) 202.

Lease.

See *Landlord and Tenant*, 1-4.

LIBEL AND SLANDER.

What is actionable.

1. Defendant published an article in a newspaper calling the plaintiff a "skunk." *Held*, that it was libelous *per se*.—Massuere v. Dickens, (Wis.) 849.*

Interpretation.

2. In an action for libel, the jury were instructed that to publish in a newspaper that a man is a skunk, "if it is intended, as it ordinarily would be, * * * to render him ridiculous and odious," is libel. *Held*, that the words "as it ordinarily would be" were not error, as the jury were left to decide whether that was the intention of the publication.—Id.

3. Defendant in a published article called the plaintiff "a skunk,—a thing as repulsive to the finer sensibilities of a man as your low insinuations and business practices are to your fellow-townsmen." *Held*, that as the article was libelous *per se*, the court, in assuming in his charge that the defendant called plaintiff a "skunk" and "disreputable in his business practices," did not depart sufficiently from the facts to call for a reversal.—Id.

Malice.

4. In an action of slander it appeared that the defamatory words consisted in a charge of burglary, and were spoken to an officer, with the order to arrest plaintiff; that defendant afterwards refused to make complaint, but requested the officer to prefer a charge of vagrancy. The plaintiff introduced evidence to show how long he was kept in jail by reason of the charge. *Held*, that the evidence was admissible as tending to show malice on the part of the defendant.—Plummer v. Johnson, (Wis.) 884.

5. In an action of slander, where the defamatory words were a charge of burglary resulting in the arrest and imprisonment of the plaintiff, the court was asked to instruct the jury that if the arrest and imprisonment were justifiable and lawful, they could not be evidence of malice. *Held*, that the instruction was improper, for the reason that it ignores whether the defendant believed the charge to be true, and acted in good faith in making it.—Id.

Damages.

6. In an action of slander the court instructed the jury that if the plaintiff's general character and reputation was bad his compensatory damages would be thereby lessened, and should be measured by the injury actually suffered. *Held*, that this instruction was a substantial compliance with the request that in such case the jury might find only nominal damages.—Id.

7. In an action of slander, when the defamatory words consisted in a charge of felony resulting in the arrest and imprisonment of the plaintiff, the jury awarded $500 damages. *Held*, the damages were not excessive.—Id.

8. Plaintiff published a card in relation to defendant, in reply to which the latter published a libel on plaintiff. Defendant on the trial offered the card in evidence, and also to show a conversation between plaintiff and a third party prior to the publishing of the original card, but not known to defendant when he published his libel. *Held*, that the card could be introduced in mitigation of damages, but the conversation could not be shown.—Massuere v. Dickens, (Wis.) 849.

Pleading.

9. In an action for criminal libel, the complaint charged that the defendant published of and concerning the complainant a certain "false, scandalous, malicious, and defamatory libel, therein and thereby accusing and imputing to the said Adolphus A. Ellis, prosecuting attorney, infamous and degrading acts," namely, of refusing to prosecute a suspected crime of murder, because the law forbade his taking bribes. *Held*, that the complaint was sufficient.—People v. Jones, (Mich.) 419.

Evidence.

10. Defendant published a libel on plaintiff in reply to a card published by him, and on the trial defendant offered to show plaintiff's reputation "for meddling and making insinuations in regard to his competitors in business." *Held*, that as there was nothing in either publication to call for such proof, it was properly refused.—Massuere v. Dickins, (Wis.) 849.

11. In an action for slander, plaintiff testified that at and for some time prior to the cause of action she was living with her sister, Mrs. P; that she had been working out, but had to come and help her sister,

as P.'s health had failed, and they could not get along without her; also, that defendant closed up a fence so they could not get a team in, and plaintiff had to spade up the garden, cabbage patch, etc. *Held*, that the evidence, so far as it showed the sickness of P., and dependence of his family on the services of plaintiff, and closing the fence and spading the garden, was irrelevant and incompetent, as tending to excite sympathy and increase the damages.—Perrine v Winters, (Iowa,) 679.

12. In actions for slander, evidence may be introduced showing the occupation of plaintiff, and the rank and condition in life of either party, in aggravation or mitigation of damages, but not beyond this.—Id.

License.

Forfeiture, see *Druggists*.
For sale of liquors, see *Intoxicating Liquors*, 1.

LIENS.

See, also, *Mechanics' Liens*.

For rent, see *Landlord and Tenant*, 8.
Of judgments, see *Creditors' Bill*.
mortgages, see *Chattel Mortgages*, 5–7; *Mortgages*, 1–8.

Machinists' lien.

Plaintiffs sold on time and delivered to the owners of a steam saw-mill certain machinery. The owners of the mill had previously given a chattel mortgage on it. They afterwards made an assignment, and the assignee conveyed the mill to the mortgagees, not reserving the machinery which had been purchased, and which could not be removed without injury to the mill. Plaintiffs brought suit in replevin to recover the machinery. Rev. St. 1878, § 3314, provides that, if one purchases machinery, not having sufficient interest in the building or premises for a builder's lien, the person furnishing the machinery shall have a lien on it, and, in case of default, shall have the right to remove it, leaving the building in good condition. Section 3318 provides that, within six months from the date of the last charge for furnishing material, a claim of lien shall be filed in order to secure a lien or bring an action to enforce it. *Held*, that the lien of plaintiffs was a statutory one, and was lost by not filing their claim as prescribed in section 3318.—Wilson v. Rudd, (Wis.) 321.

LIMITATION OF ACTIONS.

New promise, see *Assignment for Benefit of Creditors*, 10.
To what cases applicable, see *Bastardy*.

To what cases applicable.

1. When goods are contracted for by means of a written contract and promise to pay, the right of action for the recovery of the agreed price runs for 10 years, under Code Iowa, § 2529, subd. 4, as it is a right of action upon the written promise to pay.—Wing v. Evans, (Iowa,) 495.

Adverse possession.

2. Under Civil Code Neb. § 6, providing that an action for recovery of lands shall be brought within 10 years from the date the cause of action accrues, a suit to set aside a sale under a trust deed, when the purchaser and his grantees had been in adverse possession more than 10 years, is barred.—McKesson v. Hawley, (Neb.) 883.

3. To make a case of adverse possession, it must have been continued for the statutory time under the original hostile entry; and each succeeding occupant must show title under his predecessor, and where one enters upon abandoned property, the adverse possession of the former occupant does not inure to him.—Witt v. St. Paul & N. P. Ry Co., (Minn.) 862.*

Exceptions—Non-residence.

4. A cause of action for damages, resulting from the fraudulent representations of defendant, accrued in 1875. In 1877 defendant, who was in business in Nebraska, left the state and settled in Dakota. His wife continued to reside in Nebraska until 1880, when she joined her husband, remaining about four months. In 1881 the entire family went to Dakota. From 1877 to 1881 defendant frequently visited his former home, but did not make that his usual place of residence. *Held*, that the evidence was sufficient to warrant the jury in finding that the defendant's usual place of residence was not in Nebraska, and that limitation did not run in his favor.—Forbes v. Thomas, (Neb.) 411.*

Acknowledgment.

5. Under Rev St. Wis. § 4244, providing that if there are two or more joint contractors no such contractor shall lose the benefit of the statute by reason of any acknowledgment or promise made by any other joint contractor, a partnership note is a contract within the meaning of the statute; but a promise or acknowledgment, within the period of limitation, by one member of a firm previously dissolved, is not binding upon another member unless such dissolution was not known to the payee of the note at the time such promise or acknowledgment was made.—Clement v. Clement, (Wis.) 17.*

6. Plaintiff sued on a note more than 10 years overdue, alleging that it was made by defendants while living in Illinois, that that they removed to Iowa less than 10

years before suit was brought, and that the action was not barred by the laws of Illinois. *Held*, that an averment in the answer that the note showed on its face it was barred by the statute of limitations was no answer to the allegations of the petition.—Walker v. Russell, (Iowa,) 448.*

LIS PENDENS.

Plea in abatement, see *Abatement and Revival*, 1.

Is notice as to whom.

A purchaser at a foreclosure sale, to which a person who had title of record was a party, cannot be charged under the provisions of Code Iowa, § 2628, that when a petition affecting real estate has been filed, it shall charge third parties with notice, and no interest can be acquired by them against plaintiff's title, with notice of a litigation between such nominal party and others, over rights acquired in the property subsequent to the mortgage.—Sprague v. White, (Iowa,) 751.

LOGS AND LOGGING.

Running logs—Jams.

1. When parties conducting booming operations find the stream obstructed by a "roll-way" put in by others, so that more logs cannot be run down without injury to riparian owners by backwater, they may take possession of the logs causing the jam for the purpose of breaking it up, and in the mean time must hold back their own logs, and must use diligence in preventing jams; and if they negligently run logs against a jam caused by others, and thus increase the backwater, or do not use diligence in preventing a jam, or breaking it when formed, they will be liable for damages.—Witheral v. Muskegon Booming Co., (Mich.) 758.

2. Log-owners are only entitled to the natural capacity of a stream, and may not, by causing jams, flood the lands of riparian owners, though the floods so caused do not extend beyond the high-water stage of the stream in time of freshets.—Id.

3. In an action for damages for flooding plaintiff's land, it was shown that defendant had possession of the stream, and for a month and more continued to run logs up against a jam, thus increasing the backwater which caused the injury. *Held*, *prima facie* evidence of negligence.—Id.

Lien for wages—Attachment.

4. The right to make a constructive levy of attachment on logs on the Chippewa river and its tributaries, vested in the sheriff by Laws Wis. 1880, c. 222, is confined to logs in the sheriff's county. A warrant issued by the municipal court of Chippewa, and levied by the sheriff of that county, on logs "in the Jump river, a tributary of the Chippewa river, in Taylor county," creates no lien.—Shafer v. Hogue, (Wis.) 928.

5. Under Rev. St. Wis. § 3340, Laws Wis. 1882, c. 319, § 5, and Laws Wis. 1885, c. 469, § 6, the fact that the logs attached are not within the county, and the plaintiff is therefore entitled to no lien upon them, does not prevent the court issuing the writ from entering judgment against a defendant, personally served, for the amount found due, with costs as in ordinary civil actions; the costs for executing the attachment being adjudged against the plaintiff.—Id.

MALICIOUS PROSECUTION.

See, also, *Sheriffs and Constables*, 8.

Probable cause.

1. Where a person is arrested on the charge of malicious mischief for cutting a hedge, and is acquitted, the evidence not showing that the prosecutor had reason to believe that defendant acted with malice in cutting the hedge, *held*, that the jury was justified in finding that the arrest was procured without probable cause.—Gale v. Bohanan, (Iowa,) 599.

2. The evidence tended to show that defendant had been informed by a surveyor of certain defects in the boundary line of his land, but persisted in claiming that he "had bought 160 acres, and would have it," regardless of the true boundary line. Plaintiff, the adjoining owner, cut down a hedge fence, which, according to the surveyor's statements made to defendant, was on plaintiff's land. Defendant thereupon procured his arrest on a charge of malicious mischief. *Held*, that the jury were warranted in finding that defendant acted maliciously in procuring the arrest.—Id.

3. In an action for malicious prosecution it was claimed by the defendant, who was a constable, that he had sufficient cause for making the complaint against the plaintiff, charging him with the crime of burglary—his information being the confession of a youth whom he had previously arrested for the same crime, which confession was voluntarily given, and by which he implicated the plaintiff as being a confederate and accomplice; these facts being testified to by defendant. On his cross-examination he was asked if, prior to the confession, and while the youth was in custody, he did not, in the hearing of the party under arrest, tell another constable to take him to jail, and by the time he had laid there long enough he would confess, or language to that effect. *Held* proper to show the information on which he acted.—Dorsey v. Clapp, (Neb.) 889.

MANDAMUS.

To private corporations, see *Railroad Companies*, 8.

Failure to answer.

1. Plaintiff obtained a rule to show cause why a peremptory writ of *mandamus* should not issue to compel defendant as town clerk to place upon the tax-roll for collection a certain judgment against the town. Defendant did not answer, but the chairman of the board of supervisors made an affidavit in answer. *Held*, that this was a default on the part of the clerk which could not be supplied by the affidavit of the chairman, and a peremptory writ should have been allowed as of course.—Hoffman v. Sdes, (Wis.) 819.

Issue of fact.

2. When there is likely to be an issue on the facts, proceedings for a writ of *mandamus* should be instituted by an alternative writ.—Id.

MASTER AND SERVANT.

Trespass by servant.

1. Defendant employed a servant to drive his team, and the servant, without express authority from the defendant, took, by trespass, plaintiff's hay, and fed to the team. *Held*, that it was within the line of the servant's employment, and defendant is liable for the trespass.—Potulni v. Saunders, (Minn.) 879.

2. A servant, without express orders from his master, the defendant, entered plaintiff s field and took hay to feed defendant's team. *Held*, that Gen. St. Minn. 1878, c. 66, § 269, providing for treble damages for trespasses upon certain personal property, does not apply against one who is deemed in law guilty of the trespass only, by reason of his relation to the actual trespasser.—Id.

Negligence of master.

8. The evidence showed that it was the custom for defendant railroad company to send its cars to the yard of certain lumber merchants to be loaded with lumber, and to put them into the train when loaded. In an action by plaintiff against the railroad company to recover damages for the death of her intestate, caused by the improper loading of a car of lumber by the owners of the lumber in their yard, *held*, that it made no difference whether the car was in fact loaded by men in the employ of defendant or not; the loading was essentially the act of defendant, and it was its duty to see that the car was properly loaded.—Haugh v. Chicago, R. I. & P. Ry. Co., (Iowa,) 116.

4. Plaintiff and others, section-hands in the employ of defendant railroad company, were directed to get upon a loaded moving train by the conductor and others in charge. They requested those in charge of the train to stop it, but were told that, if stopped, it could not be started again. Plaintiff, in attempting to get on the moving car, was thrown down, and received severe personal injury. *Held*, that the facts do not warrant the conclusion, as a matter of law, that either plaintiff or defendant was guilty of negligence. The question was for the jury.—Rayburn v. Central Iowa Ry Co., (Iowa,) 606.*

5. Plaintiff was in the employ of defendant loading and unloading cars. The manager of the defendant company requested plaintiff to come and help him couple some empty cars. Plaintiff went in between the cars to do the coupling, when a loaded car came down against the empty ones, shoving them together, by reason of which plaintiff's hand was caught between the cars and injured. There was nothing to show that the loaded car was moved by defendant's orders. *Held*, that this was not sufficient, in an action by the employe for damages, to charge the defendant with negligence.—Anderson v. Sowle Elevator Co., (Minn.) 882.

6. A complaint charging the company only with negligence in the movement of a particular train without warning, does not involve, as a cause of action, the neglect of the company to establish general regulations for the conduct of its servants in such cases.—Connelly v. Minneapolis E. Ry. Co., (Minn.) 582.

—— Defective appliances.

7 Plaintiff was injured by means of a defective step-ladder on one of defendant's freight cars. He was not at the time in the service of defendant, but of another company, which was then using the car in its own business. The car had been sent over the road of the latter company, which connects with defendant's, consigned to a point in another state; but, on its return, was transferred beyond the point where it should have been returned to defendant, and was loaded with freight for a point on the connecting road. *Held*, that defendant owed no duty to plaintiff in respect to the condition of the car growing out of contract or otherwise.—Sawyer v. Minneapolis & St. L. Ry Co., (Minn.) 671.

8. In an action for damages for the negligent killing of a brakeman, by reason of a defective and improperly constructed bridge, it was shown that the bridge was 13 feet and 4 inches wide between the trusses, which were 10 feet high; that it had been in use a number of years; that it was sound, and safe for the passage of trains,

and without defect, and in good repair, at the time of the accident. *Held*, the company was not negligent.—Illick v. Flint & P. M. R. Co., (Mich.) 708.

—— Warning to employes.

9. Where an unfenced railroad runs through pasture land, cattle must be expected on the track at any point; and it is not the duty of the company to warn employes engaged in operating trains on the road of the danger of encountering cattle. —Patton v. Central Iowa Ry. Co., (Iowa,) 149.

Negligence of vice-principal.

10. Where defendant gave an employe full control of a building and the men employed thereon, *held*, that he stood in the shoes of his principal, the defendant, and his negligence was that of the defendant. —Slater v. Chapman, (Mich.) 106.*

—— Knowledge of master.

11. Plaintiff, a carpenter employed on a building by defendant, was sent by one S., who had been placed in full control of the building by defendant upon some stairs from which S. had removed the cleat which kept them from slipping. There was evidence that defendant knew S. was careless, and that he had been careless in other work about the building. *Held*, that an instruction, that if the accident was caused by the negligence of S., and defendant knew S. was a careless workman in the place where he put him, and S. was in fact careless, then defendant was liable if plaintiff was in exercise of due care and in ignorance that S. was careless, and had removed the cleat, was not erroneous.—Id.

Negligence of fellow-servants.

12. The foreman of a gang of section or track men engaged in the discharge of his ordinary duties in the course of his employment is a fellow-servant with them.—Olson v. St. Paul, M. & M. Ry. Co., (Minn.) 866.*

13. A railroad company is not responsible to its section or track men for the negligence of the engineer or brakeman of a train, they being fellow-servants.—Connelly v. Minneapolis E. Ry. Co., (Minn.) 582.*

—— Iowa rule as to railroads.

14. Code Iowa, § 1307, providing that railroad companies shall be liable to persons or employes for damages sustained by neglect of agents, mismanagement of engineers, or willful wrong by them or other employes, when connected with the use and operation of a train, is not in conflict with the fourteenth amendment to the constitution of the United States.—Rayburn v. Central Iowa Ry. Co., (Iowa,) 606.*

15. Plaintiff, a section-hand in defendant's employ, was directed to get on a loaded moving train by the conductor and others in charge, to go to another place to help unload it, and, in attempting to get on, was thrown down and injured. *Held*, that such injuries occurred in the "use and operation" of the train, within the meaning of Code Iowa, § 1307, relating to the liability of railroad companies.—Id.*

16. Under Code Iowa, § 1307, providing for the recovery of damages suffered by reason of the negligence of a co employe, "connected with the use and operation" of a railway, a person injured in operating a ditching-machine which is carried on a car, and worked by the movement of the car on the railroad track, comes within the provision, and evidence tending to show that the injury was caused by the negligence of coemployes should be submitted to the jury. —Nelson v. Chicago, M. & St. P. Ry. Co., (Iowa,) 611.*

Contributory negligence.

17. Plaintiff's intestate, a yardman in defendant's employ, was ordered to couple to the train a car of lumber. The car had been improperly loaded, the lumber projecting too far forward, and in coupling the car plaintiff's intestate was caught between the projecting lumber and the tender of the locomotive, and killed. The evidence showed that the order to deceased to couple the car was unqualified, and given at the last minute. The car was to be put immediately into the train for transportation. It was night, and the projecting lumber was seen by deceased only as he approached it by the light of his lantern. *Held*, that deceased had a right to presume that the car was properly loaded, and he was not guilty of contributory negligence in not closely examining the car as to its readiness for shipment.—Haugh v. Chicago, R. I. & P. Ry. Co., (Iowa,) 116.

18. It was not negligence for plaintiff to attempt to get on the moving car when required to do so by order of the conductor and others in charge.—Rayburn v. Central Iowa Ry. Co., (Iowa,) 606.

19. A court cannot say, as a matter of law, that it appears from the allegations of the complaint that the plaintiff was guilty of contributory negligence, or had voluntarily assumed, as incident to his employment, the risks which caused the injury, unless these allegations so clearly show that fact that there could be no room for different minds reasonably arriving at any different conclusion, upon any possible evidence admissible under and consistent with the allegations of the pleading.—Rolseth v. Smith, (Minn.) 565.

Risks of employment.

20. Railroad corporations have the right, in the absence of a statute or contract, to fence their roads or not, and to construct

their road-beds, in respect to curves and grades, as they see fit. And where a fireman on a railroad train has been over the road, and continues in his employment without objection, he assumes all risk arising from the unfenced condition of the road, and consequent danger of encountering cattle on the track, or from the peculiarities of the road-bed as to grades and curves. BECK, J., dissenting.—Patton v. Central Iowa Ry. Co., (Iowa,) 149.*

21. Where it is the established practice and one of the rules of a railway company to run special or irregular trains at any time, without notice in advance to station agents or section men, who are required to govern themselves accordingly, and it appears from the evidence that an engine with snow-plow is a train of that class, *held*, that sending out such a train over the road, in a storm, without such notice, was not negligence, but that the risks to trackmen attending its use are among those assumed by such employes, if they are informed of the rule, or if, from their observation and knowledge of the practice of the company in respect to running such trains, they knew, or ought to have known, in the exercise of ordinary intelligence and reasonable prudence, that such a train might be expected.—Olson v. St. Paul, M. & M. Ry. Co., (Minn.) 866.*

22. A brakeman on a freight train was standing on a flat car, and while the train was approaching a bridge, the engineer signaled for brakes, and, in response thereto, the brakeman immediately sprang, and caught the round of the ladder on the side of a box car, and, swinging himself around to ascend, his body came so far out as to come in contact with the trusses of the bridge with such force that he was thrown from the ladder, run over by the train, and killed. *Held*, that his death "was one of the accidents incident to his employment," and there could be no recovery.—Illick v. Flint & P M. R. Co., (Mich.) 708.

23. Where defendant railroad company was in the habit of sending extra trains on the road without notice, and an employe was killed by one of them while riding on a hand car, *held* error for the court to refuse to charge the jury that if the injured employe knew of such usage and practice of the company, he could not recover.—Olson v. St. Paul, M. & M. Ry. Co., (Minn.) 866.

MECHANICS' LIENS.

Property subject to.

1. Plaintiff filed a claim for a lien upon land for machinery placed upon it before a patent had issued to the defendant. *Held*, that under Rev. St. U. S. § 2296, which protects land from liability for the satisfaction of a debt contracted prior to the issuing of the patent, plaintiff could acquire no interest in the land, but that his lien upon the machinery might be enforced.—Paige v. Peters, (Wis.) 328.

Defenses.

2. Under Mech. Lien Law Neb., the owner of a building is liable to material-men and laborers, for material furnished or labor performed for a contractor on such building. *Held*, that the owner may plead as a defense the fact that the labor or material was furnished to a contractor, and that no lien has been obtained on account of the poor work done by said contractor and his subcontractor.—Hoagland v. Van Etten, (Neb.) 869.

Who may claim.

3. Plaintiffs contracted with the president of one of the defendants to do work on a railroad. Prior to the contract the road had been sold to the other defendant. In a suit to recover a balance due for work on said road, and to establish a lien thereon, *held*, the contract not having been made with the company then owning the road, plaintiffs could not acquire a lien as against that company unless they were subcontractors.—Templin v. Chicago, B. & P. R. Co., (Iowa,) 634.

4. Where one railroad company sells its road to another company before completion, and agrees to complete the same, the seller is a contractor, and persons working under it, by contract made subsequent to the sale, are subcontractors; and, to acquire a lien, the persons thus working must bring themselves within the statute providing for subcontractors.—Id.

5. In a suit to establish a mechanic's lien on a house, one of the defendants claimed that she owned the house; that she let the contract for building it to her co-defendant, her husband, and that he contracted with plaintiff; and that plaintiff gave no notice of his claim as required by statute; but other evidence showed that a carpenter who worked on the house was directed by both husband and wife how to build it, was addressed by the husband as if he and his wife were controlling the building jointly, and other evidence discredited the defendants' claim. *Held*, that a judgment for defendants should be reversed.—Rand v. Parker, (Iowa,) 498.

Affidavit.

6. Under Comp. St. Neb. 1885, c. 54, § 3, providing in mechanics' liens for the filing of an affidavit of amount due for labor and material furnished in the erection of a building, the affidavit is sufficient although their may be no technical averment as to the ownership of the property.—Hays v. Mercier, (Neb.) 894.

Priority.

7. Plaintiff sold and deeded certain real estate to defendant in June, 1885. On the same day T. sold and delivered to defendant material for the erection of a building on said property. In July, 1885, defendant and wife executed a mortgage to plaintiff to secure the unpaid portion of the purchase price *Held*, that the mechanic's lien in favor of T. was superior to the lien created by the mortgage.—Ansley v. Pasahro, (Neb.) 885.

Enforcement.

8. The evidence showed that defendant was engaged in the erection of two buildings at the same time, for each of which he procured materials from plaintiff. *Held*, that it was not necessary for plaintiff to show that the particular materials in question went into the building on which the lien was sought to be established. If the question was of any materiality to defendant, the burden was on him to show how the materials were used; following Lumber Co. v. Newton, 33 N. W. Rep. 377.—Lewis v. Saylors, (Iowa,) 601.

9. It was admitted on the trial that the copy of the account attached to the petition as an exhibit was a copy of the statement of the account filed with the clerk, and that the same was sworn to and claimed a mechanic's lien. *Held*, that it was not necessary to introduce the sworn statement to prove that it had been filed.—Id.

10. It was shown that defendant contracted for materials for the erection of the building; that he procured it to beerected; and that, since its erection, he had occupied it as a residence. *Held*, that defendant's ownership was sufficiently shown.—Id.

11. A provision of the Minnesota mechanic's lien law, making the "knowledge and consent" of a married woman to the furnishing of material in certain cases evidence that the husband acted as agent of the wife, *held* applicable as a rule of evidence, not merely for the purpose of establishing a lien, but for the purpose of a personal recovery against the wife. But proof of the "knowledge" only of the wife is not sufficient.—Smith v. Gill, (Minn.) 178.

12. In an action to recover *in personam* for material sold to the defendant, and to have the recovery adjudged to be a lien, under the Minnesota mechanic's lien statute, the former relief may be had, although it be found that no lien had ever been perfected.—Id.

MORTGAGES.

See, also, *Chattel Mortgages.*

Lien, priority, see *Mechanics' Liens*, 7.

Rights of purchaser under foreclosure, see *Lis Pendens.*

Lien.

1. Plaintiff, knowing defendants had an interest in certain land, bought from his grantor the legal title of the patentee, who had sold the land to another, but had never given a deed, and gave a note, secured by mortgage, in payment, which was sold to one who did not know of defendants' equitable interest; the record showing a legal title in plaintiff. *Held*, that the owner of the mortgage was entitled to a decree of foreclosure and a judgment against the maker and indorser of the mortgage, and that he should first exhaust his remedy against them, and, if the land was sold or defendants paid the mortgage, they should be subrogated to his rights under the judgment.—Dillon v. Shugar, (Iowa.) 509.

2. Defendant and S., owners in common of certain land, gave a mortgage thereon to plaintiff to secure the payment of a $400 note. Subsequently a third person recovered a judgment against S. in the county where the land lay, which judgment became a lien on S.'s interest in the land. The next year S. conveyed his interest to defendant, who thereafter applied to plaintiff for a further loan, stating that she desired to take up the $400 note, and to borrow $200 additional, giving a new note for $600, payable at a later date, and secured by a mortgage which should be a first lien on the land. Plaintiff acceded to this, and the old mortgage was canceled; both of the parties believing there was no other lien on the land. *Held*, that the new mortgage, to the amount of the old, was to be regarded as a mere renewal, and that plaintiff was entitled to have such amount declared a lien superior to that of the judgment against S.—Young v. Shauer, (Iowa,) 629.

3. Plaintiff's husband purchased lands, and mortgaged them to secure payment of certain promissory notes given defendant. Some of these notes came into the possession of one M., who, upon their non-payment, obtained judgment and decree of foreclosure. On others of the notes, which matured later, defendant also obtained judgment and decree. M. sold, under his decree, a certain portion of said land, bidding it in himself. Subsequently plaintiff's husband conveyed said land to plaintiff, and she, as grantee of a judgment debtor, redeemed said land from M. *Held*, that the property in question, redeemed by plaintiff, became divested of defendant's lien. Its sale under foreclosure exhausted the property so far as the mortgage debt was concerned.—Harms v. Palmer, (Iowa,) 515.

Satisfaction and discharge.

4. Complainant filed a bill to reform a warranty deed, to show that the consider-

ation was the payment of a certain mortgage, instead of $1, as expressed, and to have the mortgage, which the grantee had paid and had assigned to himself, discharged of record. *Held*, that it was not necessary to reform the deed, nor change its covenants, and the bill was properly drawn to obtain the discharge of the mortgage.—Flynn v. Flynn, (Mich.) 817.

5. Complainant deeded a portion of his farm to his son, for an expressed consideration of $1, but alleged that it was agreed that the son should pay a mortgage on the whole farm; the son paid it, but had it assigned to him, claiming that his father had driven him from the other part of the farm, which they were to work in common, and from the crops of which he was to get money to pay the mortgage. *Held*, that under the evidence, complainant was entitled to have the mortgage discharged of record.—Id.

6. Rev. St. Wis. § 2256, provides that if a mortgagee, after full performance of the conditions of the mortgage, whether before or after breach, shall, for seven days after request made and tender of reasonable charges, refuse to discharge the mortgage, he shall be liable to the mortgagor for $100 damages and also for the actual damages. *Held*, that the "$100 damages" is neither a fine nor a forfeiture, but exemplary damages; that payment by the mortgagor of all demanded by the mortgagee in satisfaction, and acceptance thereof by the latter in full payment, is such full performance in case of a mortgage given to secure a debt; and that, upon such refusal, the penalty is incurred regardless of the mortgagee's honest belief that the debt had not been paid. Stone v. Lannon, 6 Wis. 497, and Cohn v. Neeves, 40 Wis. 393, distinguished.—Shields v. Klopf, (Wis.) 284.

Satisfaction and discharge—Mistake.

7. Where a mortgage has been discharged from the record through mistake, it may be restored in equity, and given its original priority as a lien, when the rights of innocent third parties will not be affected.—Ferguson v. Glassford, (Mich.) 820.

8. A discharge upon the record of a mortgage is not an absolute bar to a foreclosure, unless there has been actual satisfaction. Such discharge is evidence sufficient to sustain the rights of all persons interested, unless the person setting up the discharged mortgage shall show some accident, mistake, or fraud; and unless shown satisfactorily, the discharge is conclusive proof of payment in favor of third persons, who have a right to look to the record for protection.—Id.

9. Where the discharge of a mortgage was placed upon record by mistake, and it is shown that the mortgage debt has not been paid, a purchaser of the premises covered by the mortgage, who is informed by the mortgagor that the mortgage is still outstanding, and held by a person, naming him, is affected with notice that the discharge was recorded by mistake, and is not protected by an abstract showing the mortgage to have been discharged.—Id.

10. Purchasers or incumbrancers, who become such after the discharge of mortgage is placed upon record, are entitled to the same protection which the laws afford to subsequent purchasers and incumbrancers in good faith, as against unrecorded conveyances, who can be affected only by actual notice, or notice of such facts as should have put them upon inquiry.—Id.

Rights of mortgagee.

11. Judgment of foreclosure was obtained March 30, 1881, on a mortgage dated May 27, 1878, and the judgment was assigned to plaintiff. The premises were sold in February, 1885, and bid in by plaintiff, to whom a sheriff's deed issued. In November, 1879, the property was sold for taxes of 1878, and bid in by the mortgagee, who assigned to a third person to whom a tax deed issued, and he afterwards conveyed to defendant. *Held* that, as the mortgagee had the right to pay the taxes to protect his mortgage, his purchase at the tax sale was such payment merely, and cannot operate to give him title, and defeat the senior lien of the mortgage.—Eck v. Swennenson, (Iowa,) 503.

12. A mortgagor of certain lands had no legal title thereto, but was in possession, and the taxes were legally chargeable to him, and, on his failure to pay them, the agent of the mortgagees procured a tax-sale certificate, which he assigned to a third party, who took a tax deed, and at the agent's request conveyed to defendant. Neither the third party nor defendant paid any consideration for their interest in the lands, but the transactions were for the benefit of the mortgagees. Plaintiffs, having the legal title, brought ejectment, and defendant claimed title under the tax deed. Rev. St. Wis. §§ 1158–1160, provide, in effect, that the amount of taxes paid on the mortgaged premises by the mortgagee may be added to the debt, and the security of the mortgage will extend over it. *Held*, that the payment of the taxes by the mortgagee's agent operated as a redemption therefrom, and the tax deed conferred no title on defendant.—Burchard v. Roberts, (Wis.) 286.

13. In a proceeding to foreclose a mortgage for $6,529.12, on an hotel property, the evidence showed that the mortgage contained no stipulation requiring the mortgagor to insure for the mortgagee's benefit;

that an insurance company issued to the mortgagee a policy for $2,000 on his mortgage interest in the building; that the hotel burned, and the insurance company paid the $2,000 to the mortgagee; that the policy contained no provision that, in case of payment, the company would be entitled to subrogation. The evidence also showed that the whole course of the dealings of the parties was consistent with a memorandum indorsed on the application, that the assessments were to be paid by the mortgagor, and was inconsistent with the theory that the insurance was obtained by the mortgagee solely and exclusively for his benefit. *Held*, that the mortgagor was entitled to have the insurance money applied in reduction of the mortgage debt. — Pendleton v. Elliott, (Mich.) 97.

Assignment to mortgagor's agent.

14. The evidence showed that defendant, who had assumed a mortgage, ordered plaintiff, who was acting as his agent, to send certain money to pay the mortgage to a person named. The later misappropriated and failed to use the money for the purpose specified, and plaintiff afterwards bought the mortgage from the mortgagee. *Held*, that plaintiff might properly buy and foreclose the mortgage.—Hollenbeck v. Stearns, (Iowa,) 643.

Foreclosure—Maturity of debt.

15. A mortgagee, for a sufficient consideration, extended the time of payment, and prior to the expiration of the extended term, brought suit for foreclosure, but in his petition made no reference to the agreement for extension, nor alleged any default thereunder. Subsequent purchasers who were made defendants, answered, setting up the extension, and their purchase on the faith thereof. *Held*, a sufficient defense.—Eby v. Ryan, (Neb.) 225.

16. A new agreement upon a sufficient consideration, extending the time of the payment of a note and mortgage to a day certain, has the effect in equity of modifying the original condition of the mortgage to the same extent as if the terms of the new agreement were incorporated into the condition, and where it is claimed that a default has occurred after the extension, by which the mortgagor would be entitled to foreclosure, such default should be alleged in the petition, in order to state a cause of action.—Id.

—— Demand.

17. A mortgage stipulated that the amount due the mortgagee, a guardian, should be paid at a certain dwelling-house on the mortgaged premises, on the order of the guardian. On a bill by the guardian to foreclose, defendant demurred, on the ground that there was no averment that payment had been demanded at the place designated. *Held*, the omission to make the demand might prevent a recovery for costs, but could not affect the right to foreclose.—Norton v. Ohrns, (Mich.) 175.

—— Redemption by junior lienor.

18. Code Iowa, § 3623, provides that, any time prior to the sale under a foreclosure, a person holding a junior lien may pay the amount of the senior mortgage, with costs, and any other liens attaching, and receive an assignment of the mortgage. Code, § 213, subsec. 3, provides that an attorney may receive the money claimed during the pendency of a suit, and discharge the claim. Plaintiff, being a junior mortgagee, paid the amount of a senior mortgage to an attorney having begun a suit to foreclose it, in which plaintiff was a defendant. *Held*, that the attorney was authorized to receive it.—Harbach v. Colvin, (Iowa,) 663.

19 Plaintiff, a junior mortgagee, was made defendant in a suit to foreclose a senior mortgage. He paid the amount of the senior mortgage, with costs, to the attorney of the owner. The mortgage and notes were delivered to him, and it was agreed that the foreclosure suit should be continued in the name of the senior mortgagee. *Held*, that the judgment was held in trust for plaintiff by the senior mortgagee; and at the sale, upon bidding in the property, and tendering the costs, he was entitled to the certificate of purchase.—Id.

—— Decree and sale.

20. Plaintiff and his brother owned each an undivided two-fifths of certain real estate, and owned other land jointly. They gave their notes to two creditors, secured by mortgages, each on different pieces, in which they owned four-fifths interest. Plaintiff's brother gave an individual note and mortgage, secured on his interest in all this and some other real estate. The mortgages were foreclosed, and the decree in the foreclosure of the individual mortgage provided for the sale under all the foreclosures under one execution, and that, upon the sale of a four-fifths interest in a lot, the joint mortgage secured on that piece should be paid, and the balance applied on the individual note and mortgage. Defendant purchased at the sale, and plaintiff sought to enjoin the issuing of a sheriff's deed. *Held*, that the entire sale was invalid, but, inasmuch as the joint mortgages had been paid by the purchaser, he should be subrogated to the rights of the mortgagees.—Brown v. Brown, (Iowa,) 507.

Power of sale.

21 Where a mortgage of lands in Minnesota, given to secure a debt due to the mortgagee, residing in another state, contained a power to the mortgagee, *his exec-*

utors, administrators, or assigns, in case of default of the conditions of the mortgage, to sell and convey the premises according to the statute in such case made and provided, the power of sale might be exercised by the administrator appointed by the probate court in the state where the mortgagee resided, even prior to the enactment of chapter 41, Gen. Laws 1876, (Gen. St. 1878, c. 81, § 25.)—Holcombe v. Richards, (Minn.) 714; Yoerg v. Holcombe, (Minn.) 718.

22. The description of the lands in a notice of foreclosure, under the power in a mortgage, was: "The undivided half of lots two (2) and three, (3,) in block two, (2,) Lot eight, in block four, (4,)" etc. *Held*, that the words, "the undivided half," apply only to lots 2 and 3.—Johnson v. Cocks, (Minn.) 436.

23. In such notice, the place of sale was described as "at the front door of the courthouse in the city of Minneapolis, corner 2d Ave. S. and 3d St." The county court-house had been partly destroyed by fire, and the county commissioners had rented a building on the corner of Second avenue south and Third street for the meetings of the courts, and for some of the county officers, and it was used for that purpose for some weeks before the date of the notice, and till after the sale. *Held*, a proper designation of the place of sale, and that the sale was properly made at the front door of the building at the corner of the two streets, though the door leading to the court-rooms (which were in the second story) was at the rear of the building on Third street, 80 feet distant from its front.—Id.

24. The omission to file the affidavit of costs and disbursements required by section 23, c. 81, Gen. St. Minn. 1878, does not affect the validity of the sale.—Id.

25. When there is no fraud nor irregularity in the sale under the power, mere inadequacy in the price, especially if there be a right of redemption from the sale, is no ground for setting aside the sale.—Id.

MUNICIPAL CORPORATIONS.

See, also, *Bridges; Counties; Highways; Poor and Poor Laws; Schools and School-Districts; Towns.*

Ordinances—Erecting scales.

1. Code Iowa, § 456, provides that towns may establish markets and provide for the weighing of coal, hay, or any other article for sale. *Held*, that the town had the power to erect scales, appoint a weigh-master, and regulate their use by reasonable ordinances.—Davis v. Town of Anita, (Iowa,) 244.

2. A town of 500 inhabitants provided scales and a weigh-master, and passed an ordinance that all commodities sold by weight, exceeding 1,000 pounds, should be weighed on the town scales. *Held*, this was a just and reasonable exercise of municipal authority.—Id.

Officers and agents—Appointment.

3. An act incorporating metropolitan cities, and expressly repealing all former charters, and making no provision for keeping any officer appointed under such charters in office, provided for a board of fire and police to be appointed by the governor, having all powers of appointment, removal, and discipline of those departments, "under such rules and regulations as may be prescribed by ordinance." The board, before any ordinance was passed requiring of them official bonds, and before any rules and regulations were prescribed, appointed a chief of police. *Held* valid.—State v. Seavey, (Neb.) 228; State v. Bennett, (Neb.) 235.

4. An act requiring the governor to appoint a board of fire and police in cities of the metropolitan class is not in conflict with Const. Neb. art. 5, § 10, providing that the governor shall appoint, by and with the consent of the senate, all officers whose appointment or election is not otherwise provided for, since the act does otherwise provide for the appointment.—Id.; Id.

5. A provision in an act that not more than two of a board of fire and police to be appointed by the governor in metropolitan cities shall be of the same political party, is directory merely, and an appointment made irrespective of political qualifications is legal.—Id.; Id.

—— Liability for torts.

6. When a city, acting within its general powers to improve streets, makes a contract for the grading of a street, by the terms of which the contractors, in consideration of doing such grading, are to receive and appropriate to their own use all the stone in the street; and, under and in accordance therewith, the contractors proceed and remove the stone, they are the agents of the city in the premises, and the city is responsible for their acts.—Rich v. City of Minneapolis, (Minn.) 2.

Contracts.

7. In an action for injunction brought by a private citizen to restrain the mayor and council of a city from entering into a contract to have the streets lighted by electricity, it was alleged that a prior contract had been made with a gas-light company, which was yet in force, and that by making the second contract the city would increase its indebtedness; but it was not shown that the gas-light company had the ability or desire to perform its contract, nor that the city or the plaintiff would sustain any substantial injury by the contem-

plated act. *Held* that, without such showing, an injunction would not be granted.—Searl v. Abraham, (Iowa,) 612.

8. In an action by a tax-payer against the mayor and trustees of a town to prevent the execution of a contract made by them for the purchase of a tract of land from one of the defendant trustees, where the land had been conveyed to the town, and partly paid for, the court ordered the trustee to refund the money, and appointed a commissioner to reconvey to him the property. *Held*, that the town, not being made a party to the proceeding, could not be divested of the property, nor could the trustee be required to refund the money without a valid reconveyance of the land.—Moore v. Held, (Iowa,) 628.

Control of streets.

9. The public acquires in a street only a right of way, with the powers and privileges incident thereto. Subject to this right, the soil and mineral belong to the owner of the fee. Hence, the public easement justifies only the taking and removing of material which the process of the construction or repair of the street requires.—Rich v. City of Minneapolis, (Minn.) 2.

Defective streets.

10. The court charged the jury that if plaintiff was injured on the street by being pressed in a crowd of people, or by horses or carriages running against her, or in any way other than by a defect in the sidewalk, she could not recover. *Held* that, in the absence of any testimony tending to show that the injury complained of was received in any way other than by a defective sidewalk, the instruction was erroneous, as tending to mislead the jury.—Smalley v. City of Appleton, (Wis.) 729.

11. It appeared that the defect complained of consisted of an opening left for a cellar window close to the building, and covered by a board; that plaintiff stepped onto the board at night, and it broke, causing her to fall into the opening. The jury was asked to give a special verdict on the question whether the sidewalk was in a safe condition of repair for ordinary travel. *Held*, that the question should not have been asked, as tending to mislead the jury.—Id.

—— Liability of abutting owners.

12. In an action against the city of Sheboygan, Wisconsin, for injuries caused by an obstruction in the street, defendant answered, by way of abatement, that the obstruction was placed in the street by the owner of the abutting property. *Held* that, under the provisions of the city charter, (Laws Wis. 1874, c. 236, § 24,) before plaintiff can recover damages of the city, he must exhaust his legal remedies against the person who placed the obstruction in the street.—Raymond v. City of Sheboygan, (Wis.) 540.

13. In such a case, it is no objection to the portion of the answer setting up the matter in abatement that it does not show the wrong-doer is living, and within the jurisdiction of the court.—Id.

Public improvements — Right to damages.

14. Under the charter of Janesville, (Laws Wis. 1862, c. 221, subc. 7, § 1,) prohibiting the council from changing the grade of a street, when once established, without the recommendation of a majority of the adjacent lot-owners, it is no defense to an action by such owner, who has improved his lot subsequent to the establishment of the grade, to recover for injury to his property, caused by an accumulation of water thereon, resulting from a raising of the grade, done without such recommendation, and without proper outlets, that such water is surface water merely.—Addy v. City of Janesville, (Wis.) 931.

15. Under Code Iowa, § 469, providing that "when any city or town shall have established the grade of any street or alley, and any person shall have built or made any improvement on such street or alley, *according to the established grade* thereof, and such city or town shall alter such established grade in such a manner as to injure or depreciate the value of said property, said city or town shall pay the amount of the damages caused by the alteration," the question whether improvements have been made "*according to the established grade*" is one of fact for the jury. SEEVERS, J., dissents.—Conklin v. City of Keokuk, (Iowa,) 444.

16. Under this act an instruction that, if respondent's intestate "intentionally built his improvements above the grade line as established by the ordinances of the city, this would be building according to established grade, and with reference thereto, and to correspond with it, within the meaning of the statute," is erroneous, as it makes the question as to whether the improvements were made according to the grade depend entirely upon the intention of the builder, and a verdict thereupon in favor of the person damaged must be set aside.—Id.

17. Where the grade of two parallel streets is to be changed, and the street connecting them must thereby necessarily be changed in grade, although not specified in the ordinance fixing the amount of change, the damage caused to property on the intersecting street is a proper consideration in fixing the amount which shall be paid as damages for the proposed change of grade of the parallel streets.—Id.

Public improvements—Evidence.

18. Under the charter of Janesville, (Laws Wis. 1882, c. 221, subc. 2, § 2,) the street commissioner is an officer of the city, and in an action against the city by an abutter, to recover damages for injuries resulting from an unauthorized change of grade, it may be shown by parol that the person in charge of the work was the street commissioner; and where this fact is abundantly established by other evidence, it is harmless error that part of the testimony introduced was a conversation with such commissioner, since deceased.—Addy v. City of Janesville, (Wis.) 931.

19. Where it appears that the person in charge of the grading made a report referring to such work every two weeks, which report was received and filed in the office of the city clerk, such reports are competent evidence, the presumption being that they were made by such person in his capacity of street commissioner.—Id.

20. In such case, where it is alleged that defendant city wrongfully allowed water from a certain direction to flow upon the lot, "without providing proper escapes for carrying it off," evidence as to the insufficiency of a culvert, at a point where such water could have been caught and conducted away, is competent.—Id.

—— Appeal.

21. When a notice of appeal from the commissioner's appraisement of damages in proceedings to change the grade of streets, under Code Iowa, § 469, providing that it shall be given to the mayor in writing, etc., is properly given to the mayor of the city, it is immaterial that his official character is not designated therein.—Conklin v. City of Keokuk, (Iowa,) 444.

Fiscal management—Bonds.

22. Under Comp. St. Neb. 1887, c. 14, § 89, authorizing cities of the second class to make regulations for the public health, and to construct and regulate sewers, such cities may issue bonds to pay for necessary sewers.—State v. Babcock, (Neb.) 941.

—— Taxation.

23. A special law of 1887 detached the city of Ortonville from the township of Ortonville. *Held*, the city after being so detached was entitled to have its own assessor, and the assessor of the township is not entitled to discharge the duties of city assessor.—State v. Gurley, (Minn.) 179.

24. Acts 19th Gen. Assem. Iowa, c. 158, provides that property in a city not subject to taxes for general municipal purposes shall be liable to a road tax not exceeding five mills on the dollar. Code Iowa, § 496, provides that for general municipal purposes the tax shall not exceed 10 mills on the dollar. A railroad company was taxed at the rate of seven mills on the dollar for general purposes, and five mills on the dollar for road tax. *Held*, that as the road was liable for a general tax, the road tax was improperly levied.—Illinois Cent. R. Co. v. County of Hamilton, (Iowa,) 238.

Actions—Pleading.

25. In an action against a city for injuries caused by a defective sidewalk, an answer verified by the mayor, and denying any knowledge or information sufficient to form a belief touching the matters alleged in the complaint, is sufficient to raise the issues for trial.—Smalley v. City of Appleton, (Wis.) 729.

NEGLIGENCE.

See, also, *Bridges*, 1, 2; *Carriers*, 5–10; *Highways*, 7–10; *Master and Servant*, 1–23; *Municipal Corporations*, 10–13; *Railroad Companies*, 18–27.

Action for death, see *Death by Wrongful Act*.

Contributory, see *Carriers*, 10; *Highways*, 10; *Master and Servant*, 17–19; *Railroad Companies*, 13–20, 26.

Damages, see *Damages*, 3, 4.

Flooding land by log-jams, see *Logs and Logging*, 1–8.

Fires.

1. In an action for damages resulting from the destruction of property by fire negligently set upon the prairies, the question of negligence is alone for the jury to determine.—Powers v. Craig, (Neb.) 838.*

2. In an action for damages from a prairie fire negligently kindled, the question of the custom in plowing fire-guards around such property is not material, when a stream 30 feet in width was between the property destroyed by the fire and the place where the fire was kindled.—Id.

Contributory negligence.

3. Conflicting evidence as to whether plaintiff suffered the damage alleged by his own negligence should be submitted to the jury.—Nelson v. Chicago, M. & St. P. Ry. Co., (Iowa,) 611.

4. Whether a plaintiff is guilty of contributory negligence must be determined from the facts of the particular case. If the testimony on the subject of such negligence is conflicting, the question of negligence is for the jury; if the evidence is undisputed, the question is one of law for the judge. TAYLOR, J., dissenting.—Seefeld v. Chicago, M. & St. P. Ry. Co., (Wis.) 278.

5. Where the whole testimony in a case, and all legitimate inferences therefrom, show that the plaintiff's intestate was injured by reason of his own want of ordinary care, the question whether there was or was not negligence on the part of the

injured party is a question of law, to be decided by the court.—Mynning v. Detroit, L. & N. R. Co., (Mich.) 811.*

6. It appeared that the defendant had dug a ditch by the side of the sidewalk for the purpose of putting in sewer pipes; that, where the ditch crossed the sidewalk, an obstruction was placed. Plaintiff walking along the street at night, came to the obstruction, turned into the street, and fell into the ditch. *Held*, that the plaintiff was not guilty of contributory negligence in turning into an improved street in the night-time at a place other than the regular crossing.—Collins v. Dodge, (Minn.) 368.

7. It is error for the court to charge the jury, respecting testimony which the defendant claimed conclusively showed that the deceased did not exercise ordinary care, that such "testimony must be such as to drive you to that conclusion,—to prevent your arriving at any other conclusion."—Mynning v. Detroit, L. & N. R. Co., (Mich.) 811.

8. In an action based upon negligence, it is error for the trial court to instruct the jury, upon the question of the contributory negligence of the injured person, that "if any reasonable mind can come to a different conclusion than that the plaintiff was guilty of negligence, if there is any doubt upon the subject, or a reasonable mind can form an opposite opinion, instead of that he was guilty of negligence, then it would be for them to deliberate upon the testimony, and ascertain if, from all of it, they can come to the conclusion that the plaintiff was not guilty of contributory negligence, and hence ought to recover."—Id.

Pleading.

9. An allegation of negligence, as applied to the conduct of a party, is not a mere conclusion of law, but a statement of an ultimate pleadable fact. Hence, in an action for damages resulting from certain acts of another, alleged to have been negligent and careless, the complaint is not demurrable as not stating a cause of action, unless the particular acts alleged are such such that they could not be negligent under any possible evidence admissible under the allegations of the complaint.—Rolseth v. Smith, (Minn.) 565.*

10. A complaint setting forth that defendant knowingly did at certain times mentioned negligently, unlawfully, and wrongfully build a bridge over a river so as to prevent the natural flow of ice and water, and to cause it in the spring to gorge and overflow; that at a date mentioned a gorge and overflow were caused by said bridge; that defendant knowing the threatened danger, and being warned of its probable consequences, neglected and refused to remove the obstruction when practicable at a small expense, sufficiently alleges defendant's negligence under the Nebraska Code.—Omaha & R. V. R. Co. v. Standen, (Neb.) 183.

Burden of proof.

11. In an action to recover damages sustained by reason of defendant's negligence, the burden of proof is upon the plaintiff to show (1) that the injured party was in the exercise of ordinary care at the time he was injured; and (2) that the injury was the result of defendant's negligence.—Mynning v. Detroit, L. & N. R. Co., (Mich.) 811.

Instructions.

12. In an action for negligence in the use of a horse, where the issue was as to whether the misuse had aggravated a distemper, an instruction on the theory that such misuse had caused the distemper, is properly refused.—Conrad v. Hildebrand, (Wis.) 26.

13. An instruction that negligence may be established "by showing facts and circumstances *bearing more or less directly upon the fact of negligence*" is not error, when other instructions given in connection therewith make the meaning clear, and state the rule of law properly.—Baker v. Chicago, B. & Q. R. Co., (Iowa,) 460.

NEGOTIABLE INSTRUMENTS.

Interest on over-due paper, see *Interest*.

Consideration.

1. An agreement to relinquish to government a certificate of homestead entry so as to enable another to locate the land, is a good consideration for a promissory note.—McCabe v. Caner, (Mich.) 901.

Sureties.

2. Where one of several signers of a joint note is surety for the others, but such fact does not appear upon the face of the paper, the payee is not, in the absence of any notice, bound to inquire into the relations of the makers as between themselves, nor, until informed thereof, is he bound to regard the equitable rights of such surety —Benedict v. Thoe, (Minn.) 10.

Actions—Pleading.

3. Defendant's answer, after denying the execution of the note in suit, alleged that he was solicited to join on the note as security for the maker to the plaintiff, and did so join on the note in suit at or about its date. *Held*, a sufficient admission of the signing.—Graham v. Rush, (Iowa,) 518.

4. In an action on a note one of the joint defendants offered to prove that he signed as surety only, and was released by an un-

authorized extension of time to the principal debtor. *Held*, not admissible under the general issue, no notice having been given. —Rawlings v. Cole, (Mich.) 66.

Evidence.

5. It is competent to prove by parol that a negotiable instrument was signed by defendants as guarantors, and delivered to the payee to procure the signatures of other parties, with the understanding that when those signatures should be obtained, and not before, the guaranty should become operative.—Merchants' Exch. Bank v. Luckow, (Minn.) 494.

6. Where negotiable paper has been stolen or lost, or obtained by duress, or procured or put in circulation by fraud, proof of these circumstances may be given against the plaintiff; and, on such proof being given, the burden is on the plaintiff to prove that he is a *bona fide* holder for a valuable consideration.—Id.

NEW TRIAL.

Objections to verdict.

1. In an action for the price of a horse, defendant set up a breach of warranty. The testimony under the answer tended to show a warranty, but showed no damages. Verdict was rendered for plaintiff, and defendant moved for a new trial. *Held* that, as the jury could at best give only nominal damages, a new trial would not be granted. —Harris v. Kerr, (Minn.) 879.

Newly-discovered evidence.

2. A new trial will not be granted on account of newly-discovered evidence merely cumulative in its character.—Campbell v. Holland, (Neb.) 871.

NUISANCE.

Abatement, see *Waters and Water-Courses*, 7.

Public nuisance—Complaint.

1. Under a criminal statute, relating to buildings which are unsafe "so as to endanger life," a complaint in a criminal proceeding, alleging a building to be "dangerous, having been heretofore damaged by fire," is insufficient.—State v. Municipal Court of St. Paul, (Minn.) 576.

2. Neither is such a complaint sufficient under a statute relating to buildings which are "specially dangerous in case of fire." —Id.

Private nuisances.

3. Where a railway bridge is so negligently constructed across a river as to form an unlawful obstruction, and become a nuisance by causing a overflow of the river, no right of action accrues to a land-owner until he sustains an actual injury caused by such unlawful obstruction—as by the overflow of his lands.—Omaha & R. V. R. Co. v. Standen, (Neb.) 183; Same v. Brown, 188.

4. Where a nuisance is a continuing one, in consequence of which damages are sustained, a recovery is limited to damages which may have accrued before the action is brought, and one action is not a bar to a second action brought for damages thereafter sustained.—Id.; Id.*

Nunc pro Tunc Entry.

See *Judgment*, 7.

OBSTRUCTING JUSTICE.

What constitutes.

1. In a trial for resisting an officer while trying to keep the peace, where the officer had arrested defendant without a warrant, for an alleged breach of the peace in his presence, it was proper to instruct the jury that the officer could arrest without a warrant only for a breach of the peace actually being committed in his presence, and if no such breach took place until the arrest was made, and then only in resisting such arrest, the resistance was justifiable. —People v. Rounds, (Mich.) 77.

2. And in such case it is proper to instruct the jury that where a breach of the peace is committed in his presence, it is the power and duty of an officer to arrest the offender, for the purpose of taking him before a magistrate.—Id.

Information for.

3. The information charged that defendant "did obstruct, resist, and oppose" the officer "in the lawful execution of his office in attempting to arrest respondent for being then and there drunk, and disturbing the peace." At the time of the alleged offense, drunkenness was not an offense recognized by statute or ordinance. *Held*, that the words "being drunk" might be treated as surplusage, and that the information substantially complied with the act (How. Mich. St. § 9257) making it a felony to "obstruct, resist, and oppose officers in their lawful acts, attempts, and efforts to maintain, preserve, and keep the peace."—Id.

Evidence.

4. In a trial for resisting an officer in trying to keep the peace, where evidence had been admitted that defendant had made some disturbance at the place of the alleged offense before the officer's arrival, it was proper to instruct the jury that such evidence had no bearing as against defendant, and also to allow him to show that he tried to keep good order at the place, before the officer arrived.—Id.

Office and Officer.

See *Attorney General; Counties*, 1; *Municipal Corporations*, 3-6; *Sheriffs and Constables.*

Officers de facto, see *Elections and Voters*, 2; *Judge.*

Resisting officer, see *Obstructing Justice.*

PARENT AND CHILD.

See, also, *Bastardy; Guardian and Ward; Infancy.*

Action for services.

1. In an action for labor performed, where the person rendering the service is a member of the family of the person served, and receiving support therein, as a child, a presumption arises that such services were gratuitous; and before the person rendering such service can recover, the express promise of the party served must be shown, or such facts as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making, compensation therefor. Following Scully v. Scully's Ex'r, 28 Iowa, 548.—Cowan v. Musgrave, (Iowa,) 496.*

2. A defendant executor was permitted to introduce in evidence the will of the deceased, executed after the alleged service sued on had been performed, bequeathing to each of his children, including plaintiff, the sum of $50, and the balance of his estate to certain grandchildren. *Held* error. —Id.

Support of parent.

3. When a daughter claims pay from the estate of her mother for board furnished to the latter, who resided with the daughter, no promise to pay can be implied in favor of the claimant, but an expectation must be shown on the part of both that compensation should be rendered therefor. The claimant must, by affirmative evidence, overcome the presumption arising from the relationship that they were gratuitous; but the amount to be paid need not have been expressly agreed upon. — McGarvey v. Roods, (Iowa,) 488.*

4. Where the evidence tends to prove that a mother residing with her daughter expected to pay for her board, and the daughter expected she would, and is not clearly insufficient, a verdict allowing the claim against the estate of the mother will not be set aside.—Id.

PARTIES.

In ejectment, see *Ejectment*, 6.
equity, see *Equity*, 7.
Substitution, see *Abatement and Revival*, 2.

Real party in interest.

1. A mere assignee having no interest in the result of a suit, but who obtains an assignment upon a promise to pay the assignor the amount he may derive therefrom, cannot maintain the action under Code Neb. § 29, providing for suit to be brought by the real party in interest.—Hoagland v. Van Etten, (Neb.) 869.

2. One with whom or in whose name a contract is made for the benefit of another may prosecute an action thereon in his own name, under Gen. St. Minn. 1878, § 28, c. 66.—Lake v. Albert, (Minn.) 177.

PARTITION.

Election of widow between homestead and dower, see *Appeal*, 57.

Liquidation of debts.

1. Partition among co-heirs will not be decreed, as against the widow, until all the debts against the estate are settled. — Thomas v. Thomas, (Iowa,) 698.

2. An uncontroverted allegation that the personalty is sufficient to pay all the debts against the estate will not authorize a decree for partition. The extent of such indebtedness must be judicially ascertained. —Id.

PARTNERSHIP.

Power of partner to bind the firm, see *Limitation of Actions*, 5.

Existence.

1. Where it is clear from the articles that the parties contemplate an immediate commencement of business as a firm, the failure of one of them to pay in his part of the capital as agreed does not render him any the less a partner as of the date of the execution of the articles.—Southern White Lead Co. v. Haas, (Iowa,) 494.

2. In a state where there is no statute prohibiting the carrying on of business under a name or an abbreviation, other than that of the individual, as in Michigan, there is no necessary presumption that when "& Co." is made use of after the dealer's name, he has a partner or partners, or that such title includes more than one person.—Brennan v. Pardridge, (Mich.) 85.

3. In a suit by judgment creditors to set aside chattel mortgages on firm property on the ground that they were executed by only two of the three partners, and were therefore *ultra vires* and void, admissions of such third partner that, when the mortgages were given, the partnership had been terminated, are no evidence of that fact as against plaintiffs, but are admissible only to discredit his testimony, given on

the trial, that he was then a member.—Southern White Lead Co. v. Haas, (Iowa,) 494.

4. In an action against two defendants as partners, the evidence showed that one of the defendants and a third person had been running a livery stable,—defendant owning the stable, and the third person the horses; that the other defendant bought out the third person, and told plaintiff he had made the purchase, and had assumed the contracts of the old firm. *Held*, that a finding that defendants were partners would not be set aside.—Jenkins v. Barrows, (Iowa,) 510.

Firm and private creditors.

5. Where a firm is insolvent, the partnership property will be applied to the partnership debts, and a creditor of a member of the firm cannot be paid out of the partnership property, to the exclusion of creditors of the firm.—Rothell v. Grimes, (Neb.) 392.

6. A mortgage of partnership goods, given to secure the sureties on a bond of a member of the firm for the faithful performance of his duties as guardian, is not available as against creditors of an insolvent firm.—Id.

7. A separate creditor of a member of an insolvent firm obtained judgment against the individual partner, and levied upon all the firm property, but, before sale under the execution levy, a firm creditor attached the same property, and afterwards got judgment. The sheriff sold the property on the execution in favor of the separate creditor, and held the proceeds subject to the order of the court. On petition of intervention by the firm creditor, *held*, that, as the firm creditor had obtained a lien on the property before it had been appropriated to the debt of the separate creditor, the proceeds must first be applied in payment of the former's debt, and that it was immaterial that the separate creditor had obtained a lien first, so long as the property had not been sold before the lien of the firm creditor attached.—Powers v. Powers, (Wis.) 58.*

8. Since the fund to be distributed was in the hands of the court, and no persons were interested in it except the separate creditor and the petitioning firm creditor, the rights of the contesting creditors to the fund could be determined upon petition, without the necessity of resorting to an action in equity; and allegation and proof of fraud on the part of the separate creditors was not necessary to give the court the right to proceed by petition.—Id.

Accounting.

9. In a suit for a partnership account, it appeared that defendant had received all payments made to the partnership, that complainant had put $82 into the business in the first instance, and had increased that amount by a sum of $50 and certain profits left in the business to $165; that other profits of the partnership amounted to $181.53, and losses to $66.66, leaving a net profit of $114.87 *Held* that, under this evidence, complainant was entitled to receive one-half of the net profits, and also the amount of principal put in by him, for which sums the defendant should account.—Wingarden v. Verhage, (Mich.) 801.

10. Plaintiff and defendant entered into a joint speculation, which resulted disastrously, and a firm in which defendant was a partner failed. By agreement, each was to bear one-half of the loss, but the capital stock of defendant's firm was not to be considered one of the debts they were to pay. *Held*, that defendant was entitled to credit for the amount he had withdrawn of capital and profits from the firm prior to the deal, and had invested in it; and plaintiff, to credit for all moneys due him in the hands of defendant, who managed the deals, at the beginning of the speculation, and for money contributed by him in the settlement of the loss; and the difference between his credits and the total loss would show defendant's contribution.—Wells v. McGeoch, (Wis.) 769.

11. In a settlement of transactions between plaintiff and defendant, the latter overstated the amount of money advanced by him, and understated the amount advanced by the plaintiff. *Held*, that such representations were fraudulent, whether defendant knew them to be untrue, or, being ignorant of the real facts, assumed to know facts adverse to plaintiff which had no existence.—Id.

12. Plaintiff had for a long time joint transactions of great magnitude with defendant, in whom he had unbounded confidence, and to whom he had trusted their entire management. The business was done by defendant's firm in Chicago, but the accounts were sent to his Milwaukee house, and plaintiff had free access to them. *Held* that, in a settlement between them, plaintiff was not guilty of negligence in relying upon the statements of defendant as to the amounts of money advanced by each of them in these matters.—Id.

Dissolution.

13. In an action upon a partnership note, it was shown that the partnership was dissolved prior to the execution of the note, but that no notice of such dissolution was given to the payee. *Held* that, in the absence of such notice, all the members of the firm were chargeable, notwithstanding the dissolution.—Clement v. Clement, (Wis.) 17.

14. Plaintiff sued defendants, as copartners, upon an account for work and labor. It appeared that defendants were in partnership till within a short time of plaintiff's engagement; that, at the time of such engagement, the defendant who appeared and defended the action showed him his work; that the tools and apparatus of the partnership remained unchanged; that the business was still carried on in the partnership name; and that nothing was done, until after plaintiff had rendered his services, to notify third persons that the partnership was dissolved. *Held*, sufficient to support a finding of a continuance of the partnership as to third persons.—Reid v. Frazer, (Minn.) 269.

15. Where, by the terms of the articles, the partnership is to continue for five years, the presumption is that it remained in force for that length of time, and the burden to show an earlier dissolution is upon those setting it up. Proof that the partners agreed between themselves that the contract should be rescinded, and that one of the partners should remain on a salary, is not sufficient to rebut such presumption, where such partner, afterwards, continued to exercise the same authority and control in the management as before, and where the books show no credits for his services. —Southern White Lead Co. v. Haas, (Iowa,) 494.

Surviving partner.

16. W., an individual trader, was carrying on business under the name of "Thomas Walsh & Co." Three days after his death, defendant went to his store, and there bought goods to a large amount, which were delivered. Payment was made by a check, which was first drawn to "Thomas Walsh & Co.," but afterwards changed by defendant to one running "to bearer," this being done on account of W.'s death. The check was cashed by W.'s book-keeper, who paid over the money to the widow. The latter refused to deliver it to the administrator, who thereupon brought trover against defendant for the goods. The estate was insolvent. There had been previous dealings between W. and defendant. *Held*, that defendant was liable, notwithstanding his alleged belief that he was buying from a surviving partner of W.—Brennan v. Pardridge, (Mich.) 85.

Actions by.

17. Where a note payable to order is indorsed by the payee, and transferred to two persons, who bring an action thereon as "H. & A. F. R., partners," etc., *held* that plaintiffs, being the lawful holders of the note, if not partners, could in their individual names maintain an action thereon as "H. & A. F. R."—Walgamood v. Randolph, (Neb.) 217.

PATENTS FOR INVENTIONS.

Assignment by parol.

A parol agreement to assign a patent-right, which both parties to the agreement have shared the expense of procuring, is good, and specific performance thereof will be granted in equity, "notwithstanding the provisions of Rev. St. U. S. § 4898, that patents shall be assignable in law by an instrument in writing."—Searle v. Hill, (Iowa,) 490.*

PAYMENT.

See, also, *Accord and Satisfaction; Compromise; Release and Discharge.*

On Sunday, see *Sunday.*

Evidence.

1. In an action to recover money received by defendant as agent, and alleged to have been retained by him, the evidence of defendant was to the effect that immediately after receiving the money he had paid the same to plaintiffs by a draft sent to their place of business; that he had received a receipt for the same, which had been destroyed when his place of business was burned out. This evidence was wholly uncontradicted. *Held*, insufficient to sustain a verdict for plaintiff.—Hammond v. Jewett, (Neb.) 188.

2. In an action by a surviving partner for legal services rendered by the firm to defendant in relation to defendant's land at T., defendant produced a receipt dated more than a year before said alleged services, signed by the deceased partner and purporting to be "in full for the trip to T.;" and another witness without giving dates, testified to an admission by deceased that the account mentioned in the receipt was paid in full. *Held*, that an instruction that the receipt went as far as it read, except as explained, or modified by the acts or words of the parties, and that it was sufficient in connection with the admission, if that were believed, to show a settlement in full, was erroneous.—Baldwin v. Clock, (Mich.) 904.

3. Payment is a matter of defense, and a charge that plaintiff must not only prove his claim, but that it is unpaid, is error.—Id.

Presumption.

4. Suit was brought in 1886 on a note made in 1872. A payment had been made upon it in 1879. Defendants had failed in business, and compromised with their creditors. *Held*, that the burden of proof was on defendants to prove payment, and, in view of all the circumstances, the lapse of time was not entitled to much consideration as a presumption of payment.—Walker v. Russell, (Iowa,) 443.

Acceptance of negotiable paper.
5. An attorney, having a mortgage in his hands to collect, received a check for it, which he placed in his bank to his credit. The check was paid by the bank on which it was drawn. *Held*, that it was a payment of the mortgage.—Harbach v. Colvin, (Iowa,) 663.

Pension.

Exemption of pension money, see *Constitutional Law*, 5.

PLEADING.

See, also, *Damages*, 7, 8; *Garnishment*, 2; *Libel and Slander*, 9; *Negligence*, 9, 10; *Negotiable Instruments*, 3, 4; *Trespass*, 3.

Amendment, see *Trial*, 17.
Answer, denial and counter-claim, see *Set-off and Counter-Claim*, 1, 2.
—— sufficiency, see *Mortgages*, 15.
Bill of particulars, see *Assumpsit*, 2, 3
Complaint, see *Corporations*, 4.
Joinder of causes, see *Action*, 1, 2; *Equity*, 6.
Pleading and proof, see *Assumpsit*, 4.

Petition.
1. In an action on a contract giving to plaintiff, as rent, the balance after certain payments were made, a petition failing to aver that, after making such payments, a balance remained in defendant's hands, is demurrable.—Chicago, B. & Q. R. Co. v. Burlington & M. Elevator Co., (Iowa,) 654.

Demurrer.
2. The filing of an answer by which issue is joined upon all the averments of the petition is a waiver of exception to the decision of the court in overruling a special demurrer.—Singer Manuf'g Co. v. McAllister, (Neb.) 181.

Answer.
3. Under a general denial of a complaint alleging that defendant hired plaintiff to work, and agreed to pay him, defendant may prove that he made the contract of hiring as agent, and disclosed his principal to plaintiff.—Scone v. Amos, (Minn.) 575.

4. In an action for the value of a cow, plaintiff alleged that the animal died in consequence of the negligence of defendant's servant. Defendant's answer alleged "that of the alleged negligence of said [servant,] and the death of said cow, the defendant has no knowledge or information to form a belief that said cow died in consequence of such negligence, and therefore denies the same." *Held* that, under Code Iowa, § 2655, par. 3, the answer put upon plaintiff the burden of proving that "said cow died of such negligence," but that the allegation that the servant was guilty of the negligence charged was to be deemed true.—Beyre v. Adams, (Iowa,) 491.

—— Notice of defense.
5. Under the Michigan practice, (How. St. § 7863,) notice of an intended defense must be given wherever the common law would require a special plea.—Rawlings v. Cole, (Mich.) 66.

Motion to make more definite and certain.
6. The indefiniteness or uncertainty to be relieved against on motion, is only such as appears on the face of the pleading itself, and not an uncertainty arising from extrinsic facts as to what particular evidence may be produced to support it: following Lee v. Railway, 34 Minn. 225, 25 N. W. Rep. 899.—Todd v. Minneapolis & St. L. Ry. Co., (Minn.) 5.

Motion to strike out.
7. In an action by a mortgagee of personal property to recover the same, the defendant answered by general denial. On motion to strike out as sham, defendant made affidavit that she had purchased the property with actual notice of the existence of the mortgage, but on the representation by the mortgagor that the mortgage would never be enforced. *Held*, that a motion to strike out the answer as sham was properly sustained.—Stevens v. McMillan, (Minn.) 872.

Reply.
8. Defendant in his answer pleaded a settlement. Plaintiff in reply denied the allegation of settlement of "all claims except in the manner herein set forth," and then set forth at length the circumstances of the settlement, but omitted the essential elements of a defense of fraud and deceit. *Held*, that the admissions in the reply controlled the denial, and thus confessed the answer, and, having failed to properly set up matter in avoidance, defendant was entitled to judgment on the pleadings.—Gaffeny v. St. Paul, M. & M. Ry. Co., (Minn.) 728.

Amendment.
9. In an action on an insurance policy, an appeal having been taken and the case sent back for a new trial, defendant, at the first opportunity, asked leave to amend so as to make plaintiff's title to the property material, the defect in the answer, in this respect, having been brought out on appeal. *Held*, that it was error to refuse such leave.—Pangborn v. Continental Ins. Co., (Mich.) 814.

Variance.
10. A bill of goods alleged to have been wrongfully taken was made a part of the petition. Evidence of articles not included

was introduced, but no formal amendment of the petition appeared to have been allowed. *Held*, as it fully appeared that the court admitted the evidence on the ground that an amendment had been filed, and counsel did not call attention to the omission, the objection could not be made on appeal.—Kuhn v. Gustafson, (Iowa,) 660.

11. In an action against partners for services rendered, plaintiff alleged that he had worked for defendants for a certain period. The evidence showed that a portion of this time he had worked for one of the defendants and a third person. *Held*, that this was a variance, which must be objected to on the trial.—Jenkins v. Barrows, (Iowa,) 510.

Waiver of defects.

12. Where an action is brought by parties by the initials of their Christian names, instead of the names, the remedy of the adverse party is by motion to require the full Christian names to be set out in the pleading, and, unless such objection is made, it will be waived.—Walgamood v. Randolph, (Neb.) 217.

13. A petition sufficient to apprise defendant of the nature of the claim, and of the relief sought, though unskillfully drawn, cannot, under the Nebraska Code, be assailed after verdict.—Hoke v. Halverstadt, (Neb.) 204.

POOR AND POOR LAWS.

Duty of poor-master.

In an action against a county poor-master for neglect in not properly caring for plaintiff while in his charge, it was claimed in defense that plaintiff was brought to the poor farm without authority from the proper officers of the county, and during the absence of defendant; and that defendant was not required by law to receive or care for him. *Held*, that the fact that plaintiff was received, and care bestowed upon him by defendant, made defendant responsible for such care and attention as ordinary prudence required. Whether such care were given was a question to be submitted to the jury.—Meier v. Paulus, (Wis.) 301.

POWERS.

Mortgage power of sale, see *Mortgages*, 21–25.

Construction.

A power of attorney "to grant, bargain, sell, and convey any and all personal or real property," gives authority to sell and convey, by assignment of the certificate of sale, the interest of a purchaser at a mortgage sale during the period of redemption.—Cooper v. Finke, (Minn.) 469.

PRACTICE IN CIVIL CASES.

See, also, *Action; Appeal*, 14–23; *Continuance; Costs; Exceptions, Bill of; Judgment; Jury; New Trial; Parties; Pleading; Set Off and Counter-Claim; Trial; Venue in Civil Cases; Witness; Writs.*

Filing complaint.

In an action against a non-resident, the complaint, affidavit, and order of publication were indorsed: "County Court, Fond du Lac County, Wis. Filed May 14, 1886. J. W. Watson, Clerk,"—but they were never left in the office of the clerk of the court, but were kept by plaintiff's attorney in his office. Rev. St. Wis. § 2640, provides that an order of publication shall be based on a complaint *duly* verified and *filed*. *Held*, that it was not such a filing as is required by the statute.—Witte v. Meyer, (Wis.) 25.

PRINCIPAL AND AGENT.

Insurance agents, see *Insurance*, 8–10.
Real-estate agents, see *Factors and Brokers*.
Rights of principal, see *Trusts*, 1.

Proof of agency.

1. Agency cannot be proved by general reputation.—Graves v. Horton, (Minn.) 568.

2. M., the agent of an insurance company, resigned his agency, and asked the appointment of his son in his place, saying that the work of the latter would be under his immediate supervision. Another agent, through whom this was communicated to the company, added that the business would run the same as before, but that he, M., "desires his son to learn the business, and have some responsibility, and takes this method." The son was thereupon appointed. *Held*, that the evidence justified the finding that M. had still authority to act for the company.—Ganser v. Fireman's Fund Ins. Co., (Minn.) 584.

Authority of agent.

3. A quantity of hams having been shipped to plaintiff by defendant, a bookkeeper in defendant's employ sent a telegram warranting the hams, and signed defendant's name to it. *Held*, that no authority to make the warranty could be implied from his employment, and defendant was not bound—Forcheimer v. Stewart, (Iowa,) 148.

4. It is immaterial that the warranty was made by telegram. The ordinary rules of agency are applicable to telegrams as to other writings.—Id.

5. Defendant transmitted money to parties to invest in real estate, taking title in his name to build houses thereon, sell and convey; they, to have a share in the profits, when the land was sold, and guarantying

the return of the money sent. *Held*, that an attorney, having no knowledge of the contract, could sue the principal for services rendered in lawsuits and examining titles, relying upon the apparent authority of his agents.—Mason v. Taylor, (Minn.) 474.

Ratification.

6. In an action to recover for goods sold and delivered, plaintiff claimed that some of them were ordered by an agent of defendant. The evidence tended to show a ratification of the alleged agent's acts. *Held* that, on appeal, the extent of his original authority would not be inquired into.—Montague v. Dougan, (Mich.) 840.

7. The fact that defendant accepted payment of the purchase money from plaintiff does not bind him to the warranty made by an agent, or constitute a ratification. It appearing that the contract which defendant made with plaintiff was different from that made by the agent with plaintiff, defendant is to be considered as accepting and claiming the money under the contract which he had made.—Forcheimer v. Stewart, (Iowa,) 148.

8. An agent was authorized by his principal to sell lands upon certain terms that equal payments should be made in one, two, and three years. The written contract of sale actually made by him varied from these terms in certain particulars. He notified his principal, who was a non-resident, of the sale, and sent to the latter a deed for execution, and also a purchase-money mortgage, with notes, ready for execution by the purchaser, showing the terms of the purchase as agreed on for his inspection. These were received and acknowledged by the principal, who made no objection to the modification in the terms of payment, and promised to return them after submission to his counsel. While he held the papers, the purchaser notified the agent that he would accept the title as it was, and that he was ready to complete the purchase. The vendor subsequently refused to make the sale, or proceed further under the contract. *Held*, that the contract as made was ratified by him, and that the purchaser was entitled to a specific performance thereof. —Dana v. Turlay, (Minn.) 860.

Rights of principal.

9. S. appointed her husband her attorney in fact to sell and convey certain real estate. The power of attorney was filed for record June 9, 1886. On the same day the husband, as attorney, conveyed the premises to one Knight, who immediately reconveyed to the husband. On July 9, 1886, the husband conveyed to defendant, and on July 27, 1886, S. conveyed to plaintiff. *Held*, that the conveyance to Knight, and by him to the husband, were on their face fraudulent and absolutely void, and could be avoided by an action of ejectment.—McKay v. Williams, (Mich.) 159.

10. When one agrees to act as agent of another in buying stock, he is bound to deliver only shares bought under such agreement; but, if he deliver other shares, he is bound to deliver them at the price paid for those purchased as agent.—Keyes v. Bradley, (Iowa,) 656.

11. In an action to recover money alleged to have been obtained by defendant by false representations as to the price paid by him for mining stock as plaintiff's agent, the issues were as to the agency, and whether the shares delivered by defendant were those contemplated in the agreement. The court permitted defendant to testify as to the purchase of other shares, prior to the agreement, at the price charged plaintiff, and instructed the jury that plaintiff could not recover unless defendant was acting as his agent when he purchased the shares in question; that defendant would only be bound to deliver such stock as he purchased subsequent to the agreement; and that, if they should find that the shares delivered were in fact owned by defendant before the agreement, they should disregard certain evidence of plaintiff tending to show the price paid for stock after the agreement. The jury found for defendant. *Held*, that as they would understand from the court's rulings that plaintiff could not recover, even though he had proved the agency and the fact that the purchase was made as agent, if the shares delivered were not part of that purchase, the verdict did not necessarily determine the question of agency, and that defendant could not claim that the exclusion of testimony as to the price paid while acting as agent was error without prejudice.—Id.

12. Plaintiff offered to prove that in a transaction with a witness who had purchased like stock of defendant under an agreement to pay the price paid by defendant, witness had originally paid one-half the price paid by plaintiff, and that subsequently, having been accused of charging more than he paid for the stock, defendant returned to witness a portion of the money. *Held* that, while inadmissible as to the question of defendant's motive, the evidence was material as tending to show the price actually paid by him for plaintiff's stock.—Id.

PRINCIPAL AND SURETY.

See, also, *Guaranty; Negotiable Instruments*, 2.

Suretyship generally.

1. An action was brought on the special bond of the county treasurer of Milwaukee

county given to secure the proper management of the court-house funds. The evidence failed to show that the funds misappropriated in February, 1874, were ever replaced. *Held*, that the transfer of the funds of the account to the county general fund, under the act of March 27, 1874, was a mere formal transfer, and that the sureties on the special bond were liable for the deficit.—County of Milwaukee v. Schandeiu, (Wis.) 337.

2. The sureties on the general bond of the treasurer of Milwaukee county cannot be held responsible for the safe-keeping and disbursement, according to law, of the special court-house funds, for the proper handling of which a special bond was required by P. & L. Laws Wis. 1871, c. 400, § 3.—Id.

Discharge and release.

3. Mere neglect to bring suit, or take active efforts to collect the note of the principal maker at the request of the surety, is insufficient to discharge the latter.—Benedict v. Thoe, (Minn.) 10.*

4. Code Iowa, § 2108, provides that "when a person bound as security for another * * * apprehends that the principal is *about to become insolvent*, or to remove permanently from the state, without discharging the contract, * * * he may by writing require the creditor to sue upon the same, or permit the surety to sue upon the same." In an action upon a note, the evidence showed that defendant served such notice upon plaintiff, and was refused; the principal having become insolvent prior to the request. The court rendered judgment in favor of defendant, for costs. *Held* no error; the evidence not showing that the principal was insolvent at the time of service.—Graham v. Rush, (Iowa,) 518.*

5. Defendant signed a note as surety, but its acceptance was refused unless a third person would sign it, which the latter did, without knowledge or consent of defendant, and the note was then accepted. *Held*, that this was not such alteration of the contract as would avoid defendant's liability.—Id.

Prostitution.

Abduction for purposes of, see *Abduction*, 1, 2.

PUBLIC LANDS.

Homestead entry, relinquishment, see *Negotiable Instruments*, 1.
Incumbrance before issue of patent, see *Mechanics' Liens*, 1.

Homestead entries.

1. Plaintiff settled upon certain land in 1867, and in 1872 filed an application to enter it as a homestead. At that time the title of the land had vested in a railroad company under the railroad grants. *Held* that, prior to his application, he was in possession by sufferance only, and neither his occupancy nor anything said by the local land-office could prejudice the rights of the railroad company.—Kiteringham v. Blair Town Lot & Land Co., (Iowa,) 502.

2 Plaintiff settled upon governnent land in 1867, and applied to the land-office in 1872, claiming the right to enter it as a homestead, but omitted to insert in his aplication one 40-acre tract. *Held*, that his right and title thereto have failed.—Id.

Reservations.

3. The act of the Nebraska territorial legislature of March 7, 1855, entitled "An act defining the boundaries of counties therein named, and for other purposes," in so far as it defines the boundaries of Blackbird county, is inoperative and void, as being in violation of the act of congress approved May 30, 1854, entitled "An act to organize the territory of Nebraska," and which reserved from within the boundaries of the territory the Indian reservation of which said Blackbird county was a part.—State v. Thayer, (Neb.) 200.

QUIETING TITLE.

When maintainable — Apparent invalidity.

1. An action to remove a cloud upon title is not maintainable where the alleged invalidity of the instrument complained of is apparent upon its face. MITCHELL, J., dissenting.—Maloney v. Finnegan, (Minn.) 723.

—— Void judgment.

2. A plaintiff asserting title by mortgage foreclosure is not entitled to relief as to a void judgment recovered against the mortgagor subsequent to the recording of the mortgage; the time for enforcing the judgment by redeeming from the foreclosure sale having expired, and no apparently valid redemption having been made.—Id.

RAILROAD COMPANIES.

See, also, *Carriers; Horse and Street Railroads.*
Construction of road, see *Subscription.*
Negligence, injuries to passengers, see *Carriers*, 5–10.
—— injuries to employes, see *Master and Servant*, 3–23.
—— stock-killing cases, assignment of right of action, see *Assignment*, 1.

Regulation of rates.

1. Where a railroad company demurred to an alternative writ requiring it to reduce

its rates and charges to conform to an order of the Nebraska board of transportation, and denied the power of the board to reduce such rates and charges, *held*, that the court would determine the question of the power of the board to make the order in question before entering upon an examination of the facts, and therefore would not permit the demurrer to be withdrawn. —State v. Fremont, E. & M. V. R. Co., (Neb.) 118.

2. The Nebraska act to regulate railroads and prevent unjust discriminations, approved March 31, 1887, provides that all the charges made for service rendered, or to be rendered, by any railway company in the state, in the transportation of passengers or property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful; and requires such railway company to print and keep for public inspection, schedules showing the rates and fares and charges which have been established and are in force at the time upon such railroad. *Held*, that the board of transportation has authority to determine in the first instance what are just and reasonable charges for the services rendered, or to be rendered, on such railway.—Id.

3. The act in question prohibits any preference or advantage to any particular person, company, corporation, or locality, or any particular description of traffic in any respect, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any prejudice or disadvantage in any respect, and places the general supervision of all railroads within the state in the board of transportation, and requires it carefully to investigate any complaint made in writing, and under oath, concerning any unjust discrimination against any person, firm, corporation or locality, either in rates or facilities furnished in order to prevent unjust discriminations against either persons or places.—Id.

4. The word "locality" mentioned in the statute means the territory unjustly discriminated against, and may be a village, city, county, or portion of the state.—Id.

5. The power to determine what is an unjust rate and charge, and the extent of the same, and to prevent unjust discrimination, carries with it the power to decide what is a just rate and charge, and authorizes the board to fix just and reasonable rates and charges.—Id.

6. The finding of facts by the board of transportation in any matter submitted to it under the above statute for determination, is *prima facie* evidence of the existence of such facts and of the reasonableness of an order made by said board in pursuance thereof.—Id.

7. The Nebraska act to regulate railroads and prevent unjust discriminations approved March 31, 1887, being a remedial statute, is to receive a liberal construction to carry into effect the purpose for which it was enacted.—Id.

8. Where the board of transportation has investigated charges of unjust discrimination against a railroad company, and has found such unjust discrimination to exist, and ordered such railroad company to reduce its rates to conform to a schedule presented by such board, which order the railroad company neglected to comply with, *mandamus* is a proper remedy to enforce such order, and the mention of the district court in the statute will not preclude bringing the action in the supreme court, where the latter court has original jurisdiction.—Id.

Construction—Power of president to contract.

9. The president of a railroad company has no power, by virtue of his office simply, to let a contract, on behalf of the company, for the construction of its road.—Templin v. Chicago, B. & P. R. Co., (Iowa,) 634.

Municipal aid.

10. A township voted a tax in aid of defendant railroad, payable when a certain number of miles of the road had been built, in return for which each taxpayer would be by law entitled to a certain number of shares of stock. Before the construction was begun, defendant contracted with another railroad company, stipulating that, before a certain date, it would complete 50 miles of its road to a junction with, and then sell all its property to, the latter railroad, taking its stock in payment. This contract was signed and approved by the officers and directors of both railroads, but never submitted to the stockholders of either. Over a year later, after defendant had built miles enough of road to earn the voted tax, and had finished the stipulated 50 miles, the agreement for sale was canceled by the officers of both roads, and the cancellation approved by the stockholders of defendant company. On the same day a formal conveyance of all its property was made by its officers and stockholders to the connecting road. The connecting road furnished the money to build defendant's road, and, before the conveyance, owned practically all its stock. *Held* that defendant's contract to convey all it had to the connecting road, amounted to a sale and disposal of all defendant's road and property, and, as this was accomplished before the tax was earned, payment of the tax could not be enforced. *Held, also*, that the taxpayers were not obliged to take the stock of the connecting road, instead of stock in

defendant company. — Cantillon v. Dubuque & N. W. R. Co., (Iowa,) 620.

Taxation.

11. Code Iowa, §§ 1817-1822, provides for the valuation of railroad property by the executive council, and makes it the duty of such council to transmit to the county auditor of each county a statement showing the length of track in each county, etc., and the rate per mile of assessment. It is then made the duty of the board of supervisors to determine the length of the main track, and the assessed value of such railway lying in each city, township, or lesser taxing district in their county. Section 1822 provides that all such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, etc. Chapter 10, tit. 4, § 4, provides that agricultural lands within city limits shall not be taxed for city or town purposes. *Held*, that the boards of supervisors do not assess the railroad property lying within their respective districts, but fix the proportion of the aggregate assessment made by the council, which shall be subject to the local taxes of those districts, and the provisions of chapter 10, tit. 4, § 4, do not apply to property of this character.—Illinois Cent. R. Co. v. County of Hamilton, (Iowa,) 238.

12. By a judgment of this court in State v. Railway Co., 30 N. W. Rep. 816, entered March 28, 1887, the charter of plaintiff company was declared forfeited and annulled. Section 416, c. 34, Gen. St. Minn. 1878, continued such corporations for three years for certain purposes, such as disposing of their property, etc. *Held*, that lands acquired by plaintiff under the land-grant act of 1857, and subsequent acts, are exempt from taxation during the period of three years, unless previously leased, sold, or contracted to be sold.—Minnesota Cent. R. Co. v. Donaldson, (Minn.) 725.

Negligence—Accidents at crossings.

13. The failure of servants of a railroad company to give the statutory signals at a crossing, when running at a high rate of speed, and not upon the regular time for the train, is to be considered in deciding whether such company was guilty of negligence, and whether a person injured at the crossing used due care in attempting to cross.—Omaha, N. & B. H. R. Co. v. O'Donnell, (Neb.) 285.*

14. The question as to whether a person injured by a passing train at a railroad crossing was guilty of negligence in attempting to cross, is usually a question of fact to be decided upon all the circumstances of the case as shown by the evidence.—Id.

15. Defendant, a railroad company, asked an instruction that if plaintiff, a boy of seven years, did not, before going upon the track, look and listen, the omission was negligence; and that if he saw the train coming, and tried to cross ahead of it, he was negligent in so doing. *Held*, that the instruction was improper, as making the court the judge of plaintiff's capacity to appreciate the danger, and his manner of exercising it.—Baker v. Flint & P. M. R. Co., (Mich.) 886.*

16. The jury found specially that plaintiff could have seen the train over 400 feet away, that he was ordinarily bright, active, and intelligent, that he knew the danger of crossing before an approaching train, and that he did not see the train, but would have seen it if he had looked in the proper direction. The jury found for plaintiff. *Held*, that the findings were consistent with the verdict.—Id.

17. Plaintiff, at the time of the accident, was seven years old, ordinarily bright and intelligent; had been playing with other boys about the track before the accident; had shortly before crossed at the same place; and that, when struck, he was still playing, and running to overtake his comrades, that he did not look for a train, or hear any warning, or know of this one's approach, or that one was due; and that he was accustomed to play there, knew the danger, tried to get off the track before being struck, did not see the train, but could have seen it over 400 feet away, and, if he had, would not have tried to cross. Plaintiff testified on the trial. *Held*, that the evidence did not show want of due care on plaintiff's part.—Id.

18. Where a highway crosses a double-track railway, over which trains are liable to run frequently in opposite directions, it is contributory negligence for a traveler thereon, whose view of the second track is obscured by the presence of a passing train on the track nearest to him, to pass immediately upon the crossing as soon as the way is clear, without waiting to look or listen for the approach of a train in the opposite direction on the second track.—Marty v. Chicago, St. P., M. & O. Ry. Co., (Minn.) 670.

19. Plaintiff brought an action against the defendant railroad company for damage to person and property by collision at a crossing. It was shown that the crossing was a dangerous one, that the view of the railroad was obstructed on both sides, that the noises at the crossing were such as to render it difficult, without stopping his team, for plaintiff to hear the sound of an approaching train, and that plaintiff knew a train to be due at the crossing at the time. *Held*, that the failure of plaintiff to stop his team in order to ascertain if a

train was approaching was contributory negligence.—Seefeld v. Chicago, M. & St. P. Ry. Co., (Wis.) 278.*

20. An action was brought against a railway company for injury to plaintiff's horses, sleigh, and harness by a collision at a highway crossing. It was shown that the crossing was a dangerous one with the view of the railroad obstructed by brush in one direction; that on approaching the crossing the driver of plaintiff's team left his team and sleigh, and took a seat on a sleigh preceding his own, so muffled up that he could not well hear an approaching train, and with his back turned in the direction of the most dangerous approach to the crossing. *Held*, that the driver was guilty of gross contributory negligence.—Gunn v. Wisconsin & M. Ry. Co., (Wis.) 281.*

Negligence—Stock-killing.

21. In an action against a railroad company for killing cattle, the special findings of the jury showed that defendants were not running their engine which did the damage in a careful manner, but were running negligently and carelessly. *Held*, that the verdict for the full value of the cattle killed could be sustained on this ground, regardless of the controverted question as to whether the fence of the company was properly kept up.—Baker v. Chicago, B. & Q. R. Co., (Iowa,) 460.

22. The evidence showed that a train which killed plaintiff's cattle struck them in the night; that it was a moonlight night; that there had been a storm the preceding day, which in many places knocked down the railroad fences, of which the trainmen were aware; that, from the position in which the cattle were found, the train must have been running at a high rate of speed. *Held*, that the evidence justified findings that the train was carelessly and negligently managed.—Id.

23. It appeared that at the place of the killing the right of way was fenced on the east side but not on the west. Plaintiff testified that, in seeking to ascertain the point at which the animal went upon the track, he discovered cattle tracks leading from the west side across the switch track onto the main track where the ox was killed; that he saw no other tracks than these upon the right of way between the depot grounds and the place of the killing. *Held*, sufficient evidence upon which to base an instruction that, to entitle plaintiff to recover, the jury must be satisfied that the ox got upon the right of way at some point other than the depot grounds, and was killed outside its limits.—Dinwoodie v. Chicago, M. & St. P. Ry. Co., (Wis.) 296.

24. In an action brought to recover for the killing of an ox upon defendant's rail road track, the evidence showed that at the place of the killing, which was 60 rods north of the station, there was a ditch and an embankment; that on the west side of the main track was a spur running parallel with it used for storing cars. It did not appear that this spur was ever used for loading or unloading freight, but towards the end where the ground was level it had been used for loading ties. *Held*, that the question of whether or not the animal was killed within the limits of the depot grounds was properly submitted to the jury.—Id.

—— Fires.

25. Where the evidence in an action against a railroad company, for damages sustained by a fire alleged to have been started on its right of way, tended to show that the fire did start there, an instruction submitting the question as to where it started, and whether the company negligently allowed combustible matter to accumulate on its right of way, was warranted.—West v Chicago & N. W. Ry. Co., (Iowa,) 479.

26. Under Code Iowa, § 1289, in an action against a railroad company for setting a fire on its right of way, the fact that plaintiff was guilty of negligently exposing certain stacks of hay by failing to plow around them, and thus contributed to his loss, is not material, as, under that statute, plaintiff's contributory negligence will not release defendant from liability.—Id.

27. An instruction that if the engine which set the fire in question set several successive fires on the same day and trip, this should be regarded as evidence that the engine was not properly constructed or in good repair, or was improperly used, is not erroneous, (1) because the court improperly directs these facts to be regarded *as evidence;* or (2) because it assumes that the jury might find that there were several fires, as it appeared that there were more than two fires set; or (3) because the court called attention to this particular evidence, thus emphasizing it.—Id.

RAPE.

Evidence—Force.

1. An allegation of force in an indictment for rape is proved by evidence of a violation by physical force, or by evidence of a violation after frightening and coercing into subjection the woman ravished, and by evidence that the woman did not consent to intercourse, but used all resistance in her power, "under the circumstances, up to the time of intercourse."—State v. Ward, (Iowa,) 617.

Evidence—Reputation.

2. A question submitted to a witness for defendant in a prosecution for rape was: "Are you acquainted with the general reputation of the prosecuting witness * * * in that community for chastity?" *Held*, that it was properly excluded as incompetent and immaterial, as it did not confine the question of reputation to the time previous to the alleged rape.—Id.

—— Corroboration.

3. In a prosecution for rape it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.—Fager v. State, (Neb.) 195.

Conviction for less offense.

4. Under Code Iowa, § 4466, providing that the defendant in a criminal case may be convicted of any offense the commission of which is necessarily included in that with which he is charged in the indictment, a defendant cannot be convicted of assault and battery on an indictment charging assault with intent to commit rape, unless it is averred in the indictment that the attempt was accompanied by actual violence. —State v. McAvoy, (Iowa,) 630.

RECEIVING STOLEN GOODS.

Requisites of information.

In a prosecution for receiving stolen property, knowing it to have been feloniously stolen, it is not necessary for the information to allege that the prosecution is for a first offense of that character, nor that the act of stealing the property received by defendant was not a simple larceny, nor that defendant has made no restitution or satisfaction of any kind to the owner of the property. Nor, when judgment follows upon a plea of guilty, need any of these matters appear in the judgment.—People v. Caulkins, (Mich.) 90.

RECORDS.

Right to make abstracts.

1. Under Rev. St. Wis. § 700, any person, during the usual hours of business of each day, in a proper manner, and by paying fees, when allowed, and under the reasonable supervision and control of such officer, may enter the office of the register of deeds, and examine the records, and take minutes, notes, and copies of books, records, and instruments therefrom, to make a set of abstract books for his own use. ORTON, J., dissenting.—Hanson v. Eichstaedt, (Wis.) 80.*

2. The right to inspect the public records and papers in the office of the register of deeds, "either for examination, or for the purpose of making or completing an abstract, or transcript therefrom," given by Gen. St. Minn. 1878, c. 8, § 179, as amended by Laws 1885, c. 116, is not limited to those having some interest in such records.—State v. Rachac, (Minn.) 7.*

3. Those who are in the business of making and furnishing abstracts of title to others for compensation are entitled to this right for the purpose of making or completing their "tract indexes," subject, however, to such reasonable rules as the register of deeds may prescribe to secure the safety of the public records intrusted to his official custody.—Id.

RELEASE AND DISCHARGE.

Conclusiveness.

Plaintiff, in a settlement of certain matters in which he and defendant were jointly interested, gave defendant, and a firm of which defendant was a member, a release in full of all claims. The firm was in the hands of a receiver. *Held* that, as the settlement was made on certain fraudulent statements by defendant, the release did not conclude plaintiff in an action to recover from defendant money overpaid to him, though it might exclude him from any share in money remaining in the hands of the receiver after the settlement of the affairs of the firm. — Wells v. McGeoch, (Wis.) 769.

RELIGIOUS SOCIETIES.

Constitution—Notice of change.

1. Where a church has been organized, and a constitution adopted and signed by its members, under which the church has existed for a series of years, such constitution can be changed only in the manner provided therein, or by the rules or by-laws of such society; and where the constitution provides for a three-months notice of any proposed change in the constitution, a change effected without giving such notice is invalid, and of no effect.—Rottman v. Bartling, (Neb.) 126.

Schism—Interference by equity.

2. Where there is a schism in a religious society, a court of equity does not attempt to enforce the decree, faith, or doctrines of either party, though their existence and nature may incidentally be involved in an inquiry relative to the rights of such so-

ciety. All that it does is to enforce the observance and execution of an ascertained trust.—Id.

3. Where a separation has taken place, a court, in determining the question of legitimate succession, will adopt the rule of such society, and enforce its policy in the spirit and to the effect for which it was designed. —Id.

Schism—Possession of church property.

4. Where certain members and officers of the Evangelical Lutheran Church, without giving the notice required by the constitution and complying with its terms, join "Die Erste Deutsche Evangelische Zions Gemeinde," *held* that, having ceased to be members of the Lutheran Church, they were not entitled to the possession of the property of such church.—Id.

Conveyance of property.

5. The matter of notice of a meeting of a religious society to authorize its trustees to convey its real estate goes not to the power of the society to convey, but to the authority of the trustees as its agents. Hence, if the trustees make conveyance under the authority of a resolution passed at a meeting held without giving the notice required by statute, such conveyance is capable of ratification by the members of the society. When *all* the members of the religious society in whose behalf such conveyance has been made unite with two new religious societies, the organization of the old society being abandoned, and the two new societies bring an action to recover possession of the property, claiming title under such conveyance, *held*, to amount to such a ratification.—East Norway Lake N. E. Lutheran Church v. Froislie, (Minn.) 260.

Parsonage—Use of by pastor.

6. Where a religious society employs a pastor under an agreement by which he is to receive for his services as such a certain cash salary, and the use of a parsonage as a residence, the contract is one personal to himself, and is terminated by operation of law at his death, and his personal representative has no right to the possession of the parsonage after his decease. His occupancy, being connected with, and in consideration of, his services as pastor, does not create the conventional relation of landlord and tenant.—Id.

REPLEVIN.

When lies.

1. Pending a dispute over the cost of constructing a building, plaintiff, at defendant's request, furnished them with certain vouchers, a general statement of expenditures, and an affidavit of its correctness made by his book-keeper. *Held*, that these papers being furnished for inspection only, defendants did not become owners thereof, and an action of claim and delivery will lie for their recovery.—Drake v. Auerbach, (Minn.) 367.

2. Defendant agreed to lend plaintiff $50 to pay off a mortgage on certain chattels, the money to be repaid in six months. Plaintiff was induced by defendant's fraud to give him a bill of sale of the chattels. Defendant afterwards, without plaintiff's knowledge, quitclaimed to her a piece of land, claiming that it was in payment for the chattels. Plaintiff first learned of the deed of the land at the trial, and at once tendered to defendant a deed back. *Held*, that it was not necessary for plaintiff, in order to entitle herself to recover the chattels in an action of replevin, brought before the expiration of the six months, to tender defendant the $50 lent.—Moffitt v. Shields, (Mich.) 174.

Description of property.

3. In replevin by mortgagees of the whole of a stock of goods a description in the writ of the property to be recovered, as, "sufficient of the boots and shoes now in the store or building situate," etc., "and now occupied by defendant, to satisfy the claim of plaintiff as mortgagees of said goods amounting to $—," is sufficient. SHERWOOD, J., dissenting. — Pingree v. Steere, (Mich.) 905.

Alternative judgment.

4. In an action in the nature of replevin, the plaintiff may waive the right to have included in the judgment for the recovery of the property the usual alternative provision for the recovery of its value.—Stevens v. McMillan, (Minn.) 372.

Damages.

5. In claim and delivery, when the value of the property cannot be determined by the ordinary rule of market value, it is not error to permit a jury to consider the owner's estimate of its worth to him.—Drake v. Auerbach, (Minn.) 367.

6. In an action for the possession of certain personal property, or its value, if the same cannot be found, the plaintiff elected to take a money judgment, and the jury estimated the value of the property at $150, and the damage for the retention thereof at $100. *Held* that, having elected to take a money judgment, plaintiff was not entitled to damages for retention, and the judgment should be reversed, unless he would remit $100. — Hasted v. Dodge, (Iowa,) 462.

Bond.

7. In replevin before a justice, the sureties on the bond failed to justify as re

quired by How. St. Mich. § 6856. *Held*, that such failure was not a jurisdictional fact, and was waived by the absence of any objection.—Hatch v. Christmas, (Mich.) 888.

Res Adjudicata.

See *Judgment*, 8–10.

Rescission.

Of contracts in equity, see *Equity*, 3–5
sale for fraud, see *Sale*, 9–11.

RIPARIAN RIGHTS.

See, also, *Waters and Water-Courses.*

Surrender by deed.

The owner of certain lands on the Fox river executed a deed granting an improvement company, authorized by law to erect a dam at that point, the right to erect and forever maintain on such lands an embankment of certain dimensions, reserving to himself the right to use said embankment, but not so that the same should be injured; also the right to excavate a ditch along the side of the embankment. The improvement company had by law the exclusive right to the surplus water-power created by the dam and embankment. *Held*, that the deed operated as a surrender of all riparian rights appurtenant to such land, and that an injunction would lie to restrain the grantee of such original owner from cutting through the embankment for the purpose of utilizing the water-power.—Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., (Wis.) 529.

SALE.

Bill of sale construed as mortgage, see *Chattel Mortgages*, 1–3.
Judicial sales, see *Judicial Sales.*
Of real estate, see *Vendor and Vendee.*
Tax-sales, see *Taxation*, 6–15.

What constitutes.

1. Defendant, as sheriff, took, under execution, certain grain grown on land belonging to T., the execution debtor. T. had by written contract leased the land to plaintiff for a time certain or "until the grain is secured for the rents." Plaintiff agreed to pay T. $800, to buy seed, etc., also to apply $300 on a debt of T. to plaintiff. T. agreed to cultivate the land, sow, harvest, and thresh the grain, and deliver two-thirds to plaintiff. The court instructed the jury that this was a sale to plaintiff, valid between the parties, but whether made with fraudulent purpose was left to the jury to say. *Held*, that the instruction was not prejudicial to defendant even if inaccurate, as the question of fraud was left to the jury.—McDonald v. Peacock, (Minn.) 370.

When title passes.

2. Plaintiff sold all the lumber at his mill except some culls. The vendees confirmed their purchase by letter, and gave plaintiff the right to sell to his local trade, and instructed him to work some of the lumber before shipping. In their letter they disclaimed "all liability in connection with the stock until it has been loaded on the cars, and consigned to them." All risk from fire was assumed by plaintiff until he obtained evidence from the railroad company that he had consigned the lumber to vendees. *Held*, that the sale was executory merely, and the title to the lumber still remained in the plaintiff.—Thomas v. Tolford, (Wis.) 298.

Delivery.

3. Where a contract for the sale of a stock in a store is not of the whole quantity contained therein, but specifies that the vendor excepts and reserves from the stock whatever the same may inventory over and above the sum of $4,500, which excess the vendor is to take from the stock, and payment is to be made in land and money as soon as the inventory is completed,—the delivery of the goods, and payment in the mode specified in the contract, to be simultaneous.—and the result of the inventory showed an excess in value over the $4,500, *held*, that there could be no delivery so as to pass the title until such vendor had taken out the goods excepted and reserved in excess of $4,500.—Pierson v. Spaulding, (Mich.) 699.

4. Where, under an arrangement that the store should be kept open for trade while the inventory was being made, and in contemplation that a sale would be consummated in accordance with the written agreement, the vendee made purchases, and assisted in selling goods from the stock, and did other acts in expectation that the purchase would be completed as provided for in the contract, and no actual delivery or acceptance was alleged by plaintiff to have occurred until a certain day, *held*, that testimony as to what the vendee said and did prior to that day, and while the inventory was being made, was not admissible for the purpose of showing delivery and acceptance of the goods upon the ninth.—Id.

5. An acknowledgment of the receipt of goods, by one of two joint makers of a contract for the goods, is not binding upon the other, who is the only party defendant to an action for the value of the goods, and though indorsed upon the contract for the goods is not admissible in such action.—Wing v. Evans, (Iowa,) 495.

6. How. St. Mich, §§ 6190, 6198, provide that every sale of goods, in the possession of the vendor, unless accompanied by immediate delivery, followed by actual and continued change of possession, shall be conclusive evidence of fraud as against creditors, unless it shall be made to appear that the sale was made in good faith, without fraudulent intent. In an action of replevin wherein plaintiff claimed title under a bill of sale of property in the hands of a warehouseman, against the attaching creditors of the vendor, who claimed the instrument to be a mortgage, an instruction that if the bill of sale was made in good faith, and without fraudulent intent, plaintiff may recover, and that, even though the bill of sale be a mortgage, the property being in the hands of a warehouseman, it is not necessary to file the bill of sale in the clerk's office, is erroneous, in the absence of notice to the warehouseman of the change of ownership.—Buhl Iron-Works v. Teuton, (Mich.) 804.

Title of seller.

7. The evidence tended to prove that the plaintiff purchased an interest in certain property, being in possession as agent, and continued in possession until a subsequent date, when he purchased the remaining interest. *Held*, that the declarations of the vendor as to his interest in and ownership of said property, made after the first purchase, but before the last, were admissible in evidence for the purpose of impeaching plaintiff's title, but those made after the last purchase were inadmissible.—Campbell v. Holland, (Neb.) 871.

Warranty—Evidence.

8. Evidence showing representations as to the character, quality, and value of certain machinery sold on a written contract, and for which a note was given, which representations were made before the contract was executed, is not inadmissible as varying the terms of a written contract, because it does not shows a parol warranty of articles sold on written contract. Such representations are admissible to show fraudulent inducement to the purchase.—Dowagaic Manuf'g Co. v. Gibson, (Iowa,) 603.

Rescission.

9. If a merchant buys goods, intending never to pay for them, and intending to avoid payment by mortgaging them to another creditor, the fraud thus perpetrated will have the same effect in law as if he had made false and fraudulent representations as to his financial standing at the time of the purchase.—Ross v Miner, (Mich.) 60.

10. Defendant firm purchased goods from plaintiff, in D., where it had opened a store. Before going to D., defendant had been in business in C., and contracted debts that were unpaid. After the purchase from plaintiff, it mortgaged them to N. for a debt contracted in C., and, subsequently, assigned for the benefit of creditors. Plaintiff replevied the goods on the ground of fraud, alleging that opening the store in D. was only a scheme on defendant's part to obtain goods to liquidate the claim of N. *Held*, that it was proper to show how many goods defendant purchased on credit, from whom it bought them, if the persons with whom it dealt had any knowledge of N.'s claim, what assets it had when it came to D., what money it put into the business afterwards, what goods it sold and what it did with the proceeds of such sales, and what its assets were when it failed, as tending to prove or to rebut the claim that the business in D. was a fraudulent scheme.—Id.

11. In an action by a vendor to replevy goods sold on credit, on the ground that defendant had fraudulently purchased them in order to mortgage them to a prior creditor, and had subsequently made an assignment for the benefit of his creditors, the agent of plaintiff, who sold the goods to defendant, testified that when he spoke to defendant in regard to a mortgage existing at the time of the sale, defendant falsely represented that such mortgage had been discharged, and that there was no other indebtedness against them. *Held*, that it was error to refuse to submit the question of fraud to the jury.—Id.

Actions for price.

12. A contract of sale of all the logs at D. bearing a designated mark, the vendee to pay a specified sum per 1,000 feet "for 278,840 feet, more or less, scaled in the boom of M. & R. at P.," construed as providing that the quantity of the logs, supposed to be about 278,840 feet, should be determined by the scaling of the same at P, and that the aggregate price should be determined thereby.—Jesmer v. Rines, (Minn.) 180.

13. In an action by the vendor to recover the price, *held* that, in the absence of any averment or proof of a scaling of the logs at P., or that the contract had been changed, or that the provisions for such scaling had been dispensed with in any manner, the plaintiff could not recover.—Id.

—— Evidence.

14. In an action for the purchase price of a harvester, the sole issue being whether defendant had given the machine a fair trial, a witness called as an expert for plaintiff was asked to state "how other machines made by plaintiff [in the same year] like the machine sold [defendant] worked,—whether good or bad." *Held*, that the ques-

tion was properly excluded, as introducing a new issue not presented by the pleadings.—D. M. Osborn & Co. v. Simmerson, (Iowa,) 615.

15. The witness was also asked to state "whether or not the machine sold to defendant, the one you examined at his place, could have been made to do good work." *Held*, that the question was properly excluded, as not being confined to what the defendant contracted for.—Id.

Waiver of fraud.

16. Where it was claimed that a defendant had waived any question of fraud in a certain sale by giving a note for the articles purchased, after he had knowledge of the alleged fraud, *held* that, as there was some evidence, though slight, that defendant, at the time of giving the note, reserved his right to damages for the fraud, the court properly refused to direct a verdict for plaintiff on the ground of the waiver.—Dowagaic Manuf'g Co. v. Gibson, (Iowa,) 603.

Conditional sale—Validity.

17. A contract for the sale of personal property by the terms of which the title is to remain in the vendor until the purchase price is paid, is not valid except between the parties thereto, and those having notice thereof, unless the contract shall be in writing, subscribed by the parties, and filed in the office of the clerk of the town, city, or village where the vendee resides, as provided in Rev. St. Wis. § 2317.—Rawson Manuf'g Co. v. Richards, (Wis.) 40.

—— Rights of creditors.

18. A contract for the sale of harvesting machines, by which the title was to remain in the vendor until the machines were paid for, was not filed as required by Rev. St. Wis. § 2317, until after an attachment had been levied by the sheriff. *Held* that, as to the attaching creditors, the ownership of the machines must, in the absence of actual notice of the terms of the contract, be presumed to have been in the vendee.—Id.

19. Plaintiffs claimed title to certain attached property under a written contract of sale, by the terms of which the property was to remain in them until paid for. The proof showed that the contract was not filed as required by the statute, and the court submitted to the jury the question whether at the time of levying the attachment the defendant, a sheriff, had notice of such contract. *Held*, not error.—Thomas v. Richards, (Wis.) 42.

20. Notice of such conditional sale, if the contract is not filed as required by law, to be effectual as against an attaching creditor, must be brought home to the creditor, and not merely to the sheriff who makes the levy.—Id.

21. The court instructed the jury that to charge the sheriff with notice, they must find that he knew, either that the machines had been shipped under the contract and not paid for, or that he had reasonable cause so to believe. The only notice disclosed by the evidence was, in effect, that in executing the attachment a copy of the contract was found. *Held*, that such discovery at such a time is not such notice as would defeat the attachment, and the error, if any, in the instruction, was immaterial.—Id.

SCHOOLS AND SCHOOL-DISTRICTS.

Exemption from taxation, see *Taxation*, 2.

Formation of districts.

1. The proceedings of a board of school inspectors in detaching lands from two separate districts, and attaching them to another district, are valid where the board votes separately upon the question of detaching the territory of each district, and where those present have ample opportunity of being heard on each proposition, even though the lands are detached at the same meeting and under the same notice.—Doxey v. Township Board of School Inspectors, (Mich.) 170.

2. How. St. Mich. §§ 5033, 5041, provide that the township board of school inspectors may regulate the boundaries of school districts as circumstances require, and that the inspectors in their discretion may detach property from one district and attach it to another, but that no district shall be divided into two or more districts without the consent of the resident tax-payers of said district, and no two or more districts be consolidated without the consent of a majority of the resident tax-payers of each district. *Held*, that under these provisions a writ of *certiorari* would not lie to review the action of a board of inspectors in detaching property from one district and adding it to another, where it did not appear that the board undertook to divide or consolidate the districts, unless such action would practically destroy a district; and the fact that by this action the board was enabled subsequently to evade the statute forbidding consolidation is immaterial.—Id.

SEDUCTION.

Evidence.

1. The previous chaste character of the prosecutrix is presumed, and the state is not required to prove it.—State v. McClintic, (Iowa,) 696.

2. Defendant introduced evidence tending to show that he was not at the place

where it was claimed the seduction occurred on the twenty-seventh of January, the time fixed by the prosecutrix. In rebuttal, the state proved by K. that the prosecutrix was at her house the latter part of January; that defendant was there. Witness saw him, talked to him, and that he visited with the prosecutrix at that time. *Held* proper evidence in rebuttal, and it was therefore not necessary that the name of the witness be written on the back of the indictment.—Id.

3. Where there was no evidence that defendant used any seductive arts, or that the seduction was accomplished under a promise of marriage, *held*, that proof that the parties kept company together, and acted as lovers, was sufficient corroborating evidence tending to connect defendant with the crime.—Id.

4. Upon a trial for seduction, the evidence of the prosecuting witness was corroborated as to the visits to her by defendant, and that at such times he was alone with her until a late hour of the night. A witness testified that he had a conversation with defendant, in which he stated that he had "fixed the girl up," as the report was, that he would not marry her, and was going away. *Held*, that the jury had a right to infer that the conversation with this witness referred to the prosecutrix, and the evidence was sufficient to warrant the verdict of guilty.—Id.

5. It is sufficient if the jury find that the crime was committed about or near the time named in the indictment, and fixed by the prosecutrix.—Id.

SET-OFF AND COUNTER-CLAIM.

Pleading—Estoppel.

1. In an action against partners for services rendered, plaintiff alleged a contract for a certain amount per month and board. Defendants denied the contract, and one of them, alleging that the plaintiff boarded with him, set-up a counter-claim therefor. *Held* that, having denied the contract set up in the petition, the defendant could not claim that the counter-claim arose out of the transaction, as alleged in plaintiff's petition.—Jenkins v. Barrows, (Iowa,) 510.

Evidence—Burden of proof.

2. Defendant being sued on a note alleged payment and counter-claim. *Held*, that the burden of proof was on him to show all the facts necessary to determine the amount due on the counter-claim, and a judgment for a greater amount than his proof shows must be reversed.—Callender v. Drabelle, (Iowa,) 240.

SHERIFFS AND CONSTABLES.

Fees.

1. How. St. Mich. § 9055, giving to the sheriff for services not otherwise provided for such sums as the board of supervisors may allow, does not apply to services performed by the sheriff, but not in the capacity of sheriff.—Follansbee v. County of St. Clair, (Mich.) 257.

2. A sheriff or constable is entitled to mileage for traveling to serve a criminal warrant, although if, by no fault of his, he fails to serve it.—Davis v. County of Le Sueur, (Minn.) 364.

Liability—Wrongful arrest.

3. Code Iowa, § 674, provides that a constable shall give a bond to faithfully perform the duties of his office. The petitioner in a suit against a constable and his sureties alleged the arrest without a warrant or probable cause, beating, and malicious prosecution of plaintiff by the constable, under cover and by virtue of his office. *Held*, that the allegations were sufficient to sustain an action on the bond for his damages.—Clancy v. Kenworthy, (Iowa,) 427.

SPECIFIC PERFORMANCE.

Sufficiency of contract.

1. A contract to convey a homestead, entered into by a wife in her own name, will not be specifically enforced, as the Nebraska statute requires the instrument of conveyance to be signed and acknowledged by both husband and wife.—Larson v. Butts, (Neb.) 190.*

2. The fact that the husband and wife are not living together at the time the contract was made, will not render her contract for the conveyance of the homestead valid.—Id.

Decree.

3. A decree for specific performance of a contract to sell property made the purchase money a lien on the land in favor of defendant, and complainant was ordered to assume certain unascertained debts owed jointly by herself and defendant. *Held*, that such debts should be ascertained and included in the amount due defendant as purchase money.—Johnson v. Fowler, (Mich.) 764.

States and State Officers.

Attorney general, see *Attorney General.*
Powers of commissioners of pharmacy, see *Druggists.*

STATUTES.

Interpretation.

1. The legislature having borrowed from another state and adopted a statute which had been judicially construed in such state, a presumption arises that the legislature intended to adopt the statute with that settled construction.—Nicollet Nat. Bank v. City Bank, (Minn.) 577.

2. Acts 18th Gen. Assem. Iowa, c. 211, entitled "An act relating to insurance and fire insurance companies," published by the secretary of state, in the usual way, first giving the number of the chapter, but followed by a heading in these words, "Relating to Fire Insurance," and as arranged in the Annotated Code, and provided with marginal notes, does apply to "all insurance companies," as provided in section 2 of this act.— Cook v. Federal Life Ass'n, (Iowa,) 500.

Street.

See *Highways; Municipal Corporations*, 9–21.

Subrogation.

See *Mortgages*, 1, 20.

SUBSCRIPTION.

On condition.

Defendant made a note payable to plaintiff 10 days after its cars should run to a stated place, if that should be in 18 months, otherwise to be null and void. The track was laid from one terminus to the point within the time, and daily construction trains ran; but it was not open to freight or passengers for some months after the time. *Held*, that the condition had been performed, and plaintiffs could recover on the note. — Pontiac, O. & P. A. R. Co. v. King, (Mich.) 705.

SUNDAY.

Traveling on Sunday, see *Highways*, 8.

Payment on.

Under Rev. St. Wis. § 4595, imposing a fine for doing any business on Sunday, except works of necessity or charity, payment of a debt on Sunday discharges it, if the creditor retains the money. — Shields v. Klopf, (Wis.) 284.

TAXATION.

For private purposes, see *Constitutional Law*, 7.

Municipal taxes, see *Municipal Corporations*, 23, 24.

Road taxes, see *Highways*, 6.

Railroad property, see *Railroad Companies*, 11

Tax-titles, see *Mortgages*, 11, 12.

Taxable property.

1. Sess. Laws Mich. 1885, No. 153, § 3, provides that "all shares in foreign corporations (except national banks) owned by inhabitants of this state" shall be taxed. "Shares in corporations, the property of which is taxable to itself, shall not be assessed to the shareholders." Section 4 provides all corporate property, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, where its principal office in this state is. By subdivision 2 of section 18, each person is required to set forth, as property liable to taxation, "all shares in foreign corporations, (except national banks,) and their value." And by section 2 it is provided that, for the purpose of taxation, personal property "shall include all goods and chattels within the state; all ships, boats, and vessels belonging to inhabitants of this state;" and that the personal property of a non-resident cannot be taxed unless it has an actual *situs* in the state. Plaintiff, a resident of defendant township, was taxed on stock in a foreign corporation, whose boats lying at Benton in the state were taxed there. *Held* that, as the boats were improperly taxed, the stock was liable to be taxed by defendant.—Graham v. Township of St. Joseph, (Mich.) 808.

2. Comp. St. Neb. c. 77, art. 1, § 2, exempting school property from taxation, includes property of any institution of learning. — Omaha Medical College v. Rush, (Neb.) 222.

Assessment.

3. The Michigan statutes relating to taxation require that the taxes shall be entered and extended upon the original assessment rolls in the hands of the supervisors, and that the assessment rolls and tax-lists sent to the treasurer shall be copies of the original rolls; and a failure to observe these requirements is fatal, and invalidates the tax deeds founded upon the taxes extended upon the collection rolls.—Seymour v. Peters, (Mich.) 62.

4. The provisions of the statutes requiring that all lands unoccupied and not claimed to be owned by any resident of the township where they are situated, and not exempt from taxation, shall be entered on a part of the roll separate from that on which estates of residents are entered, are mandatory, and tax titles based on assessments made in disregard of them are invalid.—Id.

Collection.

5. Act Mich. 1885, No. 8, extending the time for collection of taxes, did not revive a warrant already expired. — Phillips v Township of New Buffalo, (Mich.) 918.

Sale for non-payment.

6. The same strictness as to definiteness and certainty is not required in the statement of the amount of tax against a tract of land in the published list (which is merely notice to the land-owner) as is required in the judgment, which is the final determination of the law as to the amount to be enforced against the land.—Collins v. Welch, (Minn.) 566.

7. In the published list at the head of the column denoting the amounts of taxes due there was a dollar-mark, and throughout this and each succeeding column denoting the amounts of such taxes the two last figures of each item or amount were separated from the others by a broad space, but there was no decimal-mark or perpendicular line between them and those which preceded. *Held* as sufficiently indicating that the last two figures in each item meant cents, and those preceding them dollars.—Id.

8. When any part of a tax levy does not appear by the record to have been duly authorized, a sale of land for its proportionate share of such levy is invalid. — Rogers v. White, (Mich.) 799.

9. Where the return of delinquent taxes is not subscribed nor sworn to by the township treasurer, a tax title for such taxes is void.—Seymour v. Peters, (Mich.) 62.

10. A tax certificate, issued under the same statute, which purports to have been made in pursuance of "a real estate tax judgment entered August 15, 1881," on "the thirty-first day of December," (year not stated,) was dated December 31, 1881. It will be presumed that the sale was made December 31, 1881, and, in the absence of any evidence or finding on the subject, it will not be held, as matter of law, that the special sale under that statute must necessarily have been completed prior to the date mentioned. — Sanborn v. Mueller, (Minn.) 666.

11. A tax certificate issued under the sale made in pursuance of chapter 135, Laws Minn. 1881, which shows on its face that several separate and distinct lots are sold together in gross for one price, is void; but where several village lots are contiguous, so that they may be used and assessed together as one tract, it will not be presumed from the certificate that such sale thereof was irregularly made in violation of the statute.—Id.

12. In an action to cancel certain tax deeds, several witnesses testified that W. bid off the land for A., one of his co-defendants, under an agreement between them to take turns in bidding; W., though testifying at the trial, failed to controvert this evidence. *Held*, that there was a fair preponderance of evidence to establish an unlawful combination between W. and A. to keep down competition at the sale, and the tax deed should be set aside.—Frank v. Arnold, (Iowa,) 453.

13. Parol evidence is admissible to prove the actual date when certificates of the assignment of the rights of the state in land bid in for it at tax sale were in fact delivered to the purchaser, and the date when he paid the purchase price into the county treasury.—Pigott v. O'Halloran, (Minn.) 4.

—— Assignment of certificate.

14. Code Iowa, § 888, provides that a certificate of purchase at tax sale shall be assignable by indorsement, and shall vest the title of the purchaser in the assignee, and that the assignment shall be recorded with the county treasurer. The purchaser of real estate at tax sale placed his name on the back of the certificate, and delivered it to another, who, by a full assignment, transferred it to defendant. The assignment was not placed on record. *Held*, that recording the assignment was not essential to the sale, but was for the purpose of affording evidence to the treasurer of who was entitled to the deed when the right to it accrued.—Swan v. Whaley, (Iowa.) 440.

15. Defendant purchased a certificate of tax sale, which was assigned to him, but the assignment was not recorded. Plaintiff, being the owner of the real estate sold, contracted for the purchase of the certificate with the original holder, who had forgotten that he had sold it. Plaintiff left by agreement the money to pay for the certifi- with the county auditor, to be paid to the purchaser when he could find the certificate. After the time of redemption expired, the assignee procured a deed. *Held*, that the statute does not make the record of the assignment constructive notice of the rights of the assignee, and the owner, if he does not redeem in accordance with the statute, must know at his peril that he is dealing with the owner of the certificate. —Id.

Notice of expiration.

16. Title will not be presumed to have been acquired under a tax certificate, issued upon the tax judgment and sale, until notice of the expiration of the time of redemption has been served.—Sanborn v. Mueller, (Minn.) 666.

17. Where the notice of expiration of redemption is addressed to a third person, and is not served on the owner, the statute of limitations never begins to run, and is not a defense by the owner to quiet his title

against the purchaser at the tax sale.—Wilson v. Russell, (Iowa.) 492.

18. Code Iowa, § 894, requiring the service of notice of the expiration of the time for redemption of land sold for taxes, provides that the holder of the certificate of purchase may cause such notice, signed by him, his agent or attorney, to be served upon the person in possession of such land, and also upon the person in whose name the same is taxed, in the manner provided for the service of original notices. Service on non-residents may be made by publication in a newspaper, and shall be deemed completed when an affidavit of the service shall have been filed with the treasurer authorized to execute the tax deed Such affidavit shall be filed by said treasurer and entered upon the records of his office, and said record or affidavit shall be presumptive evidence of the completed service of notice. *Held*, that the presumption of proper notice, arising from the possession of a treasurer's deed, supplemented by positive testimony showing that an affidavit making due proof of service by publication on a non-resident owner was properly filed, cannot be overthrown by the mere fact that the affidavit cannot be found in the proper custody, and that no record thereof was made by the treasurer.—Baker v. Crabb, (Iowa.) 484.

19. Code Iowa, § 894, which provides that service of notice of expiration of redemption may be made on non-residents by publication, does not restrict the service to publication only, and a personal service on a non-resident while in the county is sufficient.—Id.

20. The affidavit of service of notice upon the person in possession recited that the owners of the tax certificate "appointed me their agent to serve the within notice on W., [the person in possession;] that * * * I served it on him by reading it to him, and asking him to accept service, which he did by signing the acceptance on the back of this notice." The acceptance was as follows: "I hereby accept due, legal, timely, and sufficient service of the within notice on me, and waive copy." *Held*, that it was sufficiently shown that the person serving the notice was the agent of the holder of the certificate.—Id.

21. When the statute directs that the affidavit of notice shall be entered upon the record, the failure of the proper officer to do so will not be allowed to defeat the right of the parties, and the original affidavit is admissible in evidence, or, if lost, may be shown by copy duly proved.—Id.

22. On the fifteenth day of February, 1877, L. went to the county auditor's office, and selected a number of tracts which had been bid in for the state at tax sale, and requested the auditor to make out assignment certificates therefor, and, as an evidence of his good faith in the matter, deposited with the county treasurer a check for a part of the amount necessary to be paid for these certificates. The county treasurer did not at that time turn this into the county treasury, but held it until the transaction should be closed. In March, and *subsequent to the sixth, the date when Laws 1877, c. 6, went into effect*, L. paid to the county treasurer the balance of the purchase price, and thereupon the certifi cates were then delivered to him by the county auditor. *Held*, that L.'s rights as purchaser from the state vested only from the date at which the certificates were delivered to him, and consequently that he purchased subject to the provision of section 87 of the act cited, and his rights under the certificates would not ripen into title until after notice of the time of the expiration of the right of redemption had been given, as required by the section referred to.—Pigott v. O'Halloran, (Minn.) 4.

23. Code Iowa, § 894, provides that notice to redeem from tax sales shall be given by "the lawful holder of the certificate." A person purchased real estate at a tax sale, in partnership with another, and took the certificates in his own name. In dividing the certificates with his partner, he wrote his name on one, and delivered it to his partner, with the object of transferring it. *Held*, that such partner was the "lawful holder," and the proper person to give the notice, notwithstanding the informality of the assignment.—Swan v. Whaley, (Iowa,) 440.

Proceedings to refund.

24. The proceeding under Gen. St. Minn. 1878, c. 11, § 148, amended by Laws 1881, c. 10, upon the application of a holder of a tax-sale certificate to have the amount paid by him for the certificate and subsequent taxes refunded out of the county treasury, is not judicial in its nature, and the duties thereby imposed may be performed by other than judicial officers.—State v. Dressel, (Minn.) 580.

25. After the time to redeem from a tax judgment sale has expired, the former owner cannot be heard to question the regularity of the proceedings, under section 148, to refund, upon an application made on the ground that the tax judgment and sale were void for want of jurisdiction in the court, nor to object to proceedings to enforce the taxes if they were properly levied; for if the sale was void, the taxes were not satisfied by it; if it was valid, the former owner has ceased to have any interest in the land.—Id.

Tax titles—Actions to test.

26. An action brought under chapter 127, Laws Minn. 1887, to test the validity of an

adverse claim under a tax deed or certificate, may be maintained by the land-owner, without alleging or proving, either that the land is vacant or in the possession of himself or another. — Sanborn v. Mueller, (Minn.) 666.

27. The plaintiffs do not seek to recover possession, but to have the validity of the tax titles under which defendants claim determined. *Held*, that it was not error for the court to refuse to assess or allow in this action the value of defendants' improvement upon the land in question.—Id.

28. Code Iowa, § 897, subsec. 3, provides that no one shall be permitted to question the title acquired by a treasurer's deed, without showing "that all taxes due upon the property have been paid by such person, or the person under whom he claims title." Plaintiff's land had been sold for the taxes of 1876 and 1877, and tax deeds given in 1881. The taxes of 1883 were yet unpaid. In an action to set aside the tax deeds, and to enforce the right to redeem, *held*, that plaintiff's offer in his petition to pay the taxes, if it should be determined that he was entitled to redeem, was not such a compliance with the provisions of the statute as enabled him to maintain his action. *Held, also*, that the objection that the taxes had not been paid could be taken advantage of by the holder of the tax title, notwithstanding he had not been prejudiced by plaintiff's failure to pay the tax. —Maxwell v. Palmer, (Iowa,) 659.

29. Under this provision of the Code, a plaintiff is not entitled to maintain an action to set aside tax deeds unless he has paid all the taxes due on the property, even though he claims that the tax deeds are void as having been unlawfully issued without proper notice of expiration of the time for redemption—Id.

30. Plaintiffs, in an action to set aside four tax deeds, claimed title to the premises under a quitclaim deed, executed to one of their number in trust for them, and under a sheriff's deed in foreclosure proceedings against their grantor. *Held*, that plaintiffs had shown such title in themselves and their grantor as entitled them to maintain the action, and that the word "owner," in an agreed statement of facts, used with reference to the property, implies "title." —Frank v. Arnold, (Iowa,) 453.

31. The right to contest the validity of tax deeds prior to 1869 is not abridged by How. St. Mich. § 1166, providing that no one shall question a title acquired by the auditor general's deed, without proving that he, or the person through whom he claims, had the title to the land at the time of the sale thereof for non-payment of taxes; for the statute was not passed till 1869, and the act was prospective. Clark v. Hall, 19 Mich. 378, followed.—Seymour v. Peters, (Mich.) 62.

32. S., a junior mortgagee, foreclosed his mortgage, purchased at the sale, and took possession. While in possession, the premises were sold for taxes, and deeds executed to A. In an action by plaintiffs, claiming under the senior mortgage and a conveyance from the mortgagor, to set aside such tax deeds, the evidence showed that S. was the owner of a bank, and A. his cashier. The bank loaned money on mortgage security, to protect which S., at delinquent tax sales, purchased the certificates in A.'s name, under an agreement with the latter that S. would furnish the money and have authority to sign A.'s name, A. to share in the profits and pay interest on the sums invested. A. never paid any interest, nor was there ever any accounting between the parties. While S. was in possession of the tracts in controversy, he accepted service of notice of expiration of redemption from the tax sale as "the person in possession, and also as the person in whose possession the above land is taxed." *Held*, that the tax deeds were void as against plaintiffs, the evidence showing that S. was the principal in the transaction, A.'s name being used only for convenience.—Frank v. Arnold, (Iowa,) 453.

TENANCY IN COMMON AND JOINT TENANCY.

Rights and remedies inter se.

1. In an action to recover possession of real estate upon which there was situate an hotel, the evidence was that the premises were sold by contract to P. who transferred his interest to C. and W. as tenants in common; that W. transferred his interest in the property and a half interest in the hotel furniture to defendant, who agreed to keep up the payments on the original contract; that W. assigned to C. his interest in his assignment to defendant and in the original contract, who assigned to plaintiff; that defendant was not in default upon the original contract, but that he had failed to pay for the furniture as he had agreed in the assignment from W. to him. *Held*, that defendant was rightfully in possession under the original contract by virtue of W.'s assignment, and that he had never forfeited his right.—Woods. v. Burke, (Mich.) 798.

2. A tenant in common may maintain an action of trespass against a co-tenant where there has been a wrongful conversion of property. — McClure v. Thorpe, (Mich.) 829.*

TENDER.

Of amount paid, on impeaching settlement, see *Accord and Satisfaction*, 3.

Sufficiency.

1. Plaintiff had a colt killed and a mare injured by collision with a train of cars on defendant's railroad. The agent of the railroad company tendered plaintiff $175 for the damage to both animals, but did not specify the amount tendered as payment for each, which tender was refused. The jury found that the colt was worth $125, and that the damage to the mare was $70. *Held*, that the tender was not good as to either animal.—Shuck v. Chicago, R. I. & P. R. Co., (Iowa,) 429.

2. When the mortgagees of certain chattels were about to seize the property under their mortgages, the agent of the mortgagor exhibited and offered the money due on both mortgages to one of the mortgagees, and to their agent in making the seizure, stating the amount and purpose of the tender. He kept the money, subject to their order, until the trial, when he paid it into court. *Held*, that the tender was kept good.—Rice v. Kahn, (Wis.) 465

Territories.

Formation of counties on Indian reservations, see *Public Lands*, 8.

TOWNS.

See, also, *Bridges; Highways; Municipal Corporations; Schools and School-Districts.*

Actions, bond on appeal, see *Appeal*, 10.

Liabilities—School orders.

Under Rev. St. Wis. § 519, providing that a town board of school directors is a body corporate, and shall possess the usual powers of a corporation for public purposes; that it may sue and be sued, and be capable of contracting and being contracted with,—a suit cannot be maintained against a town for non-payment of a school order given for teaching, signed by the proper officers of the district, and drawn on the town treasurer, specifying that the amount is to be paid out of the school fund.—Miller v. Town of Jacobs, (Wis.) 324.

Transitory Actions.

See *Venue in Civil Case*, 1.

TRESPASS.

By servant, see *Master and Servant*, 1, 2. Who may maintain, see *Tenancy in Common and Joint Tenancy*, 2.

Who may maintain.

1. Plaintiff was in possession of land under a contract, and was entitled to a deed. *Held*, that he had sufficient title to enable him to recover for loss of hay and pasturage caused by booming operations.—Witheral v. Muskegon Booming Co., (Mich.) 758.

2. Plaintiff took possession of land under a contract containing the following clause: "The said parties of the first part (vendors) are to have one-half of the proceeds of the hay raised on said premises, until the whole amount is paid." *Held*, that the property in all the hay was in plaintiff, who could recover for its being swept away by floods caused by booming operations.—Id.

Pleading.

3. In an action for trespass to real property, a denial of plaintiff's title to the property in question, "upon information and belief," puts the title in issue.—Maxim v. Wedge, (Wis.) 11.

Evidence.

4. Actual possession is sufficient evidence of title to enable the party in possession of land to maintain trespass against a stranger.—Witt v. St. Paul & N. P. Ry. Co., (Minn.) 862.

Judgment.

5. Rev. St. Wis. §§ 2918, 2920, provide that in actions for tort the plaintiff shall be allowed full costs when his judgment is $50 or more, and if the plaintiff's judgment is less than $50, the defendant shall have full costs. *Held* that, in an action for trespass to land, where the title is in issue, the plaintiff is entitled to full costs upon a judgment of less than $50.—Maxim v. Wedge, (Wis.) 11.

Damages.

6. In an action for the value of timber cut and carried away, if defendant was an unintentional or mistaken trespasser, or honestly and reasonably believed that his conduct was rightful, the measure of damages is the value of the timber at the time of taking; that is, standing on the ground.—King v. Merriman, (Minn.) 570.

7. Actual notice of the adverse claim of the rightful owner is not necessarily inconsistent with such honesty or intention; following Whitney v. Huntington, 33 N. W. Rep. 561.—Id.

8. In an action of trespass, brought by a tenant against his landlord, for the wrongful conversion of the crops raised on the leased premises, the measure of damages is the value of the crop, less the proportionate share to which the landlord is entitled by the terms of the lease, after deducting the value of the defendant's labor, after the conversion, in bringing the crops to maturity, and for harvesting and gathering them; and, if they have been negligently cared for, plaintiff would be entitled to re-

cover for the amount of the depreciation.—McClure v. Thorpe, (Mich.) 829.

TRIAL.

See, also, *Criminal Law*, 6-10; *Exceptions, Bill of; Jury; New Trial; Witness.*

Verdict, inconsistent findings, see *Waters and Water-Courses*, 8.

Conduct of trial.

1. Counsel for plaintiff asked defendant if he had ever been on the witness stand before, and, the question being overruled, offered to show that defendant had been a witness about a hundred times; the court refused to tell the jury that the statement was irregular; he then asked him if he had had about 10 cases in the supreme court of the state; this question was also overruled. *Held*, that the questions and offer to prove were improper, but that they did not so prejudice the rights of defendant as to warrant a reversal of the judgment.—Brennan v. Busch, (Mich.) 795.

2. Where the witnesses' estimates of damages are very conflicting, the court's action in allowing plaintiff's counsel to hand the jury as they were retiring a memorandum of the highest estimates of plaintiff's witnesses, telling defendant's counsel that he might do the like, was harmless error; overruling Millar v. Cuddy, 5 N. W. Rep. 316.—Harroun v. Chicago & W. M. Ry. Co., (Mich.) 914.

Reception of evidence.

3. The court may, in its discretion, control the order of proof.—McDonald v. Peacock, (Minn.) 870.

4. After the evidence was closed, plaintiff asked to recall a witness to prove an important fact material to the issue. *Held* that, the only objection to the question being that the case was closed, and good reason being given for the prior omission, the request should have been granted.—Cowan v. Musgrave, (Iowa,) 496.

5. When a question does not indicate its purpose, and no declaration of what is expected to be proved by the answer is made, its rejection is not error.—Kuhn v. Gustafson, (Iowa,) 660.

Objections to evidence.

6. An objection that a written instrument offered in evidence is incompetent, irrelevant, and immaterial, does not involve the point that preliminary proof of its execution had not been made.—McDonald v. Peacock, (Minn.) 870.

Argument of counsel.

7. In proceedings to ascertain the damages to premises by reason of the condemnation of a portion thereof for railroad purposes, plaintiff offered evidence of the cost of the buildings, which was excluded. His counsel, in arguing the case to the jury, referred to the description of the buildings, and said: "I ask you to say whether they could be put there for $7,000." *Held*, that such reference to matter as to which evidence had been excluded did not prejudice defendant in view of the emphatic charge of the court to the jury that the cost of the buildings was not in issue, and that they were to disregard any statement made in regard to it, except as the cost was involved in the market value.—Johnson v. Chicago, B. & N. R. Co., (Minn.) 438.

Instructions.

8. The instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient—Campbell v. Holland, (Neb.) 871.

9. When the law applicable to the pleadings and evidence in a case has already been fully given by instructions to a jury by the court, on its own motion, it is not error to refuse further instructions.—Id.

10. An instruction, though abstractly sound, but not applicable to the facts in the case, should be refused.—Plummer v. Johnson, (Wis.) 834.

11. When instructions refused by the court would in fact have prejudiced the case of the party proposing them, the refusal is not a ground of complaint, even though they contain correct propositions of law.—Stennett v. Bradley, (Wis.) 467.

12. Where the testimony upon a question in issue is conflicting, an instruction of the court directing the verdict upon that question would be error.—Buhl v. Iron-Works, v. Teuton, (Mich.) 804.

13. If a court instructs a jury to take into consideration *all* of the facts brought out in the evidence, it is not error for it to refuse to indicate particular points in the evidence, suggested by defendant's requests for instructions.—State v. Laughlin, (Iowa,) 448.

14. Where the evidence was conflicting as to whether plaintiff was the sole owner of property burned, the refusal of an instruction that the jury could not find for plaintiff because the evidence did not show definitely that he was the sole owner, was not erroneous, as the ownership was a question to be determined by the jury.—West v Chicago & N. W. Ry. Co., (Iowa,) 479.

Objections and exceptions.

15. Where parties have made up the issues in a case without objection to the particular form of the action, they will be held to have waived any errors in that regard.—Downie v. Ladd, (Neb.) 888.

16. Where evidence showing that the injury resulted from a cause different from

that alleged in the complaint, is introduced, not only without objection, but by the defendant, from the minutes of the testimony given upon a former trial, an objection thereto, made after judgment, on the grounds of variance, will not be regarded by the court.—Merkle v. Township of Bennington, (Mich.) 846.

17. In an action for assault and battery, after all the evidence had been introduced, plaintiff asked leave to file an amendment to his petition to conform the allegations to the proof. It did not appear that the amendment was actually filed, but it was in the hands of the court, and the court gave instructions in conformity thereto. Defendant knew the purport of the amendment, but made no objection to it until after the verdict. *Held*, that it was then too late to object to the amendment.—Brantz v. Marcus, (Iowa,) 115.

Verdict.

18. Under Civil Code Neb. § 429, in an action against two or more defendants upon a joint obligation, the evidence being ample as to one, but insufficient as to the other defendants, the verdict and judgment should be against one, and in favor of the others. In such case where the verdict was against all of the defendants, and those against whom there was but insufficient evidence made no motion for a new trial as to themselves alone, and judgment was rendered against all, it will not be disturbed.—Hoke v. Halverstadt, (Neb.) 204.

19. In an action against a town to recover damages for personal injuries caused by a defect in the highway, the jury found that the town was liable, but assessed nominal damages of $1. The presiding judge refused to receive the verdict, and sent the jury out for further consideration, telling them that if the plaintiff was entitled to recover at all, she was entitled to substantial damages. The jury, upon returning, announced that they had not agreed upon a verdict, and were not likely to agree. They were then discharged, and the clerk, by the direction of the judge, refused to enter up any verdict or judgment in the action. Upon *mandamus* to compel the judge and clerk to enter up the verdict of $1, *held*, that the jury, having silently acquiesced in the request of the court that they should reconsider their verdict, and having afterwards declared that they could not agree upon any verdict, and having been discharged, must be considered to have receded from the verdict as first brought in; and their final action being a disagreement, there was no verdict in the case upon which any judgment could be entered.—State v. Clementson, (Wis.) 56.

20. A verdict in disregard of instructions, whether the latter be right or wrong, must be set aside.—Way v. Chicago, R. I. & P. Ry. Co., (Iowa,) 525.

21. In an action to recover damages for injuries caused by defendant's negligence in suddenly starting a train while plaintiff was on the platform in the act of alighting, the jury, by special verdict, found that plaintiff "could, by the use of ordinary care and a reasonable effort on her part, have turned back or retained her place on the steps with safety to herself;" also that plaintiff "was not guilty of any want of ordinary care in leaving the train which contributed to produce the injury complained of;" also that she was damaged in the sum of $2,000. The court set aside the verdict, on the ground of inconsistency, and ordered a retrial. *Held*, that defendant had no cause to complain. The findings were evidently inconsistent, or, if not so, they clearly acquitted plaintiff of negligence, in which case judgment should have gone for plaintiff. If any case, the findings could not be construed as holding plaintiff guilty of contributory negligence.—Kelly v. Chicago & N. W. Ry. Co., (Wis.) 538.

TROVER AND CONVERSION.

When action lies.

1. A plaintiff in an action for conversion has no ground of complaint because defendant introduces chattel mortgages on the property claimed to have been converted, which show that plaintiff has no interest in the property.—Luce v. Moorhead, (Iowa,) 598.

What constitutes conversion.

2. When the owner of mortgaged chattels, which are about to be taken under the mortgage, tenders amount sufficient to pay the debt, and such tender is kept good until the trial, it divests the title of the mortgagee, as effectually as would a payment of the debt; and the mortgagee, by taking and selling the property, is guilty of conversion, and the owner may maintain trover against him.—Rice v. Kahn, (Wis.) 465.

Evidence.

3. In an action of trover it is competent for defendant to impeach plaintiff's right of action by showing the title to the chattel to be in a third person, a stranger to the action.—Seymour v. Peters, (Mich.) 62.

4. A petition in an action for conversion alleged that plaintiffs were the "absolute and unqualified owners of" certain property; that they acquired such ownership by purchase. Plaintiffs offered in evidence a chattel mortgage to them. *Held* that, under Code Iowa, § 3225, subsec. 3, providing that "the facts constituting the plaintiff's right to the present possession, and the

extent of his interest in the property, whether it be full or qualified ownership," must be set out, this evidence was not admissible to prove plaintiffs' ownership as alleged.—Kern v. Wilson, (Iowa,) 594.

5. It was error, also, to refuse an instruction to the effect that, as the only evidence of plaintiffs' ownership under the petition was the chattel mortgage, plaintiffs had failed to establish their ownership.—Id.

6. In an action for conversion of a bank-check, it appeared that defendant gave plaintiff the check in consideration of a warranty deed of certain land; before plaintiff had the check cashed, and when about to indorse it, defendant snatched it from her, claiming that she had no title to the land, and put the deed in her hands, plaintiff shortly returned it. The evidence was not satisfactory to show that she voluntarily accepted the deed, and rescinded her bargain. *Held*, that plaintiff was entitled to the relief asked.—Krager v. Pierce, (Iowa,) 477.

Verdict and judgment.

7. In an action for conversion of crops and stock, the issue being as to the title, the evidence was not the same as to both. Counsel for both parties stipulated that, if the jury found for plaintiff, they might value the crops as uncut and standing in the field, and the stock as at the time when it was taken. *Held*, that under the stipulation, a charge to the jury that the verdict will either be for the whole amount of the property, or no cause of action, could not be complained of, in the absence of any request for an instruction distinguishing between the two classes of property.—Stennett v. Bradley, (Wis.) 467.

TRUSTS.

Resulting trusts—Agency.

1. If an agent employed to purchase lands for his principal, and with his money, upon the purchase thereof, takes the title thereto in his own name without the knowledge or consent of the latter, he will be adjudged to hold the title as trustee for his principal, and, if sold and transferred by him, the proceeds in his hands will be impressed with a similar trust, and the court will compel him to account therefor.—Kraemer v. Deustermann, (Minn.) 276.*

—— Payment of consideration.

2. Defendant in ejectment claimed that the consideration for plaintiff's purchase was paid by defendant and her husband, and that the conveyance to plaintiff, absolute in form, was in fact made in trust for defendant's husband. *Held* that, as against plaintiff's absolute conveyance, the statute of uses and trusts would not permit such a trust, arising merely from payment of the consideration, to be asserted.—Campbell v. Campbell, (Wis.) 743.

3. A wife furnished one-half of the purchase price of a homestead, by an agreement with her husband that the deed was to be made to her, but at the time the conveyance was made she knew it was made directly to her husband, and raised no objection. *Held*, that in the absence of fraud, under Rev St. Wis. § 2071, abolishing uses and trusts, except as "authorized and modified;" and providing (section 2077) that "when a grant * * * shall be made to one person, and the consideration therefor shall be paid by another, no trust shall result in favor of the person by whom such payment is made, but the title shall vest in the person named as alienee;" and providing (section 2078) that "every such conveyance shall be presumed fraudulent," etc., and "a trust shall result in favor of creditors,"—no trust resulted in favor of the wife, notwithstanding, at the time, she thought her husband took the deed in trust for her.—Skinner v. James, (Wis.) 37.*

Evidence.

4. Defendant, to prove an express written trust in favor of her husband, offered in evidence a power of attorney, in the usual form, from plaintiff to her husband, and in connection therewith a letter from the latter to plaintiff, containing this clause: "The remaining 80 acres *I purchased* of Paul last winter, *deeded to you*. I am doing business in relation to it, and would wish to have a power of attorney for doing so." *Held* insufficient to establish a trust.—Campbell v. Campbell, (Wis.) 743.

USURY.

What constitutes.

H., the payee of an overdue usurious note, pretending to L., the maker, to refuse to renew it, referred him to K., from whom he said he could borrow the money to pay it. L. thereupon applied to K. for the loan, which K. pretended to make to him, taking from him a note running to himself and giving him a check on H.'s bank, which L. indorsed over to H., receiving in exchange therefor merely his old note. In fact the pretended loan by K. was merely colorable, the transaction being a mere device by H. to evade the usury law, K. being his agent, and the new note in fact belonging to H. and being taken in substitution for the first one. *Held*, that L. could recover the value of property taken on a chattel mortgage executed to secure the new note on the ground that it was usurious, although at the time of its execution he was ignorant of the fact, and supposed that it was made

to secure an actual loan made to him by K. —Lukens v. Hazlett, (Minn.) 265.

VENDOR AND VENDEE.

See, also, *Covenants; Deed.*

Bona fide purchaser, see *Lis Pendens; Mortgages*, 9, 10.

Rights and remedies, see *Assumpsit*, 1.

Vendee's right to fixtures, see *Fixtures*, 1.

Contract—Construction.

1. An instrument acknowledging the receipt of a sum of money in part payment of a certain lot described, and signed by defendant, is a receipt only, and not a contract for the sale of land, and hence subject to be explained or supplemented by evidence *aliunde*.—McKinney v. Harvie, (Minn.) 668.

Rights and remedies.

2. The pendency of proceedings (not completed) to condemn real property for public use, is, as between vendor and purchaser, such a defect in the title that the latter, under a contract to convey to him good title, is not obliged to take the title so affected.—Cavenaugh v. McLaughlin, (Minn.) 576.

3. Plaintiff had agreed to purchase, and defendants to convey, land in fee-simple. Defendants could not make out a title, and plaintiff brought action to recover money paid under the contract. *Held*, it was not necessary for plaintiff to have tendered performance to entitle him to recover.—Wright v. Dickinson, (Mich.) 164.

4. A vendee who refuses to fulfill a contract for the purchase of land, which is within the statute of frauds because not in writing, cannot recover money paid on the contract from the vendor, who is willing and offers to perform on his part.—McKinney v. Harvie, (Minn.) 668.

5. Plaintiff had contracted to purchase land of defendants, who agreed to convey in fee-simple. Plaintiff entered into possession and hewed timber, and leased a portion of the land, when both defendants and plaintiff were enjoined from cutting timber from the lands. Defendants could not make out a title, whereupon plaintiff brought action to recover money paid under the contract. Defendants contended that the contract could not be rescinded, and the money paid under it recovered, as they could not be placed *in statu quo*. *Held* that, when the value of property can be ascertained, a party entitled to rescind a contract may do so although he cannot place the other *in statu quo*.—Wright v. Dickinson, (Mich.) 164.

6. A complaint alleged that defendant railroad company had orally agreed to locate a station on plaintiffs' land in consideration of a quitclaim to the ground necessary for such a building and the right of way; that the agreed value of the land was $500, to be paid plaintiffs if the depot was not put up; that the deed had been executed and delivered to defendant's agent but was not to be recorded until the station was established, but that the agent had put it of record over plaintiffs' protest and disclaimer, and that, as recorded, it showed interlineations, unlawfully made by the agent, and conveyed more land than was contracted for; that the company had "taken possession," and, though three years had elapsed, no station had been erected, nor any money paid. *Held*, that the complaint was bad, whether considered as on tort or contract; because, if the first, there was no allegation of a wrongful taking, and so plaintiffs' remedy was, not by action, but by proceedings for compensation under Rev. St. Wis. c. 87, § 1852; and, if the second, because there was no tender of a deed upon payment of the purchase price, the company having acquired no title under the illegally recorded deed.—Cassidy v. Chicago & N. W. Ry. Co., (Wis.) 925.

7. In an action by a purchaser against a seller for falsely representing that the boundaries of land offered for sale included certain level land pointed out by the seller, it is the duty of the court to instruct the jury as to what constitutes the particular damages claimed in that case, and a general instruction that, if the jury find the plaintiff has sustained damages, they may find a verdict in his favor, is calculated to mislead.—Woolman v. Wirtsbaugh, (Neb.) 216.

8. Where real estate is purchased on the personal representations of the seller, and such representations are false as to the location of the property, the measure of damages is the difference in value between the property as represented and as it actually is.—Id.

9. Where, in an action on a promissory note, the defendant set up in his answer a contract entered into between the parties for the conveyance of certain property in full satisfaction of the debt, and alleged a performance in compliance with the contract, and there was testimony tending to sustain the answer, *held* that, in case of defect of title of, or incumbrance on part of, the property so conveyed, the measure of damages was not the amount of the note less the value of the property conveyed, but the amount of the incumbrances or value of the property to which the title had failed.—Downie v. Ladd, (Neb.) 888.

Vendor's lien.

10. A vendor of real estate, upon the absolute conveyance thereof by deed, has no

lien on the land so conveyed for such portion of the purchase money as remains unpaid.—Ansley v. Pasahro, (Neb.) 885.

11. Complainant and defendant contracted to jointly build and keep an hotel on defendant's land. Plaintiff had the option of buying defendant's interest by paying for the land and repaying what he had expended in building. *Held*, in a suit for specific performance of the contract to sell, that defendant had an equitable lien for the purchase money on the property which should be sold to satisfy such lien as in mortgage cases.—Johnson v. Fowler, (Mich.) 764.

Bona fide purchaser.

12. A grantor remained in possession after giving a deed, which was recorded. The grantee mortgaged the land, and afterwards reconveyed to the grantor, who did not record the deed. *Held*, that her continuous possession did not impart constructive notice, to the purchaser at a foreclosure sale, of any interest retained by her in the property.—Sprague v. White, (Iowa,) 751.*

13. A. sold certain land, worth $2,000, to the grantor of defendants' ancestor, and, not having received his patent, assigned his certificate of location. The grantor conveyed by deed, but the record showed no title in him. P. obtained for $25 a deed from the original owner, and conveyed to plaintiff, both knowing of the deed to defendants' ancestor. *Held*, that plaintiff had such notice of defendants' title as to put him on inquiry, and he only obtained the interest that the original owner had when he gave the deed.—Dillon v. Shugar, (Iowa,) 509.

VENUE IN CIVIL CASES.

Transitory actions — Work on logs.

1. An action for labor done upon logs is transitory, and, under Laws Wis. 1885, c. 301, § 3, an action for work and labor on logs in Taylor county is within the jurisdiction of the municipal court of Chippewa county, where personal service is had upon the defendant. — Shafer v. Hogue, (Wis.) 928.

Change of venue—Application.

2. The defendant applied for a change of venue on account of the alleged prejudice of the judge. An affidavit in support of the application stated that defendant "has reason to fear, and does fear, that he cannot have a fair trial," instead of "has reason to believe, and does believe," etc., as required by Rev. St. Wis. § 2625. *Held* not sufficient.—Smith v. Clarke, (Wis.) 318.

—— Transmission of record.

3. Rev. St. Wis. § 2627, provides that an order changing the place of trial becomes vacated unless the party obtaining the same, within 20 days thereafter, shall cause the papers in the case to be transmitted to the clerk of the county to which the case is removed, and "no change for the same cause shall thereafter be made." *Held*, that the appellant was excused from taking any steps to transmit the record until the respondent either returned it or supplied its place in the manner prescribed by law.—Cook v. McDonnell, (Wis.) 556.

WAREHOUSEMEN.

Refusal to deliver grain.

A warehouseman may waive the tender of charges and grain receipts provided for by Gen. St. Minn. c. 124, § 15, and, having refused to deliver on the ground that the grain is claimed by a third person, he cannot justify his refusal on the ground that the charges are unpaid.—Wallace v. Minneapolis & N. El. Co., (Minn.) 268.

WATERS AND WATER-COURSES.

See, also, *Riparian Rights*.

Water-courses, flooding by log-jams, see *Logs and Logging*, 1–3.

—— obstruction by bridge, see *Nuisance*, 3.

Water-rights.

1. The Wisconsin act of August 8, 1848, for the improvement of the Fox and Wisconsin rivers, provided (section 16) that, "where any lands, waters, or materials, appropriated by the board [of public works] shall belong to the state, such lands, waters, or materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the state, and whenever a water-power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water-power shall belong to the state," etc. *Held*, that the state took the absolute ownership of the whole water-power created by a dam across the Fox river, including the water-power existing on adjoining lands not owned by the state.—Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., (Wis.) 529.

2. In proceedings to restrain defendants from using water-power, the head of which was 900 feet above their lot, that reached across a mill-race, and to and into a stream, the evidence showed that plaintiff had derived title through the original owner, and defendants from his agent and joint owner, between whom an agreement had been made that plaintiff's grantor

should hold and own "the water-power and mill privileges" on said stream and lots thereby conveyed; while defendants' grantor was to have, and upon suit for specific performance of that contract obtained, possession of lots below. *Held*, that defendants had not, in the absence of a grant or title by adverse user, such rights in an artificial channel as to the water of a natural stream.—Fox River Flour & Paper Co. v. Kelly, (Wis.) 744.

3. A mill-race had been constructed over lands subsequently laid out in lots, and sold. On bill to restrain the unauthorized use of the power, defendants claimed that their grantor had always asserted hydraulic rights by virtue of his ownership of the lot, but the evidence affirmatively established his disclaimer of any such right. *Held*, that defendants had derived title neither by grant nor by adverse user.—Id.

4. A water power company, to improve the hydraulic power of a river, built an additional dam across the stream, defraying expenditures from subscriptions by riparian owners and others, but issuing no stock, and finally quitclaimed to defendants' grantor and others. On suit to restrain defendants' use of power on the lower end of a canal supplied from a pond formed by the dam, they interposed the title their grantor had acquired to the new dam. *Held*, that defendants' claim derived no strength from a conveyance to their grantor of whatever right the new dam created, as at that time he had parted with his title to the lot owned by defendants.—Id.

5. Plaintiff, the owner by purchase of a dam, and the water-power appurtenant thereto, erected across the Fox river, under authority of the Wisconsin act of August 8, 1848, sold the dam to the United States, reserving to itself "the water-power created by the dam, and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto and the [land] necessary to the enjoyment of the same, * * * all subject to the right to use the water for all purposes of navigation," etc. Defendant, the owner of certain lots on which was built a portion of the embankment connected with the dam, cut a canal through such embankment for the purpose of taking water from the pond. Plaintiff asked for a mandatory injunction requiring defendant to restore the embankment which it had removed, or to permit plaintiff to do so. *Held*, that the injunction would not lie, plaintiff having no legal interest in the dam or embankment, but only in the surplus water-power created by the same.—Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., (Wis.) 529.

Water-rights—Injunction of adverse user.

6. An injunction will issue to restrain defendants from using water, in hostility to plaintiff's right, for the operation of a mill on their lot, adjacent to the lower end of a system of hydraulic power created by dams forming a pond on the north side of, and a canal or mill-race running nearly parallel with, a stream of water, and which had been built and maintained at the expense of plaintiff and its grantors.—Fox River Flour & Paper Co. v. Kelly, (Wis.) 744.

Flowage.

7. One whose land is injured by flowage caused by an unlawfully erected dam, may abate the nuisance without permission, by pulling down the dam, before the right to maintain it is acquired by adverse user.—Winchell v. Clark, (Mich.) 907.

8. In an action to recover damages from the overflow of water caused by a mill-dam, defendant claimed the right to overflow the land by adverse user. A special verdict found that defendant had maintained the water at the dam at the same height for over 20 years previous to the action, except when prevented by casualty that the height of the water had not been increased since 1864: that the lands in question had been injured by overflow and soakage caused by the mill-dam, but had not been continuously injured from such causes for a period of 10 years next prior to the action. *Held*, that the verdict was not inconsistent or contradictory, as it was not to be inferred that the maintenance of the water in the pond at the same height for the period named caused the plaintiff's land to be overflowed during the whole of that period.—Murray v. Scribner, (Wis.) 311.

WEIGHTS AND MEASURES.

Power of city to erect scales, see *Municipal Corporations*, 1, 2.

False weights—Criminal liability.

Where a defendant was charged with keeping and having charge of scales for the purpose of weighing live-stock and grain, and willfully reporting false weights, whereby another was defrauded, it was competent, for the purpose of showing guilty knowledge, to prove that, at or about the time alleged in the complaint, the defendant used, and caused to be used, in the weighing of stock and grain, a loaded weight, heavier than correct weights kept by him, thereby causing the apparent weight of the stock, hay, etc., to be diminished.—State v. Kellner, (Neb.) 891.

WILLS.

Execution.

1. It is not necessary to the validity of a will that the witnesses should know the nature of the instrument they are signing.—Allen v. Griffin, (Wis.) 21.

2. In the absence of clear proof that the witnesses to a will signed it before the signing of the testator, it will be presumed that the latter signed first.—Id.

Revocation.

3. Testatrix, while living with her second husband, by whom she had no children, made a will bequeathing her property to her children by her first husband. Her second husband dying, she married a third time. She had no children by this marriage, and died leaving the husband surviving. *Held*, that under Rev. St. Wis. §§ 2277, 2281, her will was not revoked by her subsequent marriage.—In re Ward, (Wis.) 731.*

Probate and contest.

4. It is error to refuse to allow a contestant of a will to testify upon the issue of the testator's mental capacity, as to his verbal acts prior to the date of the will, and to state what he said when angry and violent.—In re Brown, (Minn.) 726.

Construction.

5. Although courts of chancery have exclusive jurisdiction over cases brought for the sole purpose of interpreting wills, other courts, in which are cases involving rights under wills, have power to interpret their language when necessary for decision of the cases.—Covert v. Sebern, (Iowa,) 636.

6. Where a will contained devises and bequests to testatrix's "step-son H. S. Covert," and it appeared that testatrix had no step-son named H. S. Covert, and no such person was known to exist, *held*, that there was a latent ambiguity, and parol evidence was admissible to show that testatrix directed the scrivener to devise and bequeath the property to her "step-son Harvey," and that the scrivener, believing Harvey's initials to be H. S. instead of J. H., wrote those initials to designate him.—Id.*

7. A will contained the following provisions: "*Fourth.* The balance, residue, and remainder I give and bequeath to my brothers and sisters, the same to be equally divided among them." "*Lastly.* I give and bequeath to my step-son H. S. Covert all the remainder and residue of my property, be it real or personal, of what kind or character whatsoever." *Held*, that these clauses were repugnant, and the last, being the latest expression, must prevail.—Id.

8. Provisions of a will construed, and *held* that the rents and profits of a farm devised, and not the general assets of the estate, should be first appropriated to the payment of certain incumbrances.—Watkins v. Jenkins, (Iowa,) 689.

9. The first clause of a will devised land; the second and third money; the fourth "the balance, residue, and remainder" to certain legatees; the sixth and last gave "all the remainder and residue of my property" to another legatee; while the fifth bequeathed articles of furniture. It was contended that, since all the estate, except the land and chattels specifically disposed of, consisted of notes, testatrix in the fourth clause meant to bequeath the balance of the notes after satisfying the money bequests. *Held* that, as the notes were undated, and there was no evidence showing the character or quantity of testatrix's estate at the time the will was made, such could not be said to be her intention.—Covert v. Sebern, (Iowa,) 636.

WITNESS.

See *Deposition; Evidence.*

To will, see *Wills*, 1, 2.

Competency.

1. In Michigan, the parties to a suit are, by statute, made competent witnesses to show that others have made settlements with such parties upon their books of account, and that the books have been correctly kept.—Montague v. Dougan, (Mich.) 840.

2. In an action against an executor to recover for work performed by plaintiff for her deceased father after her majority, the issue being whether the deceased had promised to pay her for her services, plaintiff was asked by her counsel to state the kind of work she performed for her father, and whether she expected compensation therefor *Held*, properly excluded under Code Iowa, § 3639, prohibiting testimony by a party to an action against an executor as to conversation and transactions with his decedent.—Cowan v. Musgrave, (Iowa,) 496.

3. In a suit for rent upon a verbal lease, the defendant introduced himself as a witness, and his counsel asked this question: "What conversation took place between you and James P. Pendill in the rear of his store, some time in the latter part of February, 1885, relative to renting a store from him?" *Held* that, on an objection that it was incompetent, because James P. Pendill was dead, it was properly excluded; affirming 31 N. W. Rep. 177.—Pendill v. Neuberger, (Mich.) 249.

Examination.

4. In proceedings to probate a will, one of the proponents was examined as a witness for the contestants. *Held*, that under the provision of Gen. Laws Minn. 1885, c. 193, § 1, providing that a party to the rec-

rd, or one for whose benefit an action is eing prosecuted or defended, is compelled o testify as if under cross-examination, he ould be interrogated by contestants conerning statements said to have been made y him to others concerning the mental apacity of the deceased.—In re Brown, Minn.) 726.

5. The latitude to be allowed in cross-xamination is largely within the discreion of the trial court, and this court will ot reverse unless there has been a gross nd oppressive abuse of such discretion.—ukens v. Hazlett, (Minn.) 265.

6. When, upon the examination or cross-xamination of a witness, a certain conersation is drawn from him, the opposite arty will always be permitted to cross-xamine or re-examine him, for the purpose of eliciting the whole of such conversation.—Campbell v. Holland, (Neb.) 871.

7. Witnesses testified, upon direct examination, as to occurrences in a bank and at their home, and it appeared that they were also at a lawyer's office, and that at these places business connected with the subject in controversy was transacted. *Held*, that cross-examination as to what occurred at the lawyer's office, which was not touched upon in the direct examination, was properly refused.—Krager v. Pierce, (Iowa,) 477.

Impeachment.

8. After plaintiff had introduced a certain bill of sale, he was allowed to file an amendment charging fraud in the making thereof. Upon defendant's objection, on the ground that plaintiff could not discredit his own witness, *held*, that a bill of sale was not a *witness*, and plaintiff had a right to introduce it, and discredit it, for the purpose of showing the whole transaction connected with the pretended sale.—Henny Buggy Co. v. Patt. (Iowa,) 587.

9. The court instructed: "If a witness has testified whose general reputation for truth and veracity has been successfully impeached, you have a right, if you think proper, to disregard such testimony, or partially, as you think the necessity of the case may require or admit." *Held*, that the use of the words "the necessity of the case" was inappropriate, but not necessarily error.—State v. McClintic, (Iowa,) 696.

Fees.

10. A county is not liable for the mileage of a witness subpœnaed to attend a preliminary examination of a person accused of crime, where the subpœna was issued and served before the complaint was lodged with the magistrate, and before the accused was arrested. — Warnstaff v. County of Louisa, (Iowa,) 604.

WRITS.

Service by fraud, see, also, *Appearance.*

Service of process—By mail.

1. Plaintiff's attorneys lived at St. Cloud· defendant's, at Moorhead. Personal service of summons was made November 17th and December 7th. Defendants' attorneys mailed their answer at St. Paul, directed to plaintiff's attorneys at St. Cloud, who received it the following day. *Held*, that the service was not good, as the answer was not mailed from the place of residence of defendant's attorneys as provided in Gen. St. Minn. 1878, c. 66, § 75, relating to service by mail.—Van Aernam v. Winslow, (Minn.) 881.

—— Fraud.

2. In an action by attachment it appeared that service of process on the defendant had been procured by means of fraudulent representations, made to a third person with the intention that they should be communicated to defendant. *Held*, that the service should be set aside and the jurisdiction refused by the court.—Chubbuck v. Cleveland, (Minn.) 362.

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